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255 P.—257 P.

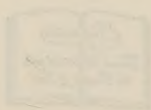
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255 P. 178

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

CALIFORNIA REPORTER

Continued from Reporter to
PACIFIC REPORTER



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Pacific Reporter, Vol. 255, Nos. 1-5; Vol. 256, Nos.
1-5; Vol. 257, Nos. 1-4.

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CASES REPORTED

Vols. 255-257 P.

	P.	
	Vol.	Page
Abel v. Reclamation Dist. No. 2047, Sup.	257	504
Acosta Bros.; Merchants' Finance Co. v., App.	255	772
Adams v. Southern Pac. Co., App.	257	551
Alechoff v. Los Angeles Gas & Electric Corporation, App.	257	569
Alexander v. Manton Joint Union School Dist. in Tehama and Shasta Counties, App.	255	516
Alfalfa Growers of California v. Icardo, App.	256	287
Allen; Ross v., App.	256	248
Allied Amusement Co. of Los Angeles v. Bryam, Sup.	256	1097
Allied Architects' Ass'n of Los Angeles; People v., Sup.	257	511
American Automobile Ins. Co.; Marple v., App.	255	260
American Ry. Employees' Pub. Corporation; Parrish v., App.	256	590
Anaheim Nat. Bank v. Dolph, Sup.	255	184
Anderson v. Nelson, App.	256	294
Andrews v. Metzner, App.	257	203
Andrews; Prior v., App.	257	560
Anstead v. Pacific Gas & Electric Co., Sup.	256	209
Apartment & Hotel Financing Corporation; Brush v., App.	256	285
Argula v. Pavlovski, App.	256	447
Armstrong v. Lassen Lumber & Box Co., App.	257	214
Arnold Taxi Corporation; McManus v., App.	255	755
Augur; Hall v., App.	256	232
August v. Gonsalves, App.	256	584
Baar v. Smith, Sup.	255	827
Babbick, Ex parte, App.	255	200
Badostain v. Pacific Electric Ry. Co., four cases, App.	256	576
Baender; Knaugh v., App.	257	606
Bailey; People v., App.	256	281
Baird v. Superior Court in and for City and County of San Francisco, Sup.	255	820
Baker v. Jackson, App.	256	277
Baldwin v. Pacific Auto Stages, App.	257	130
Ballesio v. Pontrelli, Sup.	256	1101
Ballesio's Estate, In re, Sup.	256	1101
Bank of Italy v. Wetzel, App.	255	254
Bank of San Jose; Jones v., App.	256	247
Bard; Bavin & Burch Co. v., App.	255	200
Barger; Rutledge v., App.	255	537
Barrington v. Pacific Electric Ry. Co., App.	256	567
Barrios v. Foley, App.	256	573
Bauer v. Bauer, Sup.	256	820
Bauer v. Bauer, two cases, Sup.	256	822
Bavin & Burch Co. v. Bard, App.	255	200
Beecher v. Stafford, App.	256	870
Bell v. Kelly, App.	255	864
Bennett v. Northwestern Nat. Ins. Co., App.	257	586
Benning; People v., App.	257	903

CASES REPORTED

P.

	Vol.	Page
Berkeley; Foster v., Sup.	255	1118
Bernzott v. Pacific Auto Stages, App.	257	130
Berrata v. Sales, App.	255	538
Berry; Harvey v., Sup.	255	509
Beverley; Loveall v., App.	257	167
Bingham v. Douglass, App.	256	588
Bird v. Murphy, App.	256	258
Blakeley; Bond Inv. Co. v., App.	257	189
Blanchard v. Jackson, App.	256	277
Blank v. Rodgers, App.	255	235
Blodgett v. Elliott, App.	257	544
Blodgett v. Trumbull, App.	257	199
Board of Public Service Com'rs of City of Los Angeles; Los Angeles Coun- try Club v., App.	257	194
Board of Public Works of City of Los Angeles; Thille v., App.	255	294
Board of Trustees of City of Coronado; Koehler v., App.	257	187
Bocci, Ex parte, App.	257	888
Boeson's Estate, In re, Sup.	255	800
Bohlen; Kirk v., App.	257	463
Bond Inv. Co. v. Blakeley, App.	257	189
Booth v. Friedman, App.	255	222
Boss v. Silent Drama Syndicate, App.	255	225
Bottoms v. Superior Court in and for Madera County, App.	256	422
Bragg; Gomes v., Sup.	255	499
Braun, Bryant & Austin v. McGuire, Sup.	255	808
Breaum; Sondergard v., App.	256	580
Brose; People v., App.	255	233
Brotherton; Fisher v., App.	255	854
Brown v. Brown, App.	256	595
Brown v. Davis, App.	257	377
Brown v. Lamb, App.	256	825
Brown; People v., App.	256	569
Browning v. River Farms Co. of California, App.	255	548
Brunski v. Industrial Accident Commission of California, App.	256	275
Brush v. Apartment & Hotel Financing Corporation, App.	256	285
Brusseau v. Hill, Sup.	256	419
Bryam; Allied Amusement Co. of Los Angeles v., Sup.	256	1097
Bryson v. Gross, App.	257	137
Bullard; Jones v., App.	256	555
Bullard; Kendrick v., App.	256	555
Butler; Smith v., App.	257	581
Butler v. Superior Court of California in and for Los Angeles County, App.	255	548
Butts v. Lister, Sup.	256	200
Butts' Estate, In re, Sup.	256	200
Byers; Irilarry v., App.	257	540
Cadwallader v. Martin, App.	257	538
California Bean Growers' Ass'n v. Williams, App.	255	751
California Delta Farms v. Chinese American Farms, Sup.	255	1097
California Nat. Supply Co. v. Porter, App.	257	161
California Spray-Chemical Co.; Cliff v., App.	257	99
California State Board of Optometry; Davis v., App.	257	197
California Stearns Co. v. Treadwell, App.	256	242
California Stearns Co. v. Treadwell, App.	256	594
Carmel Cattle Co.; Fowler v., App.	256	609
Carpenter; Cline v., App.	257	459
Casassa; Webb v., App.	255	541

CASES REPORTED

P.

	Vol.	Page
Central Sav. Bank v. Lake, Sup.	257	521
Chapman; Rieck v., App.	257	168
Chase; Christerson v., App.	257	889
Chinese American Farms; California Delta Farms v., Sup.	255	1097
Chowchilla Nat. Bank v. Colley, Sup.	255	188
Chowchilla Nat. Bank v. Nilmeier, App.	256	298
Chrisman v. Southern California Edison Co., App.	256	618
Christenson v. Cudahy Packing Co., App.	257	906
Christerson v. Chase, App.	257	889
Church of Christ of Long Beach v. Harper, App.	256	476
City and County of San Francisco; Mahoney v., Sup.	257	49
City and County of San Francisco; Nicholl v., Sup.	257	501
City Const. Co. v. Kenny, App.	256	601
City of Colton v. Superior Court in and for San Bernardino County, App.	257	909
City of Los Angeles v. Glassell, App.	255	209
City of Los Angeles v. Pedersen, App.	255	889
City of Pasadena v. Porter, Sup.	257	526
Clawson; People v., App.	255	552
Cliff v. California Spray-Chemical Co., App.	257	99
Cline v. Carpenter, App.	257	459
Cline v. Dimmick, App.	255	213
Coachella Valley State Bank v. Wilson, App.	256	844
Cogswell; Norman v., App.	255	251
Cohn v. Leffingwell, App.	256	1114
Cole; Taylor v., Sup.	257	40
Coleman v. Edgar, App.	257	452
Colkins; Daniels v., Sup.	255	182
Colley v. Chowchilla Nat. Bank, Sup.	255	188
Colombo; People v., App.	255	846
Columbine Creamery Co.; Ellis v., App.	256	489
Commercial Mortg. Co.; Haines v., Sup.	255	805
Conover v. Smith, App.	256	835
Cooney; Jones v., App.	255	536
Corato v. Corato's Estate, Sup.	255	825
Corato's Estate; Corato v., Sup.	255	825
Cosgrove; Finkelstein v., App.	256	608
Cotton; Ford v., App.	256	301
Covington v. Grant, App.	256	213
Covington v. Lewis, App.	256	277
Cowell Lime & Cement Co. v. Farmers' & Merchants' Nat. Bank, App.	255	881
Cowell Lime & Cement Co. v. Santa Cruz County Nat. Bank, App.	255	881
Cramer v. Jenkins, App.	255	877
Cramer v. Jenkins, App.	256	444
Cravens; Hammond Lumber Co. v., App.	256	428
Crocker v. Crocker, App.	257	611
Cross v. Superior Court of California in and for Imperial County, App.	256	453
Crowfoot; People v., App.	257	463
Crown Stage Co.; Power v., App.	256	457
Crowson; Hinkel v., App.	256	479
Cudahy Packing Co.; Christenson v., App.	257	906
Culley; Kirk v., App.	257	461
Culver, Ex parte, App.	257	876
Cunning v. Humboldt County, App.	256	841
Curley; Johnson v., App.	257	163
Dabney; Orton v., App.	255	532
Dailey v. Glassell, App.	257	905
Daly City Bank; George v., App.	257	171

CASES REPORTED

P.

	Vol.	Page
Daniels v. Colkins, Sup.	255	182
Dant; Harbor City Canning Co. v., Sup.	255	795
Daugherty; Root v., Sup.	255	181
Davis; Brown v., App.	257	877
Davis v. California State Board of Optometry, App.	257	197
Dawson v. Dawson, App.	256	491
Dawson v. San Diego Electric Ry. Co., App.	255	215
Deacon v. Deacon, Sup.	255	798
De Groot; Down v., App.	256	438
De Haven v. Smith, Sup.	256	1099
Dellepiane v. Hynes, App.	257	180
Delozier; Whiting v., App.	255	861
Del Valle; Mines v., Sup.	257	530
Difani v. Riverside County Oil Co., Sup.	256	210
Dimmick; Cline v., App.	255	213
Dimock v. Miller, App.	256	236
Doble; People v., App.	257	81
Dolph; Anaheim Nat. Bank v., Sup.	255	184
Dolph; First Nat. Bank v., Sup.	255	187
Dolph; Golden State Bank v., Sup.	255	187
Donner v. Superior Court within and for Los Angeles County, App.	255	272
Douglas v. Southern Pac. Co., App.	255	230
Douglass; Bingham v., App.	256	588
Down v. De Groot, App.	256	438
Draper v. Hellman Commercial Trust & Savings Bank, App.	256	260
Dudley v. Lowell, Sup.	257	57
Dyck; Poetker v., App.	257	185
Eaves; Stewart v., App.	257	917
Edgar; Coleman v., App.	257	452
Edwards; Willson v., App.	256	239
El Dora Oil Co. v. Gibson, Sup.	256	550
Elliott; Blodgett v., App.	257	544
Ellis v. Columbine Creamery Co., App.	256	489
Etienne; Los Angeles Gas & Electric Corporation v., App.	257	123
Fahlman, In re, App.	257	893
Fairbanks, Morse & Co.; Kirkpatrick v., App.	255	771
Farmers' & Merchants' Nat. Bank; Henry Cowell Lime & Cement Co. v., App.	255	881
Fay; People v., App.	255	239
Felton Water Co. v. Superior Court in and for Santa Cruz County, App.	256	255
Ferlin; People v., Sup.	257	857
Fernandes; Foster v., Sup.	257	503
Fernandez; Whitworth v., App.	255	873
Fernandez; Whitworth v., App.	257	205
Fickett; Weaver v., App.	255	257
Fierman; Gamble v., App.	255	269
Finkelstein v. Cosgrove, App.	256	608
Fink & Schindler Co. v. Gavros, App.	257	156
Finn; Hawi Mill & Plantation Co. v., App.	255	543
Finnie v. Smith, App.	257	866
First Nat. Bank v. Dolph, Sup.	255	187
First Nat. Bank v. Hamaker, App.	257	454
Fishel v. F. M. Ball & Co., App.	256	493
Fisher v. Brotherton, App.	255	854
F. M. Ball & Co.; Fishel v., App.	256	493
Foley; Barrios v., App.	256	573
Ford v. Cotton, App.	256	301

CASES REPORTED

P.

	Vol.	Page
Foster v. Berkeley, Sup.	255	1118
Foster v. Fernandes, Sup.	257	503
Fowler v. Carmel Cattle Co., App.	256	609
France v. Superior Court of State of California in and for Los Angeles County, Sup.	255	815
Francis; Petrich v., App.	256	444
Frank v. Maguire, Sup.	257	515
Frank; Mercantile Acceptance Co. v., App.	256	259
Franklin v. Southern Pac. Co., App.	256	214
Frank Meline Co.; Hovley v., App.	257	112
Friedman; Booth v., App.	255	222
Fronk; People v., App.	255	777
Gabel v. Industrial Accident Commission of State of California, App.	256	564
Gallatin; Licht v., App.	257	914
Gamble v. Fierman, App.	255	269
Garcia; People v., App.	256	876
Gardiner v. Holcomb, App.	255	523
Gavros; Fink & Schindler Co. v., App.	257	156
George v. Daly City Bank, App.	257	171
Ghio; People v., App.	255	205
Giacobbi; People v., App.	256	299
Gibbs v. Peters, App.	255	521
Gibson; El Dora Oil Co. v., Sup.	256	550
Gilbert; Peterson v., App.	257	140
Gilde v. Schuster, App.	257	121
Giorgetti v. Wollaston, two cases, App.	257	109
Glassell; City of Los Angeles v., App.	255	209
Glassell; Dailey v., App.	257	905
Goddard; People v., App.	256	440
Golden State Bank v. Dolph, Sup.	255	187
Gomes v. Bragg, Sup.	255	499
Gonsalves; August v., App.	256	584
Goodwin; Pfunder v., App.	257	119
Goucher v. Goucher, App.	255	892
Goucher v. Goucher, App.	255	896
Graham v. Reed, App.	257	131
Grant; Covington v., App.	256	213
Gray Top Cab Co.; Riffe v., App.	257	447
Great American Ins. Co.; Meyerstein v., App.	255	220
Gregory; Miller v., App.	256	431
Griffin, Ex parte, App.	257	458
Grisso v. Superior Court in and for Alameda County, App.	257	547
Groff; McCamish v., App.	257	79
Gross; Bryson v., App.	257	137
Haines v. Commercial Mortg. Co., Sup.	255	805
Hall v. Augur, App.	256	232
Hamaker; First Nat. Bank v., App.	257	454
Hamilton; Slavich v., Sup.	257	60
Hammond Lumber Co. v. Cravens, App.	256	428
Handleman v. Pickerill, App.	257	890
Handley; Schwartz v., App.	256	867
Hanovia Chemical & Mfg. Co. v. Keller, App.	255	884
Hansen v. Hansen, two cases, App.	256	290
Harbor City Canning Co. v. Dant, Sup.	255	795
Harker v. Southern California Edison Co., App.	256	848
Harper; Church of Christ of Long Beach v., App.	256	476
Harris v. Hensley, App.	256	832

CASES REPORTED

P.

	Vol.	Page
Harris v. Superior Court in and for Los Angeles County, App.	255	229
Hartford Accident & Indemnity Co. v. Industrial Accident Commission of California, App.	256	873
Harvey v. Berry, Sup.	255	509
Hawi Mill & Plantation Co. v. Finn, App.	255	543
Headley v. Van Ginkel, App.	257	117
Hellman Commercial Trust & Savings Bank; Draper v., App.	256	260
Hellman Commercial Trust & Savings Bank; Meyer v., App.	257	103
Henry Cowell Lime & Cement Co. v. Farmers' & Merchants' Nat. Bank, App.	255	881
Henry Cowell Lime & Cement Co. v. Santa Cruz County Nat. Bank, App.	255	881
Hensley; Harris v., App.	256	832
Higgins; Pine v., App.	256	582
Hill; Brusseau v., Sup.	256	419
Hill; Producers' Holding Co. v., Sup.	256	207
Hinkel v. Crowson, App.	256	479
Hogeberg v. Industrial Accident Commission of California, Sup.	256	413
Holcomb; Gardiner v., App.	255	523
Hollander; Smith v., App.	257	577
Holstrom v. Mullen, App.	257	545
Hovley v. Frank Meline Co., App.	257	112
Hubbard v. San Diego Electric Ry. Co., Sup.	255	508
Hulse; Johnson v., App.	256	551
Humboldt County; Cunning v., App.	256	841
Hynes; Dellepiane v., App.	257	180
Icardo; Alfalfa Growers of California v., App.	256	287
Imperial Irr. Dist.; McKim v., Sup.	255	506
Imperial Irr. Dist.; McKim v., Sup.	255	508
Independence Indemnity Co. v. Industrial Accident Commission of California, App.	257	107
Industrial Accident Commission; M. C. Threlkeld Commissary v., App.	255	866
Industrial Accident Commission of California; Brunski v., App.	256	275
Industrial Accident Commission of California; Hartford Accident & Indemnity Co. v., App.	256	873
Industrial Accident Commission of California; Hogeberg v., Sup.	256	413
Industrial Accident Commission of California; Independence Indemnity Co. v., App.	257	107
Industrial Accident Commission of California; London Guarantee & Accident Co. v., App.	256	857
Industrial Accident Commission of California; Ragos v., App.	256	487
Industrial Accident Commission of California; United States Fidelity & Guaranty Co. v., App.	257	895
Industrial Accident Commission of State of California; Gabel v., App.	256	564
Industrial Accident Commission of State of California; Rodriguez v., App.	257	879
Inner Harbor Land Co.; Ogren v., App.	256	607
Inner Shoe Tire Co. v. Tondro, App.	257	211
Inyo County Bank; Lost Burros Gold Mining Co. v., App.	257	209
Irillarry v. Byers, App.	257	540
Jackson, Ex parte, App.	256	250
Jackson; Baker v., App.	256	277
Jackson; Blanchard v., App.	256	277
Jackson; Jennings v., App.	256	277
Jaegling; Sargent v., App.	256	1116
Jameson v. Shepardson, App.	257	157
Jeffreys v. Point Richmond Canal & Land Co., App.	255	848
Jenkins; Cramer v., App.	255	877

CASES REPORTED

P.

	Vol.	Page
Jenkins; Cramer v., App.	256	444
Jennings v. Jackson, App.	256	277
Jensen; People v., App.	255	781
Johnson v. Curley, App.	257	163
Johnson v. Hulse, App.	256	551
Johnson; People v., App.	256	273
Johnson; Town of Martinez v., Sup.	257	853
Johnson v. Ulrey, Sup.	257	505
Jones v. Bank of San Jose, App.	256	247
Jones v. Bullard, App.	256	555
Jones v. Cooney, App.	255	536
Jordan; K. Tashiro v., Sup.	256	545
Joyce v. Krupp, App.	257	124
Joyland Co.; Szasz v., App.	257	871
Juri v. Koster, App.	257	901
Katzer; Numitor Gold Mining Co. v., App.	256	464
Keller; Hanovia Chemical & Mfg. Co. v., App.	255	884
Keller; People v., App.	256	829
Kelley; Lapique v., App.	256	229
Kelly; Bell v., App.	255	864
Kendrick v. Bullard, App.	256	555
Kenny; City Const. Co. v., App.	256	601
Keszthelyi; Paine v., App.	256	864
Keys; People v., App.	255	897
Kidder; Snapp v., Sup.	255	183
Kirk v. Bohlen, App.	257	463
Kirk v. Culley, App.	257	461
Kirkpatrick v. Fairbanks, Morse & Co., App.	255	771
Kirkpatrick; Sherman v., App.	256	570
Knaugh v. Baender, App.	257	606
Knight; Truitner v., App.	257	447
Knight; Truitner v., App.	257	451
Koehler v. Board of Trustees of City of Coronado, App.	257	187
Koepple v. Morrison, App.	257	590
Kornman v. Nelson, App.	257	150
Koster; Juri v., App.	257	901
Kreiss v. Swinehart, App.	256	879
Kronick; Stenzel v., Sup.	255	199
Krupp; Joyce v., App.	257	124
K. Tashiro v. Jordan, Sup.	256	545
Lake; Central Sav. Bank v., Sup.	257	521
Lamb; Brown v., App.	256	825
Lapique v. Kelley, App.	256	229
Larquier; Peterson v., App.	257	873
Larson; Scott v., App.	255	248
Lassen Lumber & Box Co.; Armstrong v., App.	257	214
Leffingwell; Cohn v., App.	256	1114
Leland v. Oliver, App.	255	775
Letchworth; Riley v., Sup.	255	195
Letchworth's Estate, In re, Sup.	255	195
Lewis; Covington v., App.	256	277
Licht v. Gallatin, App.	257	914
Linton v. Miller & Lux, App.	257	105
Lister; Butts v., Sup.	256	200
L. K. Small Co.; Rhee v., App.	256	839
London Guarantee & Accident Co. v. Industrial Accident Commission of California, App.	256	857

CASES REPORTED

P.

	Vol.	Page
Long-Hurst; Maguire v., App.	255	875
Los Angeles Country Club v. Board of Public Service Com'rs of City of Los Angeles, App.	257	194
Los Angeles County v. Payne, App.	255	281
Los Angeles Engineering & Mfg. Co.; Mahana v., App.	256	279
Los Angeles Engineering & Mfg. Co.; Mahana v., App.	257	136
Los Angeles Gas & Electric Corporation; Alechoff v., App.	257	569
Los Angeles Gas & Electric Corporation v. Etienne, App.	257	123
Los Angeles Gas & Electric Corporation; Treat v., App.	256	447
Los Banos Cotton Gins; Startzman v., App.	256	220
Lost Burros Gold Mining Co. v. Inyo County Bank, App.	257	209
Loveall v. Beverley, App.	257	167
Lowell; Dudley v., Sup.	257	57
Luna, Ex parte, Sup.	257	76
McAfee; People v., App.	255	839
McCamish v. Groff, App.	257	79
McCarthy v. Pacific Electric Ry. Co., App.	255	868
McConnell; Schlake v., App.	257	175
McDonald; People v., Sup.	255	180
McElroy; Rowe v., Sup.	255	750
McGill; People v., App.	255	261
McGuire; Braun, Bryant & Austin v., Sup.	255	808
McKean, Ex parte, App.	256	226
McKelvey, In re, App.	255	834
McKeon v. Sambrano, Sup.	255	178
McKim v. Imperial Irr. Dist., Sup.	255	506
McKim v. Imperial Irr. Dist., Sup.	255	508
McManus v. Arnold Taxi Corporation, App.	255	755
Magerl's Estate, In re, Sup.	256	204
Maguire; Frank v., Sup.	257	515
Maguire v. Long-Hurst, App.	255	875
Mahana v. Los Angeles Engineering & Mfg. Co., App.	256	279
Mahana v. Los Angeles Engineering & Mfg. Co., App.	257	136
Mahone v. Thompson, App.	257	127
Mahoney v. City and County of San Francisco, Sup.	257	49
Malmgren v. Southwestern Automobile Ins. Co., two cases, Sup.	255	512
Manton Joint Union School Dist. in Tehama and Shasta Counties; Alexan- der v., App.	255	516
Marblehead Land Co.; People v., App.	255	553
Marini v. Southern Pac. Co., Sup.	257	74
Marks; People v., App.	257	92
Marple v. American Automobile Ins. Co., App.	255	260
Martin; Cadwallader v., App.	257	538
Martin v. Pacific Gas & Electric Co., App.	255	284
Martin v. Ward, Sup.	256	204
Mayer v. Superior Court of California in and for City and County of San Francisco, App.	257	893
M. C. Threlkeld Commissary v. Industrial Accident Commission, App.	255	866
Megarry; Topley v., App.	257	911
Mello; Stockton Savings & Loan Ass'n v., Sup.	256	202
Mellor v. Rideout, App.	257	173
Melson; People v., App.	257	555
Mercantile Acceptance Co. v. Frank, App.	256	259
Mercantile Trust Co. of California; Philbrook v., App.	257	882
Merchants' Finance Co. v. Acosta Bros., App.	255	772
Metcalf v. Romano, App.	257	114
Metzner; Andrews v., App.	257	203

CASES REPORTED

P.

	Vol.	Page
Meyer v. Hellman Commercial Trust & Savings Bank, App.	257	103
Meyer v. Meyer, App.	255	767
Meyerstein v. Great American Ins. Co., App.	255	220
Miller; Dimock v., App.	256	236
Miller v. Gregory, App.	256	431
Miller v. Miller, App.	255	1099
Miller & Lux; Linton v., App.	257	105
Miller & Lux v. Pinelli, App.	257	573
Mills v. Richards, App.	257	542
Mines v. Del Valle, Sup.	257	530
Mock Ming Fat; People v., App.	256	270
Mojave River Irr. Dist. v. Superior Court of State of California within and for San Bernardino County, App.	256	469
Moody v. Shufleton, App.	257	564
Moore; People v., App.	256	266
Moore v. Superior Court of State of California in and for City and County of San Francisco, App.	255	852
Morrison; Koeppe v., App.	257	590
Mullen; Holstrom v., App.	257	545
Muller; P. A. Smith Co. v., Sup.	256	411
Munos; People v., App.	257	549
Murata v. Vernon School Dist., App.	255	208
Murphy; Bird v., App.	256	258
Mutual Realty Corporation; Peavey v., App.	255	858
Nelson; Anderson v., App.	256	294
Nelson; Kornman v., App.	257	150
Newton; Tucker v., App.	256	440
Nicholl v. City and County of San Francisco, Sup.	257	501
Nichols, Ex parte, App.	255	244
Nickell v. Rosenfield, App.	255	760
Nilmeier; Chowchilla Nat. Bank v., App.	256	298
Norman v. Cogswell, App.	255	251
Northwestern Nat. Ins. Co.; Bennett v., App.	257	586
Numitor Gold Mining Co. v. Katzer, App.	256	464
Nunemacher v. Western Motor Transport Co., App.	255	266
O'Connell v. O'Connell, Sup.	255	514
Ogren v. Inner Harbor Land Co., App.	256	607
O'Hanrahan; Richardson v., App.	256	1103
Oliver; Leland v., App.	255	775
Orton v. Dabney, App.	255	532
Otto, Ex parte, App.	257	880
Ousdal; Urton v., App.	257	584
Owen, Ex parte, App.	255	541
Pacific Auto Stages; Baldwin v., App.	257	130
Pacific Auto Stages; Bernzott v., App.	257	130
Pacific Electric Ry. Co.; Badostain v., App.	256	576
Pacific Electric Ry. Co.; Barrington v., App.	256	567
Pacific Electric Ry. Co.; McCarthy v., App.	255	868
Pacific Employers' Ins. Co. v. Woland, App.	255	764
Pacific Gas & Electric Co.; Anstead v., Sup.	256	209
Pacific Gas & Electric Co.; Martin v., App.	255	284
Page, Ex parte, App.	255	887
Paine v. Keszthelyi, App.	256	864
Park v. Walsh, App.	255	773
Parrish v. American Ry. Employees' Pub. Corporation, App.	256	590
Parsons, Ex parte, App.	257	881
Parsons; People v., App.	255	212

CASES REPORTED

P.

	Vol.	Page
P. A. Smith Co. v. Muller, Sup.	256	411
Patterson; People v., App.	255	209
Pavlovski; Argula v., App.	256	447
Pavlovski; Pozen v., App.	256	446
Payne; Los Angeles County v., App.	255	281
Peavey v. Mutual Realty Corporation, App.	255	858
Pedersen; City of Los Angeles v., App.	255	889
People v. Allied Architects' Ass'n of Los Angeles, Sup.	257	511
People v. Bailey, App.	256	281
People v. Benning, App.	257	903
People v. Brose, App.	255	233
People v. Brown, App.	256	569
People v. Clawson, App.	255	552
People v. Colombo, App.	255	846
People v. Crowfoot, App.	257	463
People v. Doble, App.	257	81
People v. Fay, App.	255	239
People v. Ferlin, Sup.	257	857
People v. Fronk, App.	255	777
People v. Garcia, App.	256	876
People v. Ghio, App.	255	205
People v. Giacobbi, App.	256	299
People v. Goddard, App.	256	440
People v. Jensen, App.	255	781
People v. Johnson, App.	256	273
People v. Keller, App.	256	829
People v. Keys, App.	255	897
People v. McAfee, App.	255	839
People v. McDonald, Sup.	255	180
People v. McGill, App.	255	261
People v. Marblehead Land Co., App.	255	553
People v. Marks, App.	257	92
People v. Melson, App.	257	555
People v. Mock Ming Fat, App.	256	270
People v. Moore, App.	256	266
People v. Munos, App.	257	549
People v. Parsons, App.	255	212
People v. Patterson, App.	255	209
People v. Piazza, App.	257	592
People v. Powell, App.	256	561
People v. Rice, App.	256	450
People v. Richardson, App.	256	616
People v. Sanders, App.	256	251
People v. Schwarz, Sup.	257	71
People v. Scott, App.	257	1118
People v. Shearer, App.	256	611
People v. Sheasbey, App.	255	836
People v. Sieber, Sup.	257	64
People v. Stoll, App.	257	583
People v. Stone, App.	257	544
People v. Superior Court of California in and for Contra Costa County, App.	257	922
People v. Tognola, App.	256	455
People v. Vukich, Sup.	257	46
People v. Weitzel, Sup.	255	792
People's Finance & Thrift Co. v. Shuman, App.	257	144
Percival; Schnier v., App.	256	1109

CASES REPORTED

P.

	Vol.	Page
Peters; Gibbs v., App.	255	521
Peterson v. Gilbert, App.	257	140
Peterson v. Larquier, App.	257	873
Petrich v. Francis, App.	256	444
Pfunder v. Goodwin, App.	257	119
Philbrook v. Mercantile Trust Co. of California, App.	257	882
Phoenix Assur. Co., Limited, of London, v. Salvation Army, App.	256	1106
Piazza; People v., App.	257	592
Pickerill; Handleman v., App.	257	890
Pickwick Stages Northern Division; Seney v., App.	255	279
Pine v. Higgins, App.	256	582
Pinelli; Miller & Lux v., App.	257	573
Poetker v. Dyck, App.	257	185
Point Richmond Canal & Land Co.; Jeffreys v., App.	255	848
Pontrelli; Ballesio v., Sup.	256	1101
Porter; California Nat. Supply Co. v., App.	257	161
Porter; City of Pasadena v., Sup.	257	526
Porter; Union Tool Co. v., App.	257	163
Powell; People v., App.	256	561
Power v. Crown Stage Co., two cases, App.	256	457
Pozen v. Pavlovski, App.	256	446
Prior v. Andrews, App.	257	560
Producers' Holding Co. v. Hill, Sup.	256	207
Ragos v. Industrial Accident Commission of California, App.	256	487
Randolph v. Wise, App.	256	575
Rathbun v. Security Mfg. Co., App.	256	296
Reclamation Dist. No. 2047; Abel v., Sup.	257	504
Reed; Graham v., App.	257	131
Reese; Welch v., App.	255	250
Reichhold v. Sommarstrom Inv. Co., App.	256	592
Reynolds; Sherman v., App.	256	846
Rhee v. L. K. Small Co., App.	256	839
Rice; People v., App.	256	450
Richards; Mills v., App.	257	542
Richardson v. O'Hanrahan, App.	256	1103
Richardson; People v., App.	256	616
Rideout; Mellor v., App.	257	173
Rieck v. Chapman, App.	257	168
Riffes v. Gray Top Cab Co., App.	257	447
Riley v. Letchworth, Sup.	255	195
Riley & Peterson; Russell v., App.	256	557
River Farms Co. of California; Browning v., App.	255	548
Riverside County Oil Co.; Difani v., Sup.	256	210
Roberts v. Roberts, App.	256	826
Rodgers; Blank v., App.	255	235
Rodriguez v. Industrial Accident Commission of State of California, App.	257	879
Romano; Metcalf v., App.	257	114
Root v. Daugherty, Sup.	255	181
Roseberg Oil Corporation; Ventura Refining Co. v., App.	256	434
Rosenfield; Nickell v., App.	255	760
Ross v. Allen, App.	256	248
Rowe v. McElroy, Sup.	255	750
Russell v. Riley & Peterson, App.	256	557
Rutledge v. Barger, App.	255	537
Sales; Berrata v., App.	255	538
Salvation Army; Phoenix Assur. Co., Limited, of London, v., App.	256	1106
Sambrano; McKeon v., Sup.	255	172

CASES REPORTED

P.

	Vol.	Page
San Bernardino Lumber & Box Co.; Willis v., App.	256	224
Sanders; People v., App.	256	251
San Diego Electric Ry. Co.; Dawson v., App.	255	215
San Diego Electric Ry. Co.; Hubbard v., Sup.	255	508
San Joaquin Light & Power Corporation; Young v., App.	257	152
Santa Ana Sugar Co.; Stanton v., App.	257	907
Santa Cruz County Nat. Bank; Henry Cowell Lime & Cement Co. v., App.	255	881
Sargent v. Jaegling, App.	256	1116
Schlake v. McConnell, App.	257	175
Schmeiser Mfg. Co.; Willett v., App.	255	529
Schnier v. Percival, App.	256	1109
Schuster; Gilde v., App.	257	121
Schwartz v. Handley, App.	256	867
Schwarz; People v., Sup.	257	71
Scott v. Larson, App.	255	248
Scott; People v., App.	257	1118
Scott v. Superior Court within and for Los Angeles County, App.	256	603
Security Mfg. Co.; Rathbun v., App.	256	296
Seney v. Pickwick Stages Northern Division, App.	255	279
Shaw, Ex parte, App.	257	585
Shaw, Ex parte, App.	257	586
Shearer; People v., App.	256	611
Sheasbey; People v., App.	255	836
Shepardson; Jameson v., App.	257	157
Sherman v. Kirkpatrick, App.	256	570
Sherman v. Reynolds, App.	256	846
Shirley v. Shirley, App.	256	823
Shuffleton; Moody v., App.	257	564
Shuman; People's Finance & Thrift Co. v., App.	257	144
Shumway v. Woolwine, App.	257	898
Sichofsky, Ex parte, Sup.	257	439
Sieber; People v., Sup.	257	64
Silent Drama Syndicate; Boss v., App.	255	225
Slavich v. Hamilton, Sup.	257	60
Smith; Baar v., Sup.	255	827
Smith v. Butler, App.	257	581
Smith; Conover v., App.	256	835
Smith; De Haven v., Sup.	256	1099
Smith; Finnie v., App.	257	866
Smith v. Hollander, App.	257	577
Smith v. Smith, Sup.	256	419
Smith v. Southern Pac. Co., Sup.	255	500
Smith Co. v. Muller, Sup.	256	411
Snapp v. Kidder, Sup.	255	183
Sommarstrom Inv. Co.; Reichhold v., App.	256	592
Sondergard v. Breaum, App.	256	580
Soule v. United States Fidelity & Guaranty Co., App.	255	886
Southern California Edison Co.; Chrisman v., App.	256	618
Southern California Edison Co.; Harker v., App.	256	848
Southern Pac. Co.; Adams v., App.	257	551
Southern Pac. Co.; Douglas v., App.	255	230
Southern Pac. Co.; Franklin v., App.	256	214
Southern Pac. Co.; Marini v., Sup.	257	74
Southern Pac. Co.; Smith v., Sup.	255	500
Southern Pac. Co.; White v., App.	255	230
Southwestern Automobile Ins. Co.; Malmgren v., Sup.	255	512
Spano; Stewart v., App.	255	532

CASES REPORTED

	P.	
	Vol.	Page
Spry; Tobin Grocery Co. v., Sup.	255	791
Stafford; Beecher v., App.	256	870
Stanton v. Santa Ana Sugar Co., App.	257	907
Startzman v. Los Banos Cotton Gins, App.	256	220
State Board of Chiropractic Examiners v. Superior Court of California in and for Los Angeles County, Sup.	255	749
Stein; Ung v., App.	256	274
Stenzel v. Kronick, Sup.	255	199
Stevens, In re, App.	257	218
Steward v. Spano, App.	255	532
Stewart v. Eaves, App.	257	917
Stockton Savings & Loan Ass'n v. Mello, Sup.	256	202
Stoll; People v., App.	257	583
Stone; People v., App.	257	544
Superior Court in and for Alameda County; Grisso v., App.	257	547
Superior Court in and for City and County of San Francisco; Baird v., Sup.	255	820
Superior Court in and for City and County of San Francisco; Wheeler v., App.	255	275
Superior Court in and for Los Angeles County; Harris v., App.	255	229
Superior Court in and for Madera County; Bottoms v., App.	256	422
Superior Court in and for San Bernardino County; City of Colton v., App.	257	909
Superior Court in and for Santa Cruz County; Felton Water Co. v., App.	256	255
Superior Court of California in and for City and County of San Fran- cisco; Mayer v., App.	257	893
Superior Court of California in and for Contra Costa County; People v., App.	257	922
Superior Court of California in and for Imperial County; Cross v., App.	256	453
Superior Court of California in and for Los Angeles County; Butler v., App.	255	548
Superior Court of California in and for Los Angeles County; State Board of Chiropractic Examiners v., Sup.	255	749
Superior Court of State of California in and for City and County of San Francisco; Moore v., App.	255	852
Superior Court of State of California in and for Los Angeles County; France v., Sup.	255	815
Superior Court of State of California within and for San Bernardino County; Mojave River Irr. Dist. v., App.	256	469
Superior Court within and for Los Angeles County; Donner v., App.	255	272
Superior Court within and for Los Angeles County; Scott v., App.	256	603
Swinehart; Kreiss v., App.	256	879
Szasz v. Joyland Co., App.	257	871
Taylor v. Cole, Sup.	257	40
Thille v. Board of Public Works of City of Los Angeles, App.	255	294
Thompson; Mahone v., App.	257	127
Threlkeld Commissary v. Industrial Accident Commission, App.	255	866
Tipton, Ex parte, App.	257	445
Tobin Grocery Co. v. Spry, Sup.	255	791
Tognola; People v., App.	256	455
Tondro; Inner Shoe Tire Co. v., App.	257	211
Topley v. Megarry, App.	257	911
Town of Martinez v. Johnson, Sup.	257	853
Treadwell; California Stearns Co. v., App.	256	242
Treadwell; California Stearns Co. v., App.	256	594
Treat v. Los Angeles Gas & Electric Corporation, App.	256	447
Truitner v. Knight, App.	257	447

CASES REPORTED

P.

	Vol.	Page
Truitner v. Knight, two cases, App.	257	451
Trumbull; Blodgett v., App.	257	199
Tubby v. Tubby, App.	256	586
Tucker v. Newton, App.	256	440
Ulrey; Johnson v., Sup.	257	505
Ung v. Stein, App.	256	274
Union Tool Co. v. Porter, App.	257	163
United States Fidelity & Guaranty Co. v. Industrial Accident Commission of California, App.	257	895
United States Fidelity & Guaranty Co.; Soule v., App.	255	886
Urton v. Ousdal, App.	257	584
Van Ginkel; Headley v., App.	257	117
Ventura Refining Co. v. Roseberg Oil Corporation, App.	256	434
Vernon School Dist.; Murata v., App.	255	208
Vukich; People v., Sup.	257	46
Walsh; Park v., App.	255	773
Ward; Martin v., Sup.	256	204
Weaver v. Fickett, App.	255	257
Webb v. Casassa, App.	255	541
Weitzel; People v., Sup.	255	792
Welch v. Reese, App.	255	250
Wells v. Zenz, App.	256	484
Western Motor Transport Co.; Nunemacher v., App.	255	266
Wetzel; Bank of Italy v., App.	255	254
Wheeler v. Superior Court in and for City and County of San Francisco, App.	255	275
White v. Southern Pac. Co., App.	255	230
White v. White, App.	256	579
Whiting v. Delozier, App.	255	861
Whitworth v. Fernandez, App.	255	873
Whitworth v. Fernandez, App.	257	205
Willet v. Schmeiser Mfg. Co., App.	255	529
Williams; California Bean Growers' Ass'n v., App.	255	751
Willis v. San Bernardino Lumber & Box Co., App.	256	224
Willson v. Edwards, App.	256	239
Wilson; Coachella Valley State Bank v., App.	256	844
Winslow v. Winslow, App.	255	880
Wise; Randolph v., App.	256	575
Woland; Pacific Employers' Ins. Co. v., App.	255	764
Wollaston; Giorgetti v., App.	257	109
Woolwine; Shumway v., App.	257	898
Young v. San Joaquin Light & Power Corporation, App.	257	152
Zenz; Wells v., App.	256	484



CALIFORNIA REPORTER

255 PACIFIC REPORTER

200 Cal. 739

McKEON v. SAMBRANO et al. (L. A. 9297.)

(Supreme Court of California. March 30, 1927.)

- 1. Appeal and error ⇨798—Evidence held not to establish that affidavit of mailing notice of motion to dismiss appeal was false (Code Civ. Proc. §§ 1012, 1013).**

Evidence *held* not to establish that affidavit of mailing notice of motion to dismiss appeal was false and fraudulent, in view of Code Civ. Proc. §§ 1012, 1013, providing that service is complete at time of deposit in the mail.

- 2. Appeal and error ⇨640—Appeal under alternative method may not be dismissed, where transcript contains judgment roll.**

Where transcript contained judgment roll, appeal from judgment, taken under alternative method, may not be dismissed on ground that reporter's transcript is incomplete.

- 3. Appeal and error ⇨1125—Ordinarily, Supreme Court will deny motion for affirmance of judgment appealed from.**

Ordinarily, Supreme Court will deny motion for affirmance of judgment appealed from, since consideration of such a motion necessarily involves examination of record and briefs as to merits of appeal, resulting in advancement of hearing over other appeals preceding it on calendar.

In Bank.

Appeal from Superior Court, Los Angeles County; E. P. Shortall, Judge.

Action by D. McKeon against E. Sambrano, John Lapique, and others. Judgment for plaintiff, and defendant last named appeals. On motion to dismiss appeal and to affirm judgment, and on motion to recall remittitur theretofore issued on dismissal of four appeals from orders after judgment. Motion to recall remittitur and to dismiss appeal denied, and motion to affirm judgment granted.

John Lapique, of Los Angeles, in pro per.
Guss Hagenstein, of Fullerton, for respondent.

PER CURIAM. Three motions are presented herein for determination. The re-

spondent has made a motion to dismiss the appeal from the judgment and a motion to affirm said judgment. The appellant, while opposing these motions, presents on his own behalf a motion to recall the remittitur heretofore issued by the clerk of this court upon the dismissal of four appeals from orders after judgment.

A summary statement of a few pertinent facts will be conducive to a proper understanding of the questions of law presented by these several motions. It appears that the appellant at one time had pending herein five appeals from as many orders entered by the trial court in this foreclosure proceeding. One of these several appeals was from the judgment and decree of foreclosure, while the remaining four were from orders made and entered after said judgment. Upon the calling of the December calendar of this court, the respondent made a motion, upon enumerated grounds, for the dismissal of all five of said appeals. The record indicates that the appellant failed to appear in opposition to said motion, and the same was thereupon granted as to the four appeals from the orders after judgment, but denied as to the appeal from the judgment. At the next succeeding session of this court, held in March of this year, the respondent repeated his motion to dismiss the appeal from the judgment, and, as stated above, also presented a motion for the affirmance of said judgment. The appellant, who appears herein in propria persona, was present in court upon the making of these latter motions and opposed the granting thereof. At this same time he made the motion, above referred to, for recall of the remittitur issued upon the earlier dismissal of the four appeals from the orders after judgment, urging in support thereof that he had not received notice of the making of the motion at the preceding session of the court, and that the order of this court made at such time dismissing his said four appeals was secured by reason of fraud and imposition having been practiced by the respondent's counsel in having filed herein a false and fraudulent affidavit of mailing.

[1] In our opinion, the appellant has failed to establish that the affidavit of mailing is false and fraudulent. There is nothing in the record herein which would tend to indicate that the notice of motion was not, in fact, properly addressed and mailed to the appellant. The mere circumstance that the appellant might not have received said notice of motion through the mail cannot lend support to his claim that the affidavit of mailing is false and fraudulent. Section 1012 of the Code of Civil Procedure indicates the circumstances under which service may be made by mail, and section 1013 of the same Code provides, among other things, that "the service is complete at the time of the deposit" in the mail. In *Heinlen v. Heilbron*, 94 Cal. 636, 640, 30 P. 8, 9, this court declared that:

"The service by mail authorized by section 1012 does not contemplate a delivery as a part of the service, as is seen by the provision of section 1013, that 'the service is complete at the time of the deposit' in the post office."

Other cases in which it has been held that service by mail is complete at the time of deposit in the post office, and that the addressee incurs the risk of the failure of the mail, are *Griffin v. Board of Commissioners*, 20 S. D. 142, 104 N. W. 1117, 1119, *Batchoff v. Butte, etc., Co.*, 60 Mont. 179, 198 P. 132, 135, and *Jacobs v. Hooker*, 1 Barb. (N. Y.) 71. A perusal of the affidavit of mailing, filed by respondent's counsel, reveals that:

"The case is one in which such service is permitted, and that the mode pointed out by the statute for making such service has been strictly followed." *Heinlen v. Heilbron*, supra.

The appellant's motion to recall the remittitur heretofore issued is therefore denied.

[2] This brings us to a consideration of the respondent's motion to dismiss the appeal from the judgment. In this connection it may be said that this motion appears to be but a renewal of the motion denied at the December session of the court. We perceive of no reason why the present motion should not also be denied, for it is grounded, as was the earlier motion, upon the claim that the appellant has failed to file herein a full and complete phonographic report of the trial. The transcript, however imperfect, contains the judgment roll, and, the appeal from the judgment, having been taken under the alternative method, may not be dismissed upon the ground that the "reporter's transcript" is incomplete. *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 77, 227 P. 715; *Ramsay v. Rodgers*, 189 Cal. 100, 207 P. 516; *Beckett v. Stuart*, 35 Cal. App. 796, 171 P. 107. It follows, therefore, that the respondent's motion to dismiss the appeal from the judgment must be and the same is denied.

[3] There remains to be considered the respondent's further motion for affirmance of the judgment upon the ground that the appeal therefrom is a frivolous appeal. It is the practice of this court ordinarily to deny a motion for affirmance of the judgment appealed from, for the very good reason that consideration of such a motion necessarily involves an examination of the record and briefs of counsel as to the merits of the appeal, resulting in the advancement of the hearing of the particular appeal over many other appeals preceding it on our calendar. Such a course would obviously be unfair to other litigants in this court whose appeals are entitled to priority in the matter of hearing. *Chino Land, etc., Co. v. Hamaker*, 171 Cal. 689, 690, 154 P. 850. We are of the opinion, however, in view of the several and oft-repeated motions presented herein which have to some extent familiarized us with the

issues involved in this litigation, that this particular motion for affirmance of the judgment may properly be considered without doing substantial injustice to other litigants.

An examination of the appellant's brief discloses that he is urging as grounds for reversal matters, which, with one exception, were covered by the four appeals heretofore dismissed by this court. It thus appears that the appellant is attempting to prosecute the instant appeal, in the main, upon grounds not properly reviewable under it, and which grounds have already been disposed of by the order of this court dismissing his four appeals abortively prosecuted from the orders after judgment. The only ground now urged for a reversal, which has not at one time or another during the history of this litigation received the attention of the court, is the contention that the complaint fails to state a cause of action and that the appellant's demurrer thereto was improperly overruled. A mere cursory glance at the complaint sufficiently indicates the correctness of the trial court's order. The appeal is clearly without merit and is a frivolous appeal.

The judgment is therefore affirmed.

200 Cal. 716

PEOPLE v. McDONALD et al. (L. A. 7985.)★

Supreme Court of California. March 24, 1927.

Rehearing Denied April 21, 1927.

Pleading  433(7)—Complaint, averring release of person for whom bail undertaking was executed only inferentially, held sufficient after judgment, in absence of demurrer.

Where complaint, in action on undertaking of bail, failed to directly allege that person for whom undertaking was executed was released, yet showed release inferentially, held that, in absence of demurrer, it could not be attacked after trial on merits, since defect might have been supplied by amendment.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the People against R. McDonald and R. McDonald, Jr. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Wiley, of Bakersfield, for appellants.

H. E. Schmidt, of Bakersfield, for the People.

PER CURIAM. This appeal was placed upon a special calendar of this court upon an order to the respondent to show cause why the judgment herein should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that

the appellants' brief had been filed herein, but that no brief on behalf of the respondent had been filed, although the time for the filing of such brief under the rules of this court had long since expired. In response to said order to show cause the respondent has indicated its willingness to have the matter submitted upon the appellants' brief. The appeal herein is from a judgment entered by the superior court of Kern county in an action against the appellants on an undertaking of bail executed by them in the sum of \$2,000. As their sole ground for reversal of said judgment, the appellants urge that the complaint is fatally defective, in that it fails to allege that the person for whom the undertaking of bail was executed and delivered had been released from custody. In support of this contention reliance is had on the case of *County of Los Angeles v. Babcock et al.*, 45 Cal. 252.

We have no quarrel with the doctrine enunciated in that case. It is correctly held therein that an averment of release upon or by reason of the execution and delivery of the undertaking is indispensable in an action thereon, and that, in the absence of such an allegation, a demurrer to the complaint on that ground should be sustained. That case, however, is not decisive here. In the case of *Elizalde v. Elizalde*, 137 Cal. 634, 637, 66 P. 369, 70 P. 861, 862, this court declared:

"Reversals for lack of formal allegations that might have been supplied by amendment are not favored after trial on the merits. *Cushing v. Pires*, 124 Cal. 663 [57 P. 572]. And where a necessary averment has been only inferentially pleaded, it will be held sufficient after judgment and in the absence of demurrer."

It is held in *Alexander v. McDow*, 108 Cal. 25, 29, 41 P. 24, 25, that—

"While a judgment will not relieve from the entire absence of a necessary averment, it will cure defects in all such averments as may by fair and reasonable intendment be found to have been pleaded, although defectively."

The early case of *Hill v. Haskin*, 51 Cal. 175, 178, contains the following:

"Instead of alleging the fact directly it was stated only inferentially, and might have been demurred to on this ground. The defect could then have been cured by an amendment. But having proceeded to trial, without interposing the objections it was too late afterwards for the defendant to raise the point that the offer to account ought to have been averred with greater precision and directness."

Other authorities to the same effect are *Houston v. Williams*, 53 Cal. App. 267, 272, 200 P. 55; *Diamond M. Co. v. Aetna C. & S. Co.*, 60 Cal. App. 425, 428, 213 P. 56; *Resetar v. Leonardi*, 61 Cal. App. 765, 216 P. 71.

The rule announced in these latter cases disposes of the appellants' contention, for the

complaint in the instant case, though deficient in so far as a direct averment is concerned, nevertheless, by implication, reveals that the person for whom the undertaking had been furnished had, in fact, been released from custody. This material allegation having been pleaded inferentially, it follows that the appellants, in the absence of a demurrer on that ground, are now precluded from asserting that the complaint is defective in this respect. It is true that a special demurrer was interposed in the trial court, but upon grounds not now urged.

For the foregoing reasons, the judgment appealed from is hereby affirmed.

201 Cal. 12

ROOT et al. v. DAUGHERTY. (L. A. 8524.)

(Supreme Court of California. April 4, 1927.)

1. New trial $\S$ 138—Notice of intention to move for new trial held ineffectual, where filed prior to signing and filing of findings of fact and conclusions of law (Code Civ. Proc. $\S\S$ 656, 657 and 659, as amended by St. 1923, p. 751).

Under Code Civ. Proc. $\S\S$ 656, 657, and 659, as amended by St. 1923, p. 751, notice of intention to move for new trial, filed prior to signing and filing of findings of fact and conclusions of law, held premature and ineffectual for any purpose.

2. Appeal and error $\S$ 356—Appeal dismissed, where taken more than 60 days after entry of judgment.

Where appeal was not taken until more than 60 days after entry of judgment, it was dismissed for want of jurisdiction.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Oliver H. Root and another against E. F. Daugherty. From a judgment for the plaintiffs, defendant appeals. Appeal dismissed.

John B. Yakey, of Los Angeles, for appellant.

W. C. Jensen, of Los Angeles, for respondents.

PER CURIAM. This is an appeal by the defendant from a judgment entered by the superior court of the county of Los Angeles in an action for damages for breach of contract. It appears that the plaintiffs had agreed to sell and the defendant had agreed to purchase a leasehold interest in a bungalow, together with certain household furnishings, for the sum of \$8,000. The contemplated sale was not consummated and the plaintiffs instituted this action to recover the sum of \$4,675 as damages, alleging in their complaint

that the defendant had wrongfully breached said agreement. By way of answer the defendant alleged the inability of the plaintiffs to perform their part of the agreement. After trial the plaintiffs were awarded \$1,500 and costs. This appeal was thereupon prosecuted by the defendant. As grounds for the reversal of said judgment he urges that the complaint fails to state a cause of action; that the findings of fact and conclusions of law are contrary to law and to the evidence; and that the plaintiffs failed to prove damage. Said appeal was thereafter placed upon a special calendar of this court upon an order to the respondents to show cause why the judgment herein should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that the appellant's brief had been filed herein, but that no brief on behalf of the respondents had been filed, although the time for the filing of such brief under the rules of this court had long since expired. Upon the calling of said calendar counsel for the respondents appeared and requested that this court of its own motion dismiss the appeal on the ground that the notice of intention to move for a new trial was filed more than 60 days after the entry of judgment.

[1] In view of the conclusion we have reached we do not find it necessary to pass upon the contentions urged by the appellant for a reversal of the judgment. And, in passing, it may be said that the suggestion of respondents' counsel looking to a dismissal of the appeal is without merit, for the record herein discloses that the notice of intention to move for a new trial was filed 10 days prior to the entry of judgment, and not, as stated by respondents' counsel, more than 60 days thereafter. We are of the opinion, however, that said notice of intention to move for a new trial was prematurely filed, and therefore ineffectual for any purpose. Chronologically the history of this litigation reveals that the notice of intention to move for a new trial was filed on June 13, 1924. Thereafter, and on June 20, 1924, the findings of fact and conclusions of law were signed and filed. On June 23, 1924, the judgment was duly entered. Subsequently, and on October 23, 1924, the motion for a new trial was denied. The notice of appeal from the judgment was filed on November 21, 1924. It is apparent from the foregoing that the filing of the notice of intention to move for a new trial preceded by 7 days the signing and filing of the findings of fact and conclusions of law.

This court upon numerous occasions has held that proceedings for a new trial taken prematurely are a nullity and ineffectual for any purpose. *Yamato v. Bank of So. California*, 170 Cal. 351, 356, 149 P. 826; *Fountain Water Co. v. Dougherty*, 134 Cal. 376, 377,

66 P. 316; Reclamation Dist. v. Thisby, 131 Cal. 572, 574, 63 P. 918; Dominguez v. Mascotti, 74 Cal. 269, 271, 15 P. 773; Spottiswood v. Weir, 66 Cal. 525, 529, 6 P. 381. Section 659 of the Code of Civil Procedure as amended in 1923 (Stats. 1923, p. 751) provides, in part:

"The party intending to move for a new trial must, *either before the entry of judgment or within ten days after receiving notice of the entry of the judgment*, * * * file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial. * * *" (Italics ours.)

In view of this amendment to said Code section we are called upon to determine herein whether proceedings on motion for new trial are prematurely taken when the notice of intention to move for such relief is filed not only "before the entry of judgment," but prior to the signing and filing of the findings of fact and conclusions of law. Our research has failed to disclose any decision of this court upon this question in the light of the 1923 amendment to section 659, Code of Civil Procedure. In *Hughes v. De Mund*, 70 Cal. App. 265, 266, 267, 233 P. 93, it is declared, however, that section 659 of the Code of Civil Procedure and those sections preceding and following it having to do with new trials "presuppose that the action has been prosecuted to a point where ultimate findings have been made as the basis for a final judgment." With this reasoning we are in accord. Section 656 of the Code of Civil Procedure defines a new trial as:

A "re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee."

It has repeatedly been held that where findings of fact are required and are not waived the *decision* is not rendered until said findings are signed and filed. *Aspegren & Co. v. Sherwood, Swan & Co.* (Cal. Sup.) 250 P. 400, and authorities therein cited. Section 657 of the same Code provides that "the party aggrieved" may apply for a new trial. The opinion in the early case of *Dominguez v. Mascotti*, *supra*, declares that—

"Until the findings are signed and filed there is no decision, and nobody is 'aggrieved,' within the meaning of section 657 of the Code of Civil Procedure."

We are of the opinion, therefore, that proceedings on motion for a new trial instituted by the filing of a notice of intention prior to the signing and filing of the findings of fact and conclusions of law are premature and ineffectual for any purpose.

It is stated in *Barbee v. Young* (Cal. App.) 249 P. 15, 16, that—

"Section 659 of the Code of Civil Procedure deals simply with the right of a defeated party where the court has announced its conclusions or filed its findings of fact and conclusions of

law to immediately give notice of motion for a new trial. * * *"

The foregoing statement was unnecessary to a decision of that case, and, in so far as said statement lends support to a conclusion differing from that herein announced, the same is disapproved.

[2] The proceedings on motion for new trial herein, having been prematurely instituted, were ineffectual and a nullity, and no other proceedings for new trial having been subsequently and seasonably commenced so as to extend the period of time within which the appeal from the judgment might be prosecuted, we are constrained, for want of jurisdiction of the cause, to dismiss said appeal for the reason that it was taken more than 60 days after the entry of said judgment.

The appeal is therefore dismissed.

201 Cal. 10

DANIELS v. COLKINS. (L. A. 8649.)

Supreme Court of California. April 4, 1927.

Judgment $\S$ 145(1)—Seasonable application for relief, accompanied by sufficient affidavit of merits and verified answer stating good defense, requires vacation of default judgment (Code Civ. Proc. $\S$ 473).

Where application for relief from default judgment was made within three months from entry thereof, as required by Code Civ. Proc. $\S$ 473, and accompanied by sufficient affidavit of merits and proposed verified answer setting forth good defense, it was incumbent on trial court to vacate and set aside judgment.

In Bank.

Appeal from Superior Court, Los Angeles County, F. C. Valentine, Judge.

Action by A. J. Daniels against Anna M. Colkins. Judgment for plaintiff by default, and, from an order refusing to set aside and vacate the judgment, defendant appeals. Reversed, with directions.

Woodruff & Shoemaker, of Los Angeles, for appellant.

T. C. Gould, of Los Angeles, for respondent.

PER CURIAM. This is an appeal by the defendant from an order of the superior court of the county of Los Angeles refusing to set aside and vacate a default judgment obtained after publication of summons. The appeal was placed upon a special calendar of this court upon an order to the respondent to show cause why said order appealed from should not be reversed or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar and the entry of said order to show cause it appeared that the appellant's brief had been filed herein but that no brief

on behalf of the respondent had been filed, although the time for the filing of such brief under the rules of this court had long since expired. Respondent failed to appear upon the calling of said calendar, and the order to show cause was thereupon submitted.

The appellant's application for relief from said default judgment, obtained after publication of summons, was made and denied within three months from the entry thereof, and such application was therefore seasonably presented. Code Civ. Proc. § 473. An examination of the record discloses that with the notice of motion for relief under section 473 of the Code of Civil Procedure there was filed by the appellant a good and sufficient affidavit of merits, together with a copy of her proposed verified answer to the complaint, which proposed answer contains allegations constituting a good defense to the action. The application for relief having been seasonably made and having been accompanied by a sufficient affidavit of merits and a proposed verified answer setting forth a good defense to the complaint herein, it was incumbent upon the trial court to vacate and set aside the default judgment complained of. *Gray v. Lawlor*, 151 Cal. 352, 90 P. 691, 12 Ann. Cas. 990; *Hoffman v. Superior Court*, 151 Cal. 386, 90 P. 939; *Lilly-Brckett Co. v. Sonnemann*, 157 Cal. 192, 106 P. 715, 21 Ann. Cas. 1279; *Boland v. All Persons*, 160 Cal. 486, 117 P. 547; *Osmont v. All Persons*, 165 Cal. 587, 133 P. 480; *Beggs v. Riordan*, 44 Cal. App. 230, 186 P. 187.

For the foregoing reasons the order appealed from is reversed, with directions to the court below to vacate and set aside the default judgment entered against the appellant herein and to permit said appellant to file her proposed verified answer.

200 Cal. 724

SNAPP et al. v. KIDDER et al. (L. A. 8076.)

(Supreme Court of California. March 28, 1927.)

1. Attachment ⚙️—Where attachment depends on contract being payable within state, contract must provide either expressly or by necessary implication that obligation is so payable.

Where right to attach depends on contract being payable within state, it is not enough that money be payable wherever defendant may be found, and therefore payable within state, but that contract must provide either in terms or by necessary implication that obligation is so payable.

2. Attachment ⚙️—Contract for use of gambling car with traveling show held not to create obligation payable within state, as required for attachment (Code Civ. Proc. § 537).

Contract, executed in Illinois for payment of sum of money for use or privilege of gam-

bling car connected with traveling show, and specifying a certain sum as due and payable each week, held to contemplate weekly payment at such place or places as show might be operating, and not to create an obligation either expressly or by necessary implication payable within state authorizing attachment within Code Civ. Proc. § 537.

In Bank.

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Action by William R. Snapp and another against Charles B. Kidder and another. From an order refusing to dissolve an attachment theretofore granted, defendants appeal. Reversed.

L. Lee Bernstein, of Los Angeles, for appellants.

Verge, Cooney & Calhoun, of Los Angeles, for respondents.

PER CURIAM. This appeal was placed upon a special calendar of this court upon an order to the respondents to show cause why the judgment herein should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that the appellants' brief had been filed herein, but that no brief on behalf of the respondents had been filed, although the time for the filing of such brief under the rules of this court had long since expired. The respondents failed to appear upon the calling of said calendar, and the order to show cause was thereupon submitted. There is presented herein an appeal from an order of the superior court of the county of Los Angeles refusing to dissolve an attachment. Section 537 of the Code of Civil Procedure enumerates the circumstances under which an attachment may issue upon the institution of an action. The writ of attachment complained of herein was undoubtedly issued under subdivision 1 of said section, and the conflicting affidavits filed in connection with the appellants' motion to dissolve the same indicate that the controversy revolves about the question whether or not the contract out of which the debt arose was "payable in this state."

[1, 2] It has repeatedly been held that, where the right to an attachment depends upon the contract being "payable in this state," it is not enough that the money be payable wherever the defendant may be found, and therefore payable in this state, but that the contract must provide either in terms or by necessary implication that the obligation is payable in this state. *Eck v. Hoffman*, 55 Cal. 501, 502; *Tuller v. Arnold*, 93 Cal. 166, 168, 28 P. 863; *Drake v. De Witt*, 1 Cal. App. 617, 618, 82 P. 982; *Atwood v. Little Bonanza Co.*, 13 Cal. App. 594,

596, 110 P. 344; *Erickson v. Erickson*, 47 Cal. App. 319, 320, 190 P. 464. The instant action was instituted to recover, in the main, a sum of money alleged to be due for the use of a privilege or gambling car connected with a traveling show. By the terms of the contract between the parties, executed at East St. Louis, Ill., the sum of \$275 was to be due and payable on Wednesday of each week during the show season. It may be said, therefore, that the contract contemplated the weekly payment of said sum at such place or places as the show might be operating when the same fell due. The contract itself does not, however, indicate the places where the show visited, nor does the record herein disclose that any part of the amount sued for was earned or became payable in this state. This being so, it cannot be said that the obligation or any proportionate part thereof was either expressly or by necessary implication payable in this state. The writ of attachment was therefore improperly issued, and the trial court erred in refusing to dissolve it.

The order appealed from is reversed.

201 Cal. 17

ANAHEIM NAT. BANK v. DOLPH.
(L. A. 8517.)

Supreme Court of California. April 6, 1927.

1. Bills and notes $\S$ 160—Agreement to pay "charges for collection" does not destroy note's negotiability under Uniform Negotiable Instruments Law (Civ. Code, § 3082, subd. 2, and § 3083, subd. 5).

Stipulation to pay "charges for collection" does not destroy negotiability of a promissory note on which no interest is payable until maturity, under Uniform Negotiable Instruments Law (Civ. Code, § 3082, subd. 2), providing that an instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money, and Uniform Negotiable Instruments Law (Civ. Code, § 3083, subd. 5), providing that sum is certain although to be paid with costs of collection or attorney's fee in case payment shall not be made at maturity.

2. Bills and notes $\S$ 155—Stipulation of sureties, indorsers, and guarantors that time of payment may be extended without notice does not destroy note's negotiability.

A stipulation in a note that sureties, indorsers, and guarantors consent that time of payment may be extended without notice does not destroy negotiability.

3. Bills and notes $\S$ 155—Stipulation whereby both maker and sureties, indorsers and guarantors, consent to extension by holder, either before or after maturity, does not destroy note's negotiability (Uniform Negotiable Instruments Law [Civ. Code, § 3082, subd. 3]).

Stipulation in note whereby maker as well as sureties, indorsers, and guarantors severally

agree that time of payment may be extended without notice, not limiting the making of such extension to a time after maturity and not giving right to demand extension by holder, does not destroy negotiability under Negotiable Instruments Law (Civ. Code, § 3082, subd. 3), providing that instrument to be negotiable must be payable on demand or at fixed time, since the time required to be certain is that when holder can demand payment.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action on a promissory note by the Anaheim National Bank, a corporation, against Blanche L. Dolph. Judgment for plaintiff and defendant appeals. Affirmed.

Black, Hammack & Black and Meserve & Meserve, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Ames & McFadden, of Anaheim (H. L. Dearing, of Orange, and Underwood, Burke & Cree, of Long Beach, of counsel), for respondent.

SHENK, J. On the judgment roll alone the defendant appeals from a judgment in favor of the plaintiff for \$5,000 and interest on a promissory note. The complaint sets forth a copy of the note, which is as follows: "\$5,000.00.

"Capistrano, California, Dec. 22, 1922.

"Six months after date, for value received, I promise to pay to the order of myself five thousand and no/100 dollars payable at any bank in Santa Ana, California, with interest at 8 per cent. per annum from date until maturity.

"And if interest or principal is not paid when due, then accrued interest and principal are to draw interest at the rate of 10 per centum per annum until paid, together with all attorney's fees and other costs and charges for the collection thereof. The makers, sureties, indorsers or guarantors severally waive presentment, protest and notice of protest, and the said sureties, indorsers and guarantors further all and singular, waive the plea of discussion and division. Also agree that time for payment may be extended without further notice. This note authorizes any bank or banker to discount same for cash. There are no offsets or conditions against this note.

"No. 6379.

"The makers of this note must sign upon
"\$[1.00 in canceled I. R. S.]

"Blanche L. Dolph."

Indorsements:

"Blanche L. Dolph, Capistrano."

In addition to other appropriate allegations the complaint alleged that on the 22d day of December, 1922, the defendant executed said note and on the same day "sold, assigned, indorsed, and transferred said promissory note to the Leach-Biltwell Motor Car

Company, a corporation"; that thereafter on the same day "and prior to the maturity of said promissory note said Leach-Biltwell Motor Car Company, did, for a valuable consideration, sell, transfer, and deliver said promissory note to the plaintiff herein, and that the plaintiff is now the owner and holder thereof." The defendant answered, setting up as an affirmative defense that she was induced to execute and deliver said promissory note in payment for stock in said corporation and solely by reason of certain representations made to her by the agents of said corporation which were false and fraudulent. She further alleged that shortly after the execution and delivery of the note she ascertained that the said representations were false, and she immediately rescinded the transaction and notified all parties in interest and every bank and banking institution in Southern California, including the plaintiff, that she had canceled and rescinded said transaction. The court found that the representations and statements were made to the defendant by the agents of the Leach-Biltwell Motor Car Company as alleged; that they were false and that they were the inducing cause of the execution and delivery of said note, but that said notice was not given by the defendant nor received by the plaintiff until after it had purchased said note, and "that it purchased said note in good faith in due course of business and for a valuable consideration prior to the maturity thereof and without notice or knowledge of any equities or defenses in favor of the defendant." The court thereupon rendered judgment for the plaintiff upon its conclusion of law that the note was negotiable in form, and that under the facts found the plaintiff was entitled to judgment notwithstanding the equitable defense alleged and proved. The sole question for determination is whether the note sued on is negotiable in form. If the trial court was correct in holding that it is negotiable in form, the judgment must be affirmed. If it be held to be nonnegotiable in form, the matters alleged and proved were a complete defense and the judgment must be reversed.

[1] It is first contended by the defendant that the said note is nonnegotiable by reason of the inclusion therein of the words, "charges for collection." Section 3082, subd. 2, of the Civil Code adopted as part of our Uniform Negotiable Instruments Law in 1917, provides that an instrument in order to be negotiable "must contain an unconditional promise or order to pay a sum certain in money." Section 3083, subd. 5, of the Civil Code, adopted also as a part of the same law, provides that the sum payable is a sum certain within the meaning of the act, although it is to be paid "with costs of collection or an attorney's fee, in case payment shall not be made at maturity."

The instrument here in question does not contain an accelerating clause at the option of the holder for the nonpayment of interest. No interest is due in any event under the provisions of the note until maturity. The agreement as to interest clearly is that if interest at 8 per cent. per annum be not paid at maturity, then the accrued interest and principal would draw interest at the rate of 10 per cent. per annum until paid. If the note be not paid at maturity the holder could take steps to enforce payment with the necessary costs of collection. The instrument is poorly punctuated and not precisely worded, but without doubt the agreement contemplated by the parties was no more than to pay attorney's fees and costs of collection in case of nonpayment as permitted by the statute. The insertion of the word "charges" could add nothing to the agreement so permitted, and when inserted did not destroy the negotiability of the note. *Davis v. McColl*, 179 Mo. App. 198, 166 S. W 1113; *Ex parte Bledsoe*, 180 Ala. 586, 61 So. 813; *Letcher v. Wrightsman*, 60 Okl. 14, 158 P. 1152.

[2] It is next contended that the note is nonnegotiable for uncertainty in time of payment. The contention is predicated upon the fact that the note contains an agreement on the part of "the makers, sureties, indorsers or guarantors" that time of payment may be extended without further notice. Incidentally it is urged that the note is uncertain as to what parties agree to an extension of time of payment, for the reason that the agreement for extension is set apart from the sentence which precedes it by a period. If a comma or a semicolon had been there used we apprehend no claim of uncertainty would have been urged. It is argued that because of the period it cannot be determined whether the maker alone, or the sureties, indorsers, and guarantors, as well as the maker, agree that time of payment may be extended without notice. Whatever punctuation be used between the two sentences, it is clear that both the maker and the sureties, indorsers and guarantors severally agree that time of payment may be extended without further notice. It is well settled that a stipulation in a note that sureties, indorsers and guarantors consent that time of payment may be extended without notice thereof does not destroy negotiability. *McDonald v. Mulkey*, 32 Wyo. 144, 231 P. 662; *Farmer v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170; *De Groat v. Focht*, 37 Okl. 267, 131 P. 172.

[3] The question, then, is whether a stipulation expressed in the note that the maker consents to an extension of the time of payment renders the note nonnegotiable. Upon this point the authorities from other jurisdictions are not in harmony, and the precise point seems not to have been adjudicated in this state, although the reasons which would logically lead to a declaration that such an

agreement does not destroy negotiability are stated in *Navajo County Bank v. Dolson*, 163 Cal. 485, 126 P. 153, 41 L. R. A. (N. S.) 787, where it is declared at page 491 (126 P. 156):

"When it is said that the time of payment must be stated with certainty, the time referred to is that when the holder can insist on payment. Therefore, if the time when the holder has the absolute right to demand payment is prescribed with certainty, the note is negotiable so far as this objection is concerned"—citing cases. 19 Cal. Jur. 814.

It is true that the *Navajo Bank Case* involved the construction of a note containing an agreement that after maturity the note might be extended with no impairment of liability, but the statement of this court above quoted is in accord with the trend of modern authority and affords a satisfactory reason for holding that the instrument involved herein fixes with certainty the time of payment as required by subdivision 3 of section 3082 of the Civil Code, which provides that an instrument to be negotiable "must be payable on demand, or at a fixed or determinable future time." A demand note, which is payable at the option of the holder, is expressly made negotiable by the statute. The note involved herein definitely fixed the time of payment at six months after December 22, 1922. The date of maturity so fixed was a fixed future time and was a time when the holder of the note might insist on payment. No power was granted to the maker to extend the time of payment without the consent of the holder. In *First National Bank v. Buttery*, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878, 17 Ann. Cas. 52, the note in question contained the provision that: "The makers and indorsers herein severally * * * consent that the time of payment may be extended without notice." It was argued in that case that under this provision the holder of the note might without notice extend the time of payment indefinitely, thereby rendering the note nonnegotiable for uncertainty of time of payment. The court said:

"It is strenuously argued that the use of the word 'makers' in the waiver admits of an extension being made at any time on the part of the holder, by mere secret mental process, unknown to any other party. This may be true as a psychological fact, but we do not deem it so as a matter of practice in commerce and banking. * * * Holders of notes do not by a secret mental process make an extension of the time of payment, but such extension, if made at all, is made by an agreement between the principal debtor and the holder of the paper, either with or without the consent of the indorsers."

It would unduly prolong this opinion to review the many cases involving the same or similar provisions in promissory notes under the law merchant of the several states. They are extensively annotated and commented upon in the cases hereinafter men-

tioned. The Supreme Court of Tennessee has briefly stated the reasons and cited the authorities which indicate the correctness of the holding that the inclusion of such a provision in a note does not destroy its negotiability. The law of Tennessee with reference to certainty of time of payment is in the identical language of our own statute. In *Bank of Whitehouse v. White*, 136 Tenn. 634, 191 S. W. 332, the effect of the following provision on the part of the obligors on a note was involved, to wit:

"We authorize the holder thereof to extend the payment of the same, or any part thereof, without impairing our joint and several liabilities, and the sureties agree to waive notice of any extension of time."

It was held that such a stipulation in the note did not destroy its negotiability. The court said:

"We construe the clause in the note, quoted above, to relate and to give assent to extensions that may be granted at or after maturity, the date of which is set forth with certainty in the note; or to an extension which, if made prior to maturity, has operative effect as from the time when the note falls due according to tenor; and we are of opinion that when so construed the clause should not render the note [non] negotiable, whether we view the question from the standpoint of principle, precedent, or policy.

"Principle: As already observed, the note as executed is stipulated to mature on a date fixed and certain. The provision for extension does not put it in the power of the holder to extend the note without the concurrence of the maker, and the latter may not force an extension on the holder. When they concur, a new date of maturity is fixed, and one no less certain than the original date. The sureties merely assent in advance thereto and bind themselves to waive the right of defense that might otherwise accrue; or to be bound by the supplemental contract which fixes the later maturity date. There is no agreement embodied in the note operating to bind the holder to extend. There is incorporated no promise to do anything that would, of its force, affect the unconditional promise to pay on the date named in instrument. There is nothing in the note that looks towards an indefinite extension of time of payment.

"Precedent: Cases that pass on this question may be found collated in 8 Corp. Juris, 140; * * * 17 Ann. Cas. 55 and 16 L. R. A. (N. S.) 878; *Longmont Nat. Bank v. Loukonen*, Ann. Cas. 1914B, 210; *Anniston Loan, etc., Co. v. Stickney*, 31 L. R. A. 234; *Rossville State Bank v. Heslet*, 33 L. R. A. (N. S.) 738; *State Bank of Halstad v. Bilstad*, 49 L. R. A. (N. S.) 132. The cases which have appeared since the preparation of the last of these notes demonstrate that the above is fast becoming the settled construction of the Negotiable Instruments Act. *First Nat. Bank v. Stover* [21 N. M. 453] (N. M.) 155 P. 905, L. R. A. 1916D, 1280 [Ann. Cas. 1918B, 145]; *First Nat. Bank v. Baldwin* [100 Neb. 25], 158 N. W. 371; *City Nat. Bank v. Kelly* [51 Okl. 445] (Okl.) 151 P. 1172; *Davis v. McColl*, 179 Mo. App. 198, 166 S. W. 1113.

"Policy: Such a provision for extension not infrequently operates to the advantage of a

surety in permitting the holder, at his option, safely to give grace to the maker, on the latter's application; when otherwise, pressure for payment might come inconveniently upon both maker and surety. It is common practice to embody such a provision in notes; the clause tends to give currency to the note, and the policy of the law should be in furtherance of the negotiability of such widely used instruments when they fairly fall within the spirit of the provisions of the uniform act. *White v. Hatcher*, 135 Tenn. 609, 188 S. W. 61; *Pemiscot County Bank v. Bank*, 132 Tenn. 152, 177 S. W. 74."

Among the cases holding that a provision such as the one now before us does not destroy negotiability are the following, many of which contain elaborate notes and collation of authorities on the subject: *First National Bank v. Stover* (1916) 21 N. M. 453, 155 P. 905, L. R. A. 1916D, 1280, Ann. Cas. 1918B, 145; *First National Bank v. Baldwin* (1916) 100 Neb. 25, 158 N. W. 371; *City National Bank v. Kelly* (1915) 51 Okl. 445, 151 P. 1172; *Davis v. McColl* (1914) supra; *Bank of Whitehouse v. White* (1917) supra; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 P. 239, Ann. Cas. 1912D, 1, note page 7; *Stitzel v. Miller*, 250 Ill. 72, 95 N. E. 53, 34 L. R. A. (N. S.) 1004; *City National Bank v. Goodloe-McClelland Com. Co.*, 93 Mo. App. 123; *National Bank of Commerce v. Kenney* (1904) 98 Tex. 293, 83 S. W. 368; *Russell v. Wyant*, 214 Mo. App. 377, 253 S. W. 790; *Missouri-Lincoln Trust Co. v. Long*, 31 Okl. 1, 120 P. 291; *Protection Ins. Co. v. Bill*, 31 Conn. 534; *Capron v. Capron*, 44 Vt. 410. See note to *Kimpton v. Studebaker Bros. Co.*, 125 Am. St. Rep. 202.

Of the cases adhering to a contrary doctrine the following may be noted: *Coffin v. Spencer* (C. C.) 39 F. 262; *Union Stockyards National Bank v. Bolan*, 14 Idaho, 87, 93 P. 508, 125 Am. St. Rep. 146; *National Bank v. Gunter Bros.*, 67 Kan. 227, 72 P. 842; *Woodbury v. Roberts*, 59 Iowa, 348, 13 N. W. 312, 44 Am. Rep. 685; *Citizens' Nat. Bank v. Piollet*, 126 Pa. 194, 17 A. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860; *Smith v. Van Blarcom*, 45 Mich. 371, 8 N. W. 90; *Glidden v. Henry*, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316.

The appellant concedes that the interpretation we place upon the language of the note in question is in harmony with the modern doctrine on the subject, but insists that the older cases are in a majority and better reasoned. The trend of modern authority is unquestionably opposed to the appellant's construction of the note. We are satisfied with the reasoning of these later cases. It appears to us to be the better rule and is in harmony with the statement of this court in *Navajo County Bank v. Dolson*, supra. Such an interpretation, in conjunction with the recent cases in other jurisdictions, tends for stability and uniformity in the interpretation of the uniform negotiable instruments law adopted in this state and in nearly all of the

other states of the Union. *Utah State Bank v. Smith*, 180 Cal. 1, 179 P. 160.

As there is nothing in the stipulation in the note under consideration which would give any one the right to demand of the holder of the note an extension of time of payment, we conclude that the time at which the holder could demand payment was definitely fixed and that therefore the note is negotiable in form.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

201 Cal. 767

GOLDEN STATE BANK, Plaintiff and Respondent, v. Blanche L. DOLPH, Defendant and Appellant; Leach Biltwell Motor Car Company and M. A. Leach, Defendants. (L. A. 8516.)

Supreme Court of California. April 6, 1927.

In Bank. Appeal by defendant from a judgment of the Superior Court of Orange County, R. Y. Williams, Judge, in an action upon a promissory note. Affirmed.

Black, Hammack & Black and Meserve & Meserve, all of Los Angeles, for appellant.

Underwood, Burke & Cree, of Long Beach, for respondent.

PER CURIAM. This is an appeal on the judgment roll from a judgment in favor of the plaintiff on a promissory note. The facts are the same as those involved in *Anaheim Nat. Bank v. Dolph* (Cal. Sup.) L. A. No. 8517, 255 P. 184, this day decided, with the exception of the amount of the note. By stipulation this appeal was submitted for decision on the arguments and briefs in that case.

On the authority of said case, this day decided, the judgment is affirmed.

201 Cal. 767

FIRST NATIONAL BANK OF OLIVE, Plaintiff and Respondent, v. Blanche L. DOLPH, Defendant and Appellant. (L. A. 8518.)

Supreme Court of California. April 6, 1927.

In Bank. Appeal by defendant from a judgment of the Superior Court of Orange County, R. Y. Williams, Judge, in an action upon a promissory note. Affirmed.

Black, Hammack & Black and Meserve & Meserve, all of Los Angeles, for appellant.

H. L. Dearing, of Orange, for respondent.

PER CURIAM. This is an appeal on the judgment roll from a judgment in favor of the plaintiff on a promissory note. The facts are the same as those involved in *Anaheim Nat. Bank v. Dolph* (Cal. Sup.) L. A. No. 8517, 255 P. 184, this day decided, with the exception of the amount of the note. By stipulation this appeal was submitted for decision on the arguments and briefs in that case.

On the authority of said case, this day decided, the judgment is affirmed.

200 Cal. 760

COLLEY v. CHOWCHILLA NAT. BANK.**CHOWCHILLA NAT. BANK v. COLLEY et al. (Sac. 3772.)**

Supreme Court of California. March 31, 1927.

1. Release ⚡13(1)—Consideration for release passing to third person with consent of releasor, consisting only of detriment to releasee, is sufficient (Civ. Code, §§ 1541, 1605).

Generally, consideration for release of no specific benefit to releasor and implying only detriment to releasee, moving from releasee to third person at request and acquiescence of releasor, is sufficient, under Civ. Code, §§ 1541, 1605.

2. Banks and banking ⚡260(1)—Agreement of national bank to satisfy debt without receiving benefit held ultra vires covenant to make gift of capital assets and void.

National bank's agreement to give satisfaction of debt to it without receiving any special benefit was, in legal consequence, an ultra vires and void covenant to make gift of capital assets.

3. Novation ⚡11—Novation must be expressly or impliedly pleaded.

Novation must be pleaded either expressly or by unequivocal implication.

4. Novation ⚡12—One asserting existence of novation has burden of establishing it.

Burden of establishing novation is on party asserting its existence.

5. Novation ⚡11—Allegation of agreement to surrender notes, on plaintiffs' executing quitclaim deed to third party under contract of sale assigned to defendants, is not allegation of novation, whereby third party assumed plaintiffs' indebtedness.

In action to compel cancellation of promissory notes, complaint alleging agreement by defendant to surrender notes if plaintiffs executed quitclaim deed to third party under contract for sale assigned to defendants, which would operate as payment of notes, did not impliedly allege novation releasing plaintiffs on execution of deed and new contract between defendant and third party assuming plaintiffs' indebtedness.

6. Novation ⚡12—Implied novation cannot arise until evidence is sufficient to raise inference that novation was intended.

Though novation may be established by implication, such implication cannot arise until there is evidence showing facts and circumstances from which it may reasonably be inferred that such was intention.

7. Novation ⚡12—Evidence held not to show novation by defendants' agreement to surrender notes on plaintiffs' executing quitclaim deed to vendor under contract for sale assigned to defendant as security.

In action to compel cancellation of promissory notes under alleged agreement by defendant to surrender notes if plaintiff would execute quitclaim deed to vendor under contract of sale

assigned to defendant as security, evidence held not to show new contract whereby vendor intentionally assumed plaintiffs' indebtedness, and hence execution of quitclaim deed by plaintiff did not give rise to novation releasing plaintiff from liability.

8. Novation ⚡12—Vendor accepting quitclaim deed from purchaser in default held not presumed to have assumed purchaser's obligation to bank to whom contract of sale was assigned as security (Civ. Code, § 1589).

As respects novation, where vendor under contract of sale was entitled to declare forfeiture for purchaser's default, acceptance of quitclaim deed by vendor did not raise presumption, under Civ. Code, § 1589, that vendor agreed to pay purchaser's indebtedness to defendant bank to whom purchaser assigned contract as security for debt.

9. Banks and banking ⚡262—Officers have authority to bind bank in manner that it could be bound by law, and their action was, in effect, action by bank itself.

President and officers of national bank have actual or ostensible authority to bind bank in every way that it could be bound under the law, and their action was, in effect, action by bank itself.

10. Banks and banking ⚡227(3)—Evidence of bank's agreement to look to purchase price of land for payment of loan, if contract of sale was assigned as security, did not show agreement to cancel indebtedness.

In action to compel cancellation of notes, evidence that defendant bank, to secure loan, promised plaintiffs that if contract of sale was assigned as security bank would look to purchase price on sale of land for payment of loan, and, if necessary, plaintiffs would quitclaim to vendor, and bank would release plaintiffs from personal liability on notes did not show agreement to cancel indebtedness outright, or promise to release security afforded by assignment of contract.

11. Vendor and purchaser ⚡214(4)—Bank taking contract of sale as security acquired equitable lien on property against original contractor, heirs, or assigns.

Assignment of contract of sale to bank to secure notes gave bank an equitable lien or mortgage on realty enforceable against property in hands of original contractor, his heirs, administrators, assigns, or incumbancers with notice, actual or constructive.

12. Banks and banking ⚡227(3)—Evidence of bank's agreement to look to price of land for loan payment, if sale contract was assigned as security, showed only waiver of deficiency claim.

In action to compel cancellation of notes, evidence that defendant bank, to secure loan, promised plaintiffs that if contract of sale was assigned as security bank would look to purchase price on sale of land for payment of loan, and, if necessary, plaintiffs would quitclaim to vendor, and bank would release plaintiffs from personal liability on notes amounted only to waiver by bank of claim for deficiency judgment

after foreclosure or satisfaction of its equitable lien on property by assignment of contract, and not to surrender security given by execution of assignment.

13. Banks and banking ⇨261(3)—National bank's agreement to release personal liability, when security under contract of sale was exhausted, would estop bank from setting up defense *ultra vires*.

Under agreement by national bank to release plaintiffs from personal liability on notes when security of contract of sale assigned to bank was exhausted, if found, bank would be estopped to set up defense that agreement was *ultra vires*.

14. Banks and banking ⇨260(1)—National bank taking assignment of contract of sale as security for pre-existing unsecured debt would be estopped to deny release of personal liability on notes secured if made (U. S. Comp. St. §§ 9661, 9674).

Under Rev. St. U. S. § 5136 (U. S. Comp. St. § 9661), granting national banks all incidental powers necessary for its business, and section 5137 (section 9674), authorizing taking of mortgage of real property to secure indebtedness, bank would be estopped to deny its power, in taking security for pre-existing unsecured debt, to make valid agreement releasing makers of note from personal liability, where they had in good faith assigned contract of sale to bank as security under such agreement.

In Bank.

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Actions by W. C. Colley against the Chowchilla National Bank and by the Chowchilla National Bank against Hope L. Colley and another. Judgment for plaintiff in first action, and defendant appeals. Judgment for defendants in second action, and plaintiff appeals. Reversed, with directions.

W. M. Conley, Matthew Conley, Philip Conley, and Lindsay & Conley, all of Fresno, and Faucett & Ring, of Los Angeles, for appellant.

Lee D. Windrem, of Richmond, for respondents.

PRESTON, J. By a stipulation of the parties the above-entitled causes were heard together in the court below, and while separate judgments were entered in each case and separate notices of appeal filed, still a consolidated record on appeal was prepared and the causes have been carried on our calendar under one number. They will therefore be considered and disposed of as one case.

This is appropriate, for the same basic questions underlie them, and a determination thereof will guide our action in both causes. They will be known herein as cause 1 and cause 2, respectively, following the order appearing in the caption. From the record it

appears that the Los Angeles Trust & Savings Bank was succeeded by the Pacific Southwest Trust & Savings Bank, and they are in reality one; hence reference herein will be made to them as the "Los Angeles bank."

The amended complaint in cause 1 was, by stipulation of the parties, made the answer to the complaint in cause 2, and the court in its findings of fact and conclusions of law adopted said amended complaint as its findings of fact without any other material findings whatsoever. It is, therefore, necessary to briefly set forth the allegations of said amended complaint as follows:

That on the 21st day of September, 1921, plaintiff, W. C. Colley, was indebted to the Chowchilla National Bank in the sum of \$5,300, evidenced by his promissory note, which, with accrued interest thereon, amounted on the 15th day of April, 1922, to the sum of \$5,441.45; that at the same time he was also indebted to said bank as indorser upon a promissory note in the principal sum of \$2,728, with interest, which said latter indebtedness, after deducting partial payments, amounted on the 15th day of April, 1922, to the sum of \$1,615.37, said indebtedness totaling on that date the sum of \$7,056.82.

That on the 1st day of May, 1920, Hope L. Colley, on behalf of herself and husband, entered into a written contract of sale and purchase with the Los Angeles Trust & Savings Bank, a corporation, touching 80 acres of real property situate in the county of Madera, state of California, whereby the agreed purchase price of \$18,000 was payable in installments covering a period of years and containing the usual covenants.

That on said 15th day of April, 1922, a refunding arrangement was entered into between said W. C. Colley and Hope L. Colley, his wife, and the said bank, whereby said indebtedness of W. C. Colley to appellant was subdivided by the execution of five promissory notes, as follows: One for the principal sum of \$500, payable November 1, 1923; another for the principal sum of \$1,500, payable November 1, 1924; another for the principal sum of \$1,500, payable November 1, 1925, said three above-mentioned notes being signed by Hope L. Colley and indorsed by W. C. Colley; a fourth note in the sum of \$1,500, due November 1, 1926; and a fifth in the principal sum of \$2,059.75, payable November 1, 1927, said two last-mentioned notes being executed by W. C. Colley and indorsed by Hope L. Colley; that interest provided for in said notes was 8 per cent.; that to secure the payment of said notes, and each of them, said Hope L. Colley made, executed, and delivered to said bank an assignment of said contract of sale and purchase above referred to, said assignment being subordinate to a previous assignment

which had been made by her to one A. F. Witesman.

Said amended complaint then further provides:

"That after said delivery of said second assignment of contract (meaning the assignment to defendant bank above described) to said defendant, and on or about the 22d day of April, 1922, the said defendant notified said plaintiff that if, at any time before payment of said five new promissory notes, said plaintiff and said Hope L. Colley, his wife, would execute a quitclaim deed of the said real property to Pacific Southwest Trust & Savings Bank, a corporation (formerly the said Los Angeles Trust & Savings Bank, a corporation), the same would operate in full payment of all of the aforesaid indebtedness of said plaintiff to said defendant, and that concurrently with the execution of such quitclaim deed by said plaintiff and said Hope L. Colley, the said defendant would thereupon deliver up and surrender to said plaintiff all of the said promissory notes by the terms thereof payable to said defendant as aforesaid; that thereafter and on February 24, 1923, said plaintiff and said Hope L. Colley executed to said Pacific Southwest Trust & Savings Bank, a corporation, their quitclaim deed of all of said real property, and same was on last said date acknowledged and certified so as to entitle same to be recorded, and same was on February 27, 1923, recorded in the office of the county recorder of the county of Madera, state of California, in volume 3 of 'Official Records,' at page 16."

The amended complaint further alleges that at the time said quitclaim deed was made the property covered by said contract was of the reasonable value of \$64,000, and the amount due on account of the purchase price thereof, including interest, was not to exceed the sum of \$30,000; and that said respondent, Hope L. Colley, owned an equity in said real property which was far in excess of the claims of said bank; that after the execution of said quitclaim deed the Colleys made demand upon defendant bank to surrender and deliver up to them the two notes first described in said amended complaint, and also the five notes executed later in lieu of said two first-mentioned notes; but that said bank refused to surrender or deliver up any of said notes or to acknowledge payment of all, or any, or either of them; that, however, no payment had been made on account of said indebtedness except by the execution of said quitclaim deed; that the respondents were not informed as to whether any of said notes had been negotiated; that defendant claimed none of said notes had been paid or in any manner discharged; that great and irreparable damage would be suffered should said notes remain outstanding.

The prayer of said amended complaint was that defendant bank be ordered to deliver up said notes, and each of them; that in case it failed to deliver them up, plaintiff have

judgment for the principal sum mentioned therein, with interest thereon from and after the 15th day of April, 1922, and for general relief.

As above stated, this amended complaint was by stipulation of the parties made the answer to the complaint in cause 2, which said cause is an action to recover from the Colleys the principal and interest of one of the five promissory notes involved in cause 1 and interest on two other of said notes.

The court found that all of the allegations of said amended complaint were true, and that all of the allegations of the answer of defendant bank were untrue, except that defendant bank was a national institution organized under and by virtue of the laws of the United States of America, with its principal place of business at Chowchilla, in the county of Madera, state of California.

Accordingly, in cause 1, pursuant to said findings, the court gave judgment in favor of the plaintiff, W. C. Colley, to the effect that said note for \$5,300, dated September 21, 1921, be adjudged and declared canceled and no longer an obligation of said plaintiff; that the note in the principal sum of \$2,728, bearing the same date, be likewise adjudged and declared canceled and no longer an obligation of said plaintiff, either in whole or in part; and as to the later notes it was adjudged that said defendant bank be ordered and required to deliver up each of said five promissory notes set forth in said amended complaint, or, in case delivery of any of said promissory notes could not be had, that plaintiff recover from said defendant the principal sum named therein, together with interest on said sum from April 15, 1922, to date of judgment.

In cause 2 the court likewise adopted the allegations of said amended complaint as its findings, and adjudged each of said notes sued upon in said cause 2 to have been paid and discharged in full, and gave judgment for the defendants accordingly. The appeal in cause 1 is by defendant bank from the judgment in favor of plaintiff, and in cause 2 by plaintiff bank from the judgment in favor of defendants therein.

[1] It is clear from the foregoing that the legal effect of these findings is that the indebtedness to the appellant has been satisfied by the execution of the quitclaim deed to the Los Angeles bank, and that respondents should have a release therefrom in the form of surrender of both said series of notes. *Epstein v. Gradowitz* (Cal. App.) 243 P. 877. Indeed, the findings declare the obligation released upon a new consideration which complies with the provisions of section 1541 of the Civil Code. It is also to be noted that the consideration set forth is not one of specific benefit to appellant, but is one implying only detriment to the respondents. Undoubtedly, under ordinary circumstances, a con-

sideration of this type is sufficient. Civ. Code, § 1605.

In 34 Cyc. 1050, the rule is stated as follows:

"A consideration for a release moving from a third person on behalf of the releasee to the releasor, or from the releasee to a third person at the request or by the acquiescence of the releasor, is as adequate as a consideration moving directly from the releasee to the releasor."

To the same effect, see *Midland Trust & Savings Bank v. Nagle*, 150 Minn. 279, 184 N. W. 1028, and *Gates v. Fauvre*, 74 Ind. App. 382, 119 N. E. 155.

In *Rucker v. Bolles*, 80 F. 504, 513 (25 C. C. A. 600), it is said:

"If one party to a contract agrees to release the opposite party therefrom in consideration of his doing some act which he is under no obligation to do, the doing of that act is a sufficient consideration for the release, although it was not beneficial to the first party."

[2] But, notwithstanding the above set forth principle, we must here deal with a corporation whose powers are circumscribed by the statutes of the United States. In short, we have as the alleged releasor a national banking association, which has, in practical effect, agreed to give a satisfaction of the debt without special benefit of any kind to itself. The legal consequence of the promise as found by the court is that the corporation has covenanted to make a gift of its capital assets for the doing of an act, detrimental to the doer, it is true, but without benefit to itself, and beneficial only to a third party, whose connection, if any, with appellant does not appear from the record. In other words, may a national bank under its powers as defined by the law be held to such a covenant? Appellant insists that such a contract, if proved, would be ultra vires the power of the corporation, and we think this contention must be sustained. We must look to the statutes of the United States as construed by the Supreme Court of the United States for a determination of this question. *Chemical National Bank v. Havermale*, 120 Cal. 601, 603, 52 P. 1071, 65 Am. St. Rep. 206.

In the early California case of *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 578, 579, (99 Am. Dec. 300), our court, speaking of the doctrine of ultra vires as applied to corporations, held:

"The term ultra vires, whether with strict propriety or not, is also used in different senses. An act is said to be ultra vires when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be ultra vires with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the

scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of strangers dealing with corporations may vary, according as the act is ultra vires in one, or the other, of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. When an act is ultra vires in the first sense mentioned, it is generally, if not always, void in toto, and the corporation may avail itself of the plea. But when it is ultra vires in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case."

This definition of ultra vires and this classification of the types thereof was adopted by the Supreme Court of the United States in the case of *National Bank & Loan Co. v. Petrie*, 189 U. S. 423, 23 S. Ct. 512, 47 L. Ed. 879.

We think that the agreement here involved comes clearly under the first subdivision of the subject and is ultra vires in the first or proper sense. In *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24, 59, 11 S. Ct. 478, 35 L. Ed. 55, the Supreme Court of the United States said:

"A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it."

See, also, to the same effect, *Union Pacific Ry. v. Chicago Ry.*, 163 U. S. 564, 16 S. Ct. 1173, 41 L. Ed. 265, and *Cal. National Bank v. Kennedy*, 167 U. S. 367, 17 S. Ct. 831, 42 L. Ed. 198.

The power of a national bank to deal in shares of stock or shares in a partnership was before the Supreme Court of the United States in the following cases: *National Bank of Ottawa v. Converse*, 200 U. S. 425, 26 S. Ct. 306, 50 L. Ed. 537, and *Merchants' National Bank v. Wehrmann*, 202 U. S. 295, 26 S. Ct. 613, 50 L. Ed. 1036. In the latter case the court said:

"It is not necessary in this case to say that shares like the present could not be accepted as security in any form by a national bank. But such a bank cannot accept an absolute transfer of them to itself. It recently has been decided that a national bank cannot take stock in a new speculative corporation, with the common double liability, in satisfaction of a debt. *First National Bank of Ottawa v. Converse*, 200 U. S. 425 [26 S. Ct. 306, 50 L. Ed. 537]. A fortiori, it cannot take shares in a partnership to the same end."

The rule as laid down in 7 *Corpus Juris*, page 784, is as follows:

"The officers of a national bank cannot bind it by contracts or acts which are not within the

scope of the business which the bank is authorized to transact, such as * * * agreeing to receive anything but money in payment of a nonnegotiable note indorsed to the bank, or making donations to a charity or to public or private enterprises."

The reason for the rule is found in *McCormick v. Market National Bank*, 165 U. S. 549, 17 S. Ct. 433, 436, 41 L. Ed. 817, as follows:

"The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

Respondents, however, practically conceding the force of the above authorities, vigorously contend that the pleadings, proof, and findings warrant the conclusion that respondents are entitled to the relief given them by the court because of a novation of the contract, wherein and whereby respondents were released from their obligation to appellant and a new contract was made between appellant and the Los Angeles bank, whereby said latter bank assumed and agreed to pay the indebtedness of respondents to appellant.

We have been cited to no evidence, nor can any be found to sustain this contention of respondents. The legal principles comprising the doctrine of novation, as far as the same are here involved, may be stated as follows:

Civil Code, § 1530:

"Novation is the substitution of a new obligation for an existing one."

Civil Code, § 1531:

"*Modes of Novation.* Novation is made: (1) By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; (2) by the substitution of a new debtor in place of the old one, with intent to release the latter; or (3) by the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former."

In 20 Cal. Jur. p. 250, it is said:

"But when it is clear that a new contract has been entered into without fraud and upon the understanding and with the intent that it shall be substituted for a former one, a novation is effected and the former agreement is extinguished. For example, it is said that where a bank to which checks on another bank are sent for collection, accepts credit from the drawee bank instead of requiring payment, such acceptance of the obligation of the drawee bank in discharge of the check amounts to novation between the two banks."

[3-5] Novation must be pleaded, either expressly or by unequivocal implication. *Traubucco v. Collins*, 39 Cal. App. 412, 179 P. 221; *McGinn v. Willey*, 24 Cal. App. 303, 141 P. 49; 20 Cal. Jur. 258; *People's State Bank v. Penello*, 67 Cal. App. 103, 227 P. 190; *Anglo-California Trust Co. v. Wallace*, 58 Cal. App. 625, 209 P. 78. The amended complaint is wholly deficient in this regard. The burden of establishing a novation is upon the party asserting its existence. *Anglo-California Trust Co. v. Wallace*, supra; *Robinson v. Rispin*, 33 Cal. App. 536, 165 P. 979; *Brown v. Coffee*, 17 Cal. App. 381, 121 P. 309, 311; and *Linder Hardware Co. v. Pacific Sugar Corp.*, 17 Cal. App. 81, 118 P. 785, 789.

In 20 Ruling Case Law, at page 367, we find the following rule announced:

"An essential element of every novation is a new contract to which all the parties concerned agree. * * * It is essential, then, in order to constitute a novation by which the original debtor is released, the creditor being bound thereby to discharge the debt as to him and look to another for the payment of his demand, that a contract be made between the new debtor and the creditor by which the claim can be enforced against such new debtor; and if the new debtor enters into no contract with the creditor by which he becomes the debtor of the creditor, so that the creditor may maintain an action against him, there is not a novation."

In 29 Cyc., at page 1136 and page 1139, the rule is again stated:

"The most frequent novation is the substitution of a new debtor. To constitute this kind of a novation, there must be a mutual agreement among three parties, the creditor, his immediate debtor, and the intended new debtor, by which the liability of the last named is accepted in the place of the original debtor in discharge of the original debt. * * * The burden of proof rests upon him who asserts that there has been a novation to establish it."

[6] While it is true that a novation may be established by implication, nevertheless—"such implication cannot arise until there is evidence showing facts and circumstances from which it may reasonably be inferred that such was the intention." 20 Cal. Jur. 258; *People's State Bank v. Penello*, supra; and *Anglo-California Trust Co. v. Wallace*, supra.

[7] A discussion to be made later herein of the evidence will disclose that the record contains no facts whatsoever from which it can be said that a new contract was made between the Los Angeles bank and appellant for payment of said indebtedness, with the intention of releasing and discharging the old obligation existing on the part of respondents or any agreement whatsoever to assume or pay the same.

[8] Respondents also insist that, under the principle announced in section 1589 of the Civil Code, the Los Angeles bank, having ac-

cepted the quitclaim deed, must be held to have assumed and agreed to pay and satisfy the indebtedness to appellant. The only thing shown by the record is that said bank, after accepting said quitclaim deed, asserted in an action brought by it the right to possession of said premises, but this is consistent with its rights under the terms of the contract of sale. It might have otherwise caused to be forfeited the rights of the respondents by declaring them in default and taking proceedings under the terms of the contract for that purpose and thus get possession of the land. There was nothing done by it that was not in strict accord with the enforcement of the contract, and this without reference of any kind to the claim of appellant bank for the indebtedness of respondents to it. The evidence shows nothing compelling the conclusion that the said bank assumed or agreed to pay any portion of this indebtedness of the respondents to appellant. The respondents were on the verge of insolvency, having made at least three assignments of said contract of sale and purchase as security for large amounts of indebtedness, and they were, as above noted, in default upon their payments under the contract itself. No reason whatsoever is shown by the record for an independent promise of payment of their indebtedness to appellant by the Los Angeles bank.

[9] In the foregoing and subsequent discussions we have assumed that action by the several presidents of the appellant bank was, in each case, action by the bank itself, for we conclude that the president and such officers who acted herein had actual or ostensible authority to bind the bank in every way that it could be bound under the law. 4 Cal. Jur. 158; *Jennings v. Bank of California*, 79 Cal. 323, 21 P. 852, 5 L. R. A. 233, 12 Am. St. Rep. 145; *Burnell v. S. F. Savings Union*, 136 Cal. 499, 69 P. 144; *Carp v. Dowdell*, 115 Cal. 677, 47 P. 695; *Newton v. Johnston Organ, etc., Mfg. Co.*, 180 Cal. 185, 180 P. 7; *Bartlett Est. Co. v. Fraser*, 11 Cal. App. 373, 105 P. 130.

[10] Appellant further insists that the findings hereinabove discussed are without support in the evidence, and we agree also with that contention. The most that can be claimed under the evidence is that the appellant bank, in order to get security for the pre-existing loan made to respondent, W. C. Colley, promised the respondents that if the new notes were executed by them and the contract of sale and purchase assigned as security therefor, that if and when the land covered by said contract was sold, the bank would look to the purchase price received for payment of the loan, and, if it became necessary on account of untoward circumstances for respondents without a sale to quitclaim or release their equity back to the legal owner, that appellant should and would

release respondents from personal liability on said notes. And that after said new notes were executed and the security given this promise was renewed and was relied upon when the quitclaim deed was executed and delivered.

[11] There is no evidence that the bank agreed to cancel the indebtedness outright, nor is there any evidence that it promised to release or forego the security afforded by the assignment of the contract. The assignment of this contract gave the appellant an equitable lien or mortgage upon said real property, enforceable against the property in the hands not only of the original contractor, but also in the hands of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice, actual or constructive. 17 Cal. Jur. 734, §§ 38-40; *Title Ins. & Trust Co. v. California Dev. Co.*, 171 Cal. 173, 152 P. 542.

[12] And no excuse can be found in the evidence for making the improvident promise to forego this security. Neither does the evidence fix any date or other time for the surrender to respondents of said notes, and the most favorable deduction that could be made from it in behalf of respondents is that said notes would be returned to them when and not until the security given for them had been realized upon. In short, giving the evidence the fullest weight, it amounts to no more, in legal effect, than a waiver by appellant bank of its claim for a deficiency judgment after a foreclosure or satisfaction of the equitable lien or mortgage given it by the assignment of the real estate contract.

Neither is there any evidence whatsoever that the Los Angeles bank assumed or agreed to pay or to become personally liable or liable in any other way for said indebtedness. There is likewise no evidence whatsoever of a substitution of the said bank in the place and stead of the respondents with intent to release them from the obligation of their notes.

The evidence further shows that the respondents were in default both to the Los Angeles bank and upon their other obligations; that they were threatened with and were themselves threatening bankruptcy at the time said quitclaim deed was executed. It is true that, at the time said deed was made, it was done on the advice and at the instigation of Mr. Witesman, the then president of appellant bank, but, as above pointed out, nothing was said or done by any representative of appellant which indicated an intention to release and satisfy said indebtedness. On the contrary, the clear inference is that appellant bank in so advising said quitclaim deed did not intend to satisfy said indebtedness, but, doubtless, thought that its rights would remain in statu quo, or probably be benefited by execution thereof. There

is not one word of evidence that at the time of making the deed, or any other time, appellant promised to forego and surrender the security given it by the execution of said assignment.

[13] Summing up the whole situation, the inference is clear that, at most, the bank was moving in its own interests in trying to get security for its obligation and later to realize upon it, and was not in any sense intending to satisfy said indebtedness altogether, but was willing to release respondents from personal liability only upon said notes and surrender them only when said security had been exhausted. Had the court made findings and given judgment in accord with this construction of the effect of the evidence, we would have been constrained to hold that such an agreement would have been within the power of the appellant to make, for, in our opinion, such an act on the part of appellant would have been at most ultra vires under the second subdivision of the doctrine announced in *Miners' Ditch Co. v. Zellerbach*, supra, and the appellant in such event would have been estopped from setting up this defense. This observation is also pertinent in the consideration of the appeal in cause 2, for, as we have observed, the court found said notes sued upon had been paid and gave judgment accordingly for respondents, who were defendants in the court below in cause 2.

[14] The defense that the bank had waived personal liability of defendants on the notes was not made. Neither was the defense that an independent action would not lie under section 726 of the Code of Civil Procedure made. On the contrary, the court took the broad ground that said notes, by the execution of said quitclaim deed to a third party, had been thereby paid. As the cause may be retried, we feel called upon to say that, under the general powers of the appellant as a national banking corporation, and under Revised Statutes of the United States, section 5136 (U. S. Comp. St. § 9661), which grants "all such incidental powers as shall be necessary to carry on the business of banking," and section 5137 (U. S. Comp. St. § 9674), which confers the power to take, hold, and convey real property mortgaged to secure a pre-existing indebtedness, together with the right to convey or expose same to sale and purchase it thereat, appellant would be estopped to deny its power, in getting security for a pre-existing, unsecured debt, to make a valid agreement to release the respondents from personal liability on same, where they had in good faith executed to their detriment their covenants under such a contract. See *Ohio & Miss. Ry. Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693. In *Morris v. Third Nat. Bank of Springfield, Mass.*, 142 F. 25, 73 C. C. A. 211, the court said:

"A national bank may lawfully do many things in securing and collecting its loans, in the en-

forcement of its rights and the conservation of its property previously acquired, which it is not authorized to engage in as a primary business."

In *First Nat. Bank v. Nat. Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, the court said:

"* * * Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter. * * * This necessarily implies the right of a bank to incur liabilities in the * * * course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. * * * Compromises to avoid or reduce losses are oftentimes the necessary results. * * * These compromises come within the general scope of the powers committed to the * * * directors and the officers, * * * and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter. * * * Banks may do, in this behalf, whatever natural persons could do under like circumstances."

See, also, *Second Nat. Bank v. U. S. Fidelity & Guar. Co.* (C. C. A.) 266 F. 489.

In *Teele v. Rockport Granite Co.*, 224 Mass. 20, 25, 112 N. E. 497, it was said:

"Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care and management of its property, may be undertaken by the corporation and be within the scope of its corporate powers."

See, also, 14a C. J. 252. It was this principle that the court had in mind in the case of *James Eva Estate v. Oakland B. & M. Co.*, 40 Cal. App. 515, 181 P. 415.

We deem it unnecessary to consider the further point raised by appellant that, because the covenants claimed were not contained in the contemporaneous written instruments, evidence in respect thereto would be inadmissible, for we have held, treating the evidence as admissible, that it is insufficient to support the findings.

The judgment of the court in cause 1 in declaring the notes paid and in ordering them to be delivered up for cancellation is clearly in excess of any relief warranted by the findings or the evidence. This observation is also true of the provisions authorizing, in case of nondelivery, a judgment against appellant bank for the principal sums mentioned in said notes, with interest from the 15th day of April, 1922.

In cause 2 the judgment was to the effect that the notes had been satisfied and discharged. The said judgment is likewise, for the reasons hereinabove pointed out, clearly

in excess of any relief warranted by the evidence in the case; however, upon the facts as shown by the record here presented, the effect of this decision is to hold that respondents are entitled to be released from personal liability upon said obligations sued upon herein.

It therefore becomes necessary to reverse the judgment in both cases, and it is so ordered, with instructions to the court below to take such further proceedings in them as may be deemed advisable, not inconsistent with the views herein expressed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

201 Cal. 1

In re LETCHWORTH'S ESTATE.

RILEY, State Controller, v. LETCHWORTH.

(L. A. 9339.)

(Supreme Court of California. April 2, 1927.)

1. Taxation ⚡856—"Inheritance tax" is on transfer or right to succeed to property (Inheritance Tax Act).

Tax imposed by Inheritance Tax Act (St. 1921, p. 1500) is imposed on the transfer of the property or on the right to succeed to the property, rather than on the property itself.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inheritance Tax.]

2. Taxation ⚡872—Statute exempting property transferred to decedent not more than five years before death, by another decedent, where tax was paid thereon, exempts property for transfer of which tax was paid (Inheritance Tax Act, § 6, subd. 2[b]).

Inheritance Tax Act (St. 1921, p. 1500) § 6, subd. 2(b), providing that all property transferred by decedent to any person in specified class, if it was transferred to such decedent not more than five years prior to his death by another decedent of the same class and a tax paid thereon, shall be exempt, *held* to mean that property, for transfer of which tax was paid, should be exempt.

3. Courts ⚡95(1)—That decision in another state was rendered by divided court on misconception of earlier case held not to destroy persuasive effect.

Decision of court of another state *held* not to be without persuasive effect because it was rendered by divided court and was based on misconception of an earlier case before the same court.

4. Taxation ⚡872—Exemption allowed in computing inheritance tax on husband's estate devised to wife held not exempt in computing tax on wife's estate devised to sons, where wife died year after husband (Inheritance Tax, §§ 2, 6, subds. 2[b], 6).

Where husband devised estate to wife and exemption of \$24,000 was allowed in computing

inheritance tax and wife devised estate to sons and died less than a year after husband, *held*, that such \$24,000 was not exempt in computing inheritance tax on wife's estate under Inheritance Tax Act (St. 1921, p. 1500), § 6, subd. 2(b), providing that property transferred by decedent to certain persons which was transferred to decedent not more than five years prior to his death by another decedent of same class shall be exempt where tax was paid thereon, in view of subdivision 6 of section 2.

5. Taxation ⚡860—Intention of statute, clearly apparent, must be given effect, though result be unjust or absurd (Inheritance Tax Act, § 6, subd. 2[b]).

In case language of Inheritance Tax Act (St. 1921, p. 1500) § 6, subd. 2(b), makes the legislative intent clearly apparent, it should be given its true meaning even though the result be unjust or absurd.

6. Taxation ⚡860—Section of statute must be construed to effect just and equal results if statute as a whole can be reasonably so construed (Inheritance Tax Act, particularly § 6, subd. 2[b]).

Court must construe Inheritance Tax Act (St. 1921, p. 1500) § 6, subd. 2(b), so as to effect just and equal results, rather than unjust and absurd results, if statute as a whole can be reasonably so construed.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Sarah Evan Letchworth, deceased. Inheritance tax proceeding wherein Ray L. Riley, State Controller, was plaintiff, and William Pryor Letchworth was objector. From an order fixing the amount of the inheritance tax, the objector appeals. Reversed with directions.

V. Lewis Kaye, of Berkeley, for appellant.

Heaney, Price & Postel, of Santa Barbara (Atwell Westwick, of Santa Barbara, of counsel), amicus curiae.

George S. Dennison, Erwin P. Werner, and Adrian C. Stanton, all of Los Angeles, and Wesley E. Marten, of Sacramento, for respondent.

CURTIS, J. This appeal is from an order of the superior court of the county of Los Angeles fixing the inheritance tax to be paid by the devisees under the last will and testament of Sarah E. Letchworth, deceased. Sarah E. Letchworth was the surviving wife of Pierre E. Letchworth and the sole devisee under his will. Pierre E. Letchworth died June 1, 1924. His will was admitted to probate in the superior court of the county of Los Angeles and his estate was administered upon in said court. Pending the settlement of her deceased husband's estate, and on April 16, 1925, the said Sarah E. Letchworth died, leaving two sons as her sole devisees. Her will was also admitted to probate in said superior court and letters testamentary issued there-

on. Upon the final settlement of the estate of Pierre E. Letchworth, deceased, the property belonging to said estate was distributed to the estate of Sarah E. Letchworth, deceased, and upon the final settlement of the latter estate the property belonging thereto was distributed to her two sons as her sole devisees. The property of the estate of Pierre E. Letchworth, deceased, was appraised at \$99,033.93. The expenses of administration, the debts of said deceased, and such other charges as were necessary to close said estate amounted to the sum of \$11,546.31. The latter sum deducted from the total appraised value of said estate left \$87,487.62 as the net value of the property of said estate. From this amount was deducted the sum of \$24,000, the exemption allowed by the statute to the surviving wife. The amount remaining, the sum of \$63,487.62, was the amount upon which an inheritance tax was actually paid in the estate of Pierre E. Letchworth, deceased. Due to the fact that the property left by the said Pierre E. Letchworth, deceased, was income producing, the amount of property actually distributed in the estate of Pierre E. Letchworth, deceased, as appraised in said estate, was \$93,638.44. This property was distributed to the estate of Sarah E. Letchworth, deceased, and was appraised in the latter estate at the sum of \$102,190.44. In computing the tax to be paid by the heirs of said Sarah E. Letchworth, deceased, the inheritance tax appraiser in said estate fixed the value of the property distributed to said estate upon which a tax had been actually paid in the estate of Pierre E. Letchworth, deceased, at the sum of \$65,510.77, which amount was found to be exempt from inheritance tax in the Sarah E. Letchworth estate under subdivision 2(b) of section 6 of the Inheritance Tax Act (Stats. 1921, chap. 821). It is not necessary for any purpose in this proceeding to discuss the method by which the inheritance tax appraiser arrived at the above result, except to state that in arriving at this result, among the deductions made by him from the appraised value of the property to which the estate of Sarah E. Letchworth, deceased, succeeded from the estate of Pierre E. Letchworth, deceased, was the sum of \$24,000, being the exemption allowed the wife under said statute. Upon the report of the inheritance tax appraiser the court fixed the tax to be paid by the heirs of Sarah E. Letchworth, deceased, and in accordance with said report, and it is from this order that this appeal has been taken.

It is conceded by respondent herein that said computation was erroneous in certain respects and that the amount of property distributed to the estate of Sarah E. Letchworth, deceased, from the estate of Pierre E. Letchworth, deceased, upon which a tax had been paid in the estate of Pierre E. Letchworth, deceased, and which was therefore exempt from tax in the estate of Sarah E. Letchworth, deceased, under said statute, was the sum of

\$78,190.94 instead of \$65,510.77 as fixed by said inheritance tax appraiser. This amount was obtained by deducting from said sum of \$102,190.94, the appraised value in the estate of Sarah E. Letchworth, deceased, of the property distributed to said estate from the estate of Pierre E. Letchworth, deceased, the sum of \$24,000, the exemption allowed the surviving wife under said statute. The principal controversy in this proceeding from its inception, and the only one now remaining after the concession of respondent just referred to, involves the right to deduct said sum of \$24,000 from the appraised value of the property distributed from the estate of the husband to the estate of the wife for the purpose of determining the amount of property belonging to the wife's estate, which is exempt from an inheritance tax. The respondent contends that said deduction was proper and allowable under the terms of the statute and the amount of the exempt property coming from the husband's estate to the wife's estate was the sum of \$78,190.94 only. Appellant, on the other hand, insists that said deduction should not be made and that no tax whatever should be paid by the devisees under the will of Sarah E. Letchworth, deceased, upon any part of said sum of \$102,190.94 coming to her estate from that of her deceased husband.

The solution of this controversy depends upon the construction to be given to subdivision 2(b) of section 6 of the Inheritance Tax Act, already referred to, and which reads as follows:

"All property transferred by a decedent to any person described in the first subdivision of section four, providing the same was transferred to such decedent not more than five years prior to his death by another decedent of the class described in the first subdivision of section four, and a tax paid thereon, shall be exempt."

The persons "described in the first subdivision of section four," mentioned above, are "husband, wife, lineal ancestor, lineal issue of the decedent," etc. The facts in this case bring it squarely within the terms of subdivision 2(b) of said section 6. The property on which it is sought to collect a tax from the devisees under the will of Sarah E. Letchworth, deceased, was acquired by her by will from her husband within five years prior to her death and by her will this same property was devised to her two adult sons. Was all this property exempt from inheritance tax in the second or the wife's estate, or was only that portion of it exempt from tax which was not exempt from an inheritance tax in the estate of the deceased husband? In other words, was the exemption of \$24,000 which the statute gave to Mrs. Letchworth as the surviving wife of her husband exempt also from an inheritance tax upon its transfer by her will to her two sons?

[1] It is well settled in this state, as well as in other jurisdictions where the laws provide

for the collection of an inheritance tax, that the tax imposed by the inheritance tax statute is on the transfer of the property or on the right to succeed to the property rather than on the property itself. In re Wilmerding, 117 Cal. 281, 49 P. 181; McDougald v. Low, 164 Cal. 107, 127 P. 1027; Estate of Potter, 188 Cal. 55, 204 P. 826; Estate of Bowditch, 189 Cal. 377, 208 P. 282, 23 A. L. R. 735; Estate of Watkinson, 191 Cal. 591, 217 P. 1073.

[2] Appellant argues, therefore, as the tax was on the transfer of the property and not on the property itself, that when the tax was paid by the Sarah E. Letchworth estate on the property transferred to it from the estate of Pierre E. Letchworth, deceased, it was paid upon the transfer of all of the property received by said estate of Sarah E. Letchworth, deceased, including that which was exempt from tax as well as that which was subject to tax. Accordingly, appellant insists that the tax having been paid on the transfer of all of said property from the Pierre E. Letchworth estate under subdivision 2(b) of said section 6, all of said property was exempt from tax in the Sarah E. Letchworth estate. Referring to said subdivision of the section and eliminating certain words therein for the present, we find the following language:

"All property transferred by a decedent to any person * * * not more than five years prior to his death by another decedent * * * and a tax paid thereon, shall be exempt."

This, without doubt, means that all property transferred under the conditions therein mentioned, on which transfer a tax had been paid, shall be exempt.

[3, 4] Was the tax in the Pierre E. Letchworth estate paid on the transfer of all of the property transferred therefrom to his wife's estate, or was it paid on the transfer of only that part thereof which was not exempt from tax? Appellant contends that the section above quoted clearly and unmistakably provides that the tax was paid on all of said property. We are not entirely convinced that this meaning clearly appears from the language used or that it so appears at all. To say the least, the meaning of the section just quoted may be said to be somewhat obscure. By reference, however, to other sections of the statute, the meaning of the one under consideration may be clarified to some extent. For instance, section 2 of the act provides:

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, *said taxes to be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted.* * * *

This section indicates that the tax is imposed "upon the transfer * * * only up-

on the excess over the exemption." In subdivision 6 of section 6 of the act it is provided:

"In computing the tax upon transfers subject to tax under the provisions of this act, *the exemptions in this section allowed shall be deducted from the aggregate amount of property transferred*, and the transfer of the remainder of the property after making such deduction shall be taxed at the rates at which it would have been taxed had no exemption whatever been allowed." (Italics ours.)

By this provision of the act it appears that "the transfer of the remainder of the property after making such deduction (the exemption) shall be taxed at the rates," etc. Further reference might be made to other provisions of the act for the purpose of determining the meaning of the said subsection, but the above are sufficient, we feel, to demonstrate the fallacy of the position of appellant. It must be apparent, we think, from the provisions of the statute above quoted, that the tax is only imposed upon the transfer of the excess over the exemptions and paid upon the remainder of the property after deducting the exemptions. This conclusion is in harmony with that reached by the Supreme Court of Iowa under a statute in many respects similar to our own. In re Nilson's Estate, 201 Iowa, 1033, 204 N. W. 244. That case is criticized by appellant for the reason that it was decided by a divided court, and for the further reason that it was based upon a misconception of an earlier case of said court and upon which the court relied in deciding the Nilson Case. Neither of these reasons in our opinion destroys the persuasive effect of the latter case.

[5, 6] There is another consideration which we think should be referred to in holding that the construction of said statute contended for by appellant is erroneous, and that is, the nature of the consequences that would follow in some cases if appellant's construction of said statute should be accepted by the courts. This can be illustrated by referring to a supposed case mentioned in respondent's brief. A married man died, leaving as his sole devisee his wife, and property of the clear market value of \$24,000. Upon the settlement of this estate this property passed to his wife, and, as its value did not exceed the exemption allowed the wife under the statute, she would pay no inheritance tax thereon. Thereafter and within five years after the property was transferred to her the wife died, leaving this same property to an adult child as her sole devisee. As no tax was paid on the transfer of this property to the mother, her devisee, it is admitted by appellant, would be required to pay an inheritance tax on the transfer of said property to said devisee, except such as might be exempt by reason of the child's relationship to its mother. On the other hand, if the value of the property belonging to the husband at the time of his death was of the

value of \$25,000, that is \$1,000 in excess of the exemption allowed the wife, then the wife on the transfer of said property to her would be required to pay a tax on such transfer to the extent of the rate fixed by law upon said sum, \$1,000. Upon her death within five years after such transfer, leaving an adult child as her sole devisee and the property received by her from her husband's estate, then, according to appellant's contention, said devisee would not be required to pay any tax whatever on the transfer of any of said property received by the devisee from the mother for the reason that the mother had paid a tax on the transfer of the property received by her from her husband's estate computed on \$1,000 valuation over and above her exemption as wife. In the one case the heir would pay a tax on the transfer of the property computed on \$24,000, and in the other the heir would pay no tax whatever, although in the latter case the heir would receive a greater amount of property than in the former. Looking at these two supposed cases from the standpoint of the state, and giving the statute the construction contended for it by appellant, in the first case no inheritance tax would be paid on the transfer from the husband to the surviving wife, but on the transfer from the mother to her adult child a tax would be computed on \$14,000 (\$24,000, less \$10,000 exemption). In the second of the supposed cases, where the value of the property was \$25,000, a tax would be paid on the transfer from the husband to the surviving wife, computed on \$1,000, but on the transfer from the mother to her devisee, because a tax had been paid computed on \$1,000 on the transfer of the property to the mother, no tax whatever would be paid by said devisee. The amount of taxes received by the state from the two transfers where the property was of the value of \$24,000 would be \$140. In the second of these cases, where the property of the value of \$25,000, the amount of taxes received by the state from the two transfers would be \$10. We cannot attribute to the Legislature an intention to accomplish such an unequal and unjust result. Of course, if the intention of the Legislature were clearly apparent from the language of the section, it should be given its true meaning as indicated by such language,

even though the result might be unjust or even absurd. But where no such clear intent is to be found in the section, but on the other hand the statute as a whole can be reasonably construed in favor of just and equal results, it is the duty of the court to adopt such construction. *San Joaquin, etc., Irr. Co. v. Stevinson*, 164 Cal. 221, 128 P. 924; *In re Haines*, 195 Cal. 605, 234 P. 883.

For the above reasons we are of the opinion that the action of the inheritance tax appraiser in including in the property subject to a tax in the estate of Sarah E. Letchworth, deceased, the \$24,000 of property received from the estate of Pierre E. Letchworth, deceased, was correct, and the order of the trial court in approving the report of the inheritance tax appraiser in that respect and fixing the tax in said estate, in so far as said order was based upon that part of said report, was proper. The other deductions made by said inheritance tax appraiser, and which the respondent concedes to have been improper, the court approved, and to this extent the order fixing the tax in said estate was erroneous. For this reason the said order is reversed with directions to the lower court to fix the tax in said estate of Sarah E. Letchworth, deceased, in accordance with the views expressed herein. In so doing it will compute said tax on said amount of \$24,000, but on no part of said sum of \$78,190.94, property received by the Sarah E. Letchworth estate from the estate of Pierre E. Letchworth, deceased.

The tax to be paid by each of the sons of Sarah E. Letchworth, deceased, would therefore be computed as follows:

One-half residue of property of estate after deductions for expense of administration..	\$50,376 21
One-half joint tenancy.....	12,500 00
Total	\$62,876 21
\$39,095 47 Exempt by reason of tax paid in estate of Pierre E. Letchworth, deceased.	
10,000 00 Statutory exemption.	
904 50 at 2 per cent.....	\$ 19 09
12,876 21 at 4 percent.....	515 05
Total tax.....	\$533 14

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.

201 Cal. 26

STENZEL v. KRONICK. (L. A. 9214.)

Supreme Court of California. April 7, 1927.

1. Appeal and error $\Leftrightarrow$ 662(2)—Judge's statement that he exercised discretion in certifying transcript held to show relief granted from default in notifying clerk to prepare it (Code Civ. Proc. §§ 473, 953a).

Where trial judge expressly stated that he exercised his discretion in certifying transcript, presented under Code Civ. Proc. § 953a, it sufficiently appeared that appellant was granted relief, under section 473, from default in not notifying clerk to prepare it within ten days after notice of judgment, though it did not affirmatively appear that appellant formally applied for such relief or even presented adequate excuses.

2. Appeal and error $\Leftrightarrow$ 757(1)—Appending supplement, largely devoted to evidence, to appellant's opening brief, held sufficient compliance with Code requirements as to printing record in brief.

Appending supplement of over 100 pages, largely devoted to excerpts from evidence, to appellant's opening brief, held sufficient compliance with Code requirements as to printing record in brief to justify denial of motion to affirm judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by A. E. Stenzel against Harry B. Kronick. Judgment for plaintiff, and defendant appeals. On plaintiff's motion to affirm the judgment. Motion denied.

Rose & McTavish, of Los Angeles, for appellant.

John C. Packard, of Los Angeles, for respondent.

RICHARDS, J. The plaintiff and respondent herein has moved this court to affirm the judgment in his favor, from which this appeal has been taken, upon two grounds: (a) That no sufficient record is before the Supreme Court upon which said court can predicate error; (b) that no sufficient record on appeal in this case has been printed in appellant's brief.

The facts upon which the respondent predicates his motion are these: The judgment herein in plaintiff's favor was made and entered on December 19, 1923. Notice of entry of said judgment was served upon attorneys for the defendant on December 29, 1923. The defendant's notice and demand for the preparation of the transcript was filed with the clerk of the trial court on January 16, 1924, 16 days from and after the time of the receipt of the notice of entry of judgment. The transcript on appeal was presented to the trial court for certification under the provisions of section 953a of the Code of Civil Procedure on February 23, 1924. The bill of exceptions dis-

closes that the plaintiff appeared in the trial court and objected to the certification of the transcript upon the ground that the defendant's notice to the clerk to prepare the same had not been given within ten days after notice of entry of judgment. While it does not appear that the defendant in response to said objections made a formal motion for relief from his default under the provisions of section 473 of the Code of Civil Procedure, it does affirmatively appear therein that the trial judge "exercised his discretion in favor of certifying said transcript," and thereupon made an order that the same be settled, allowed, and certified as and for the bill of exceptions in said cause.

[1] The respondent in support of the first ground urged upon his motion chiefly relies upon the decision of this court in the case of *Des Granges v. Des Granges*, 175 Cal. 71, 165 P. 13. The appellant in resisting the motion cites and chiefly relies upon the case of *In re Barney*, also decided by this court and reported in 191 Cal. 18, 214 P. 853. In the case of *Des Granges v. Des Granges*, supra, this court held that the action of the trial court in certifying to the record in that case was erroneous; but in so holding the court expressly stated that:

"It does not appear that the plaintiff at the hearing, or at any other time asked for any relief under section 473 of the Code of Civil Procedure, or attempted to offer any explanation to excuse her failure to comply with the provisions of section 953a. There was presented, in fact, no opportunity for the exercise of any discretion by the court."

In the case of *In re Barney*, supra, on the other hand, it appeared that while the defendant made no formal application for relief under section 473 of the Code of Civil Procedure, she appeared at the time of the certification thereof and stated certain reasons going to excuse her default, and that thereupon the trial court exercised its discretion and by certifying to the transcript, in effect, relieved the appellant from her said default. In the case of *Rubin v. Platt Music Co.* (Cal. App.) 251 P. 243, that court in commenting upon an identical situation held that when objections to the certification of the transcript were presented in the trial court and the transcript was thereafter settled and certified to by it, such settlement and certification was the equivalent of relief from the default. We are of the opinion that these two later cases have more immediate application to the instant proceeding than has our former decision in the case of *Des Granges v. Des Granges*, supra. Herein the trial court has expressly stated that it exercised its discretion in the settlement and certification of the transcript after the respondent's objection thereto had been urged. The only subject upon which the trial court under such circumstances would

be called upon to exercise its discretion would be that of relieving the defendant from his said default, and while it does not affirmatively appear herein that the defendant formally applied for such relief, or even that he presented adequate excuses, nevertheless we are of the opinion that it sufficiently appears that he was granted relief from his default under the power of the court so to do, given in section 473 of the Code of Civil Procedure. Respondent's motion upon his first ground urged should therefore be denied.

[2] As to the second ground urged for the granting of said motion, an inspection of the record discloses that the appellant herein has appended to his opening brief a supplement of more than 100 pages, largely devoted to excerpts from the evidence in the case. In so doing we think he has shown a sufficient compliance with the requirements of the Code in that particular to justify a denial of the respondent's motion, also upon this ground.

The motion to affirm the judgment upon both grounds is therefore denied.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

82 Cal. App. 172

Ex parte **BABBICK**. (Cr. 1389.)

District Court of Appeal, First District, Division 1. California. April 2, 1927.

Habeas corpus ⇨79—Habeas corpus will be denied where return shows trial court minutes were corrected as to matters complained of (Pen. Code, § 464).

Application for habeas corpus to secure release from custody on conviction of burglary with explosives, under Pen. Code, § 464, on ground that such count was dismissed and defendant thereafter found guilty, and also that minutes of court failed to show jury was sworn, will not be granted where return thereto showed minutes of trial court were corrected to speak truth, showing that such count was not dismissed, and that jury was duly sworn.

Original application for habeas corpus by Louis Babbick, to be directed to the Warden of San Quentin Prison, to secure petitioner's release from custody upon conviction of burglary with explosives. Writ discharged.

William J. Gloria and Ernest B. D. Spagnoli, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., and Emery F. Mitchell, of San Francisco, for respondent.

TYLER, P. J. The petition recites that Louis Babbick is unlawfully detained in the state prison at San Quentin by the warden

thereof. Proceeding, it alleges that on or about May 21, 1926, the district attorney of Los Angeles county filed an information in the superior court of said county charging petitioner in one count thereof with a violation of the provisions of section 464 of the Penal Code (burglary with explosives) and in a second count with another felony, to wit, receiving stolen goods. It is then alleged that petitioner pleaded not guilty to the information, and was placed on trial in said superior court, such trial commencing July 6, 1926, and ending July 9th of the same year; that the minutes of the proceedings of said court, had during such period, show that, on motion of the district attorney, count 1 of the information was dismissed, and that petitioner was thereafter found guilty under this count as charged; that thereafter, on July 13, 1926, petitioner was sentenced to be imprisoned in the state prison at San Quentin by reason of said conviction, and that he is now confined therein. It is claimed that the judgment of conviction is void for the reason that the minutes of the trial court show that count 1 of the information (the count which charges violation of section 464 of the Penal Code—burglary with explosives) was dismissed, and the jury thereafter found petitioner guilty of such charge.

Claim is also made that the minutes of the court fail to show that the jury was sworn to try defendant. The return to the petition shows that the minutes of the trial court have been corrected to speak the truth. As corrected, it appears therefrom that it was the second count of the information that was dismissed and not the first. It further appears that the jury was duly sworn to try the case.

It follows that the writ should be, and it is hereby, discharged.

We concur: **KNIGHT, J.; CASHIN, J.**

81 Cal. App. 733

BAVIN & BURCH CO. v. BARD et al.
(Civ. 5305.)

(District Court of Appeal, First District, Division 1, California. March 15, 1927.)

1. Contracts ⇨232(4) — Owner is not liable for costs of changes unless express provision in building contract for modifications to be written is complied with.

A provision in building contract requiring written order of architect and agreement as to price prior to any modifications is designed for protection of owner, and contractor not complying therewith cannot hold owner for extra work.

2. Contracts ⇨232(4)—Contractor complied with requirement that modifications of contract be in writing, where architect confirmed verbal orders with written orders during work.

Contractor for altering building for theater substantially complied with provision requiring modifications to be upon written order from

architect, where architect during progress of work issued written orders soon after verbal orders for changes; there being no charge of bad faith or denial that benefits accrued to premises.

3. Contracts —294—Substantial compliance fulfills any contract, but its determination is individual question in each case.

Substantial compliance meets requirements of any contract, but what constitutes it must be determined in each individual case.

4. Contracts —232(4)—Architect's written orders for changes in building contract related back to oral orders therefor under circumstances.

Under circumstances of case, each of architect's written orders for changes in building alteration contract issued during progress of work soon after his verbal orders therefor related back to date of verbal order, constituting with the verbal order but one transaction.

5. Contracts —232(4)—Owner by admitting building contractor's claim, except amount held to have rescinded contract requirement that alterations be in writing.

Where plaintiff building contractor alleged furnishing extra work and materials with consent of defendant owners and lessees, and they so admitted, but denied alleged value, the only question was one of value, and defendants would be deemed to have rescinded contract provision requiring modifications to be in writing.

6. Contracts —232(4)—Parties may rescind building contract provision requiring modifications to be written.

Parties may rescind provision in building contract requiring modifications to be only upon written order of architect, and may agree to alterations by parol.

7. Contracts —232(2)—Duty of contractor to procure permits and comply with ordinances did not include liability for alterations required by city during remodeling of building.

Contractor was not liable for cost of alterations required by city during work in changing building to theater, under clause that contractor should procure permits and be liable for loss due to violation of city ordinances or laws.

8. Contracts —300(3)—Owner is not entitled to set-off against building contractor for delay without damages caused by altering plans.

Owner is not entitled to set-off for delay against building contractor whose performance is delayed beyond contract time for completion by alteration in plans during work and where no damages are shown.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Bavin & Burch Company, a corporation, against L. L. Bard and others, to foreclose lien for labor and materials. From a judgment for plaintiff, defendants appeal. Affirmed.

James, Pace, Smith & Younkin, of Los Angeles, for appellants.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for respondent.

PARKER, Justice pro tem. In this action plaintiff sues to recover on an express contract for work and labor performed for, and materials furnished to, defendants. It seeks, further, to enforce a claim of lien against the premises benefited by such labor and materials. Judgment went for plaintiff against defendants, and the case comes here on appeal by defendants.

The defendants Bard and Berkowitz are lessees of the premises owned by the remaining defendants, and the judgment was against the said lessees only, with decree foreclosing the lien.

There is no question presented involving the procedure as to the lien as separate from the judgment, nor is there any controversy as to the rights of the defendants in their separate capacities as owners or lessees. The questions raised concern the judgment; and for the purposes hereof it will be deemed that if the judgment should be affirmed, in whole or in part, the lien follows.

Plaintiff and defendants (Bard and Berkowitz) entered into a written contract, wherein the said defendants were described as owners and the plaintiff as contractor. The dispute between the parties involves certain charges made for extras under the contract. The original work specified was duly performed and the price paid, and no controversy is presented as to such work or payment. It may be stated that the contract was quite general in its terms, and consists of an agreement, plans, specifications, drawings, and an addenda to the specifications. From none of these does it appear precisely what was to be done under the original undertaking. This may be due merely to the absence of the drawings, and possibly by reason of the fact that the questions here for determination do not require such detail. The general purpose of the contract was the renovation and alteration of the premises in order to convert the existing building into a moving picture theater. In studying the original agreement it seems obvious, and the case as a whole supports the conclusion, that the parties were not informed as to exactly what might be necessary to secure the result desired, as would appear in part from a provision of the contract as follows:

"Should the owners at any time during the progress of work require any alterations, deviations from, additions to or omissions from the contract, or the drawings or specifications, they shall be at liberty to do so, and the same shall in no way affect or make void this contract, but the amount thereof shall be added to or deducted from the amount of the contract price as the same may be by fair and reasonable valuation."

The claim of plaintiff, and upon which the trial court predicated its judgment, embraces some 30 items for extras in the way of labor and materials. Without giving the items in detail, they were referred to throughout the records as orders, and they may be divided into three groups, as follows: Orders 1 to 5, inclusive; 6 to 26 inclusive (incidentally, here it may be noted that there was no order 25); orders 28, 29, 30. Plaintiff recovered judgment for the sum of \$5,882.39.

The argument of appellants is as follows:

First. Lack of written orders for various items of extra work.

Second. Extras caused by reason of plaintiff's failure to comply with requirements of city building department.

Third. Items charged as extras which were provided for in original contract.

Fourth. Failure of evidence to sustain findings on certain items.

Fifth. Failure of court to allow credit for items omitted from original contract.

Sixth. Set-off claimed as damages for delay in completion.

1. Lack of Written Orders.—Necessarily of controlling importance here are the terms of the contract. In the contract it is provided:

"No changes or modifications from the plans and specifications will be permitted excepting upon written permission from the architect, and the cost of any such change, whether a deduction or extra, must be agreed upon in writing before the same is started. The architect reserves the right to make any such changes or deviations without in any way invalidating the contract or bond."

The facts as disclosed by the evidence are that it was the practice of the architect to visit the work at frequent intervals and go over the requirements with the contractor. When there appeared the necessity for any particular item agreed upon as an extra, the architect would orally direct the contractor to proceed and the price would be fixed. Thereafter a written order would follow. With the exception of orders 28, 29, and 30, the contractor did receive a written order from the architect for every item claimed as extra work, and in each instance the order was received before the work was completed. As to the items excepted there were no written orders. The testimony regarding orders 6-26 is not at all clear. All that appears concerning these is the statement that these orders were prepared by the contractor and left at the office of the architect, and that they would usually lay around for a week or so, and that the work on some of the items was commenced before the orders were actually received.

[1] The provision in the contract requiring the written order of the architect and agreement as to price is a provision designed for the protection of the owner and is to be construed in his favor. Courts generally have held this provision in a building contract as

valid and binding, and have further held that without compliance therewith by the contractor the owner cannot be charged for extra work. The California cases are in accord with the general rule. *Gray v. La Société Francaise*, 131 Cal. 566, 569, 63 P. 848; *White v. S. R. & S. Q. R. Co.*, 50 Cal. 417. Indeed, in almost every jurisdiction the rule is accepted, through in some courts a tendency has developed to modify the strictness of the rule by declaring a waiver when benefits have been accepted and retained. The purpose of a provision of this sort in a contract is to protect the owner from unnecessary or unwarranted expense and to assure him that there will be some limit to his outlay. The average person desiring to construct a home or other building would be wholly at the mercy of his architect and contractor if the courts were to hold such a provision ineffectual for any purpose. No harm can come to the contractor, nor can any loss or damage ensue to him, by a strict enforcement of a provision of this character. He has his contract, and is bound only by the provisions thereof. He is not obliged to do anything extra without the written order, and knows that if he does he must speculate upon the owner's pleasure as far as payment is concerned. We are called upon to determine whether or not this provision in the present contract has been met.

Appellants concede that the labor for which payment is sought was actually performed, and that likewise the materials were supplied. They accept the finding of the court that the charge was reasonable, and the record discloses that the benefits of the labor and material have accrued to the premises. They rest their whole contention upon the words of the contractor "before the same is started" in the provision quoted.

The transcript shows that the general work to be done under the contract was tied up with the extras; in other words, it was not a case of completion of the first agreement and then something additional, but the extras were interjected into the work as it progressed and were an integral part thereof. The situation was foreseen, obviously, in the execution of the contract itself. As we have seen, the work in hand was the alteration of an existing building for a specific purpose, and was initiated under general plans. No one knew just what each day would develop in the necessities of the situation. The owner for his protection inserted the clause as to extras, and placed in charge his representative, the architect. The contractor in turn was obliged to look to the architect for his directions, and for his protection to receive from him written orders as to the requirements. The contractor did attempt to secure these written orders from the architect and was successful. However, anticipating to a certain extent, he would on the oral order alone commence his work, expecting to re-

ceive immediately the written order confirming the previous directions.

[2, 3] We would not decide at this time that the possession of a written order obtained long after the work had been completed would always be a sufficient answer to a contention similar to the claim of appellants here. But, in case, as in the instant one, where there is no lack of good faith charged, where the owner has had the protection of his architect before the commencement of the work, and has accepted the benefits of the work and materials, it would indeed be too strict a construction to hold that the contractor must lose the value of his outlay and labor. This court will hold that under the present state of facts as outlined there has been no breach, confining the effect of this conclusion to the facts involved here and declining to announce any general rule. Indeed, it would be beyond human ingenuity to anticipate every set of facts which might arise and cover them with one general rule. We will approve and uphold the doctrine prevailing as to the necessity of compliance with these requirements, and treat each case on its own facts where a different doctrine is contended for. In the present case it is unnecessary to deviate from the established authorities or to modify the rulings in any respect. We hold simply that under the facts here brought out the contractor did make a sufficient and substantial compliance with both the letter and spirit of this provision of the contract to entitle him to recover. We deem citation of authority unnecessary to support this view. An exhaustive search has failed to disclose any case at all similar in its facts. Nor do we need to refer at length to the law of contracts generally, it being sufficient to rely on one of its elementary and well settled principles, namely, that a substantial compliance meets the requirements of any obligation. Just what acts will constitute a compliance sufficient to meet the requirements of the law is a question to be determined in each individual case. In this case almost as a question of fact we determine that the contractor and architect, as well, have made a sufficient compliance with the provisions of the contract. On the question of substantial compliance reference may be had to Ruling Case Law, vol. 6, p. 966 et seq.; Cal Jur. vol. 6, p. 415 et seq., each of the foregoing citing numerous cases from various jurisdictions. In hardly any case will the facts be found as compelling as in the instant case. Here the owner has designated the architect as his representative on the work, and has given him the discretion to determine what shall be classed as extras, but requiring of the contractor that all extras be approved by said architect in writing before the work was commenced. The written order of the architect obviously was intended to safeguard the owner against unwarranted claims for extras or unfair charges. This protection is fully

given if the architect at any time during the progress of the work on the extras gives the written order after he has first approved and ordered it as was done here.

In the case of *Abells v. City of Syracuse*, 7 App. Div. 501, 40 N. Y. S. 233, a question similar to the one at bar arose, wherein the commissioner, occupying a position parallel with that of the architect here, had not given his order before the work had been commenced but did so afterwards. The court said:

"This provision of the contract could be * * * waived, * * * and, whether waived or not, it was ratified and adopted by the commissioner in writing, which was an equivalent to an original authority in writing."

[4] In the instant case we hold that the written orders of the architect complied with the requirements of the contract, that these orders issued in close relationship in point of time to verbal orders given by him, and that the whole constituted but one transaction, and the written orders given subsequent to work commenced related back to the date of the original verbal order.

This disposes of orders 1 to 6, inclusive, and orders 7 to 26, inclusive.

The remaining items are embraced in orders 28, 29, and 30. The court found that these were executed and performed at the instance and request of defendants, and fixed the reasonable value of the three items at the sum of \$748.81.

[5] It is conceded that there were no written orders from the architect for any of these items; but respondent contends that the appellants are precluded from raising the question as to lack of written orders by reason of their having failed to urge it in the court below, either by pleading or by timely objection. As to the pleadings, plaintiff alleged the contract, and that it had performed extra work and furnished materials to the reasonable value of \$5,589.74. Defendants admitted that plaintiff had performed extra work and furnished materials, but denied the reasonable value thereof was greater than \$2,250. Plaintiff alleged in its complaint that all of the improvements alleged were made with the full knowledge and consent of the defendants. Defendants Bard and Berkowitz in the answer so admitted. The only issue therefore presented to the trial court by the pleadings was on the question of reasonable value. At the trial, when plaintiff offered in evidence the bills for the work and materials embraced in orders 28, 29, and 30, the same were admitted and received without objection, and no subsequent or any motion to strike was made. The defendant Bard, testifying in his own behalf, stated:

"When the bills finally came to us from the architect, we looked them over and made our objections immediately. We based our objections on the fact that to a layman they looked entirely too high."

The court found, in response to the issues and the evidence, the reasonable value of these items 28, 29, and 30; and also found, as admitted in the pleadings, that the work represented by them was done with the full knowledge and consent of the defendants. Appellants, in reply to the contention of respondent, argues that no waiver was pleaded, and that a waiver must be affirmatively alleged and proved. Conceding this to be true, it does not necessarily follow that a waiver may not arise as a matter of law. Indeed, we may grant there was not a waiver as such, but rather a failure to urge a right claimed; but whether it be a waiver or otherwise, the fact is that the question was and is not before the court for determination. Reviewing the record, as stated, it is evident that the court was compelled to find according to the admission in the pleadings and the issues raised therein.

[6] Whether the contract provided against extra work except agreed in writing is immaterial, for the parties could rescind the provision in the contract if they chose, and agree to alterations by parol. This proposition is firmly established in the case of *McFadden v. O'Donnell*, 18 Cal. 160, and in the case of *Headley v. Cavileer*, 82 N. J. Law, 635, 82 A. 908, found in 48 L. R. A. (N. S.) at page 564, accompanied by an exhaustive annotation. Surely there could be no greater evidence of rescission than the sworn statement or admission of the owner that the alterations were made with his full knowledge and consent, and his failure or refusal to raise the question at the trial. While we have indicated heretofore the disposition of the California courts to uphold and enforce stipulations in contracts requiring written orders, yet many cases may arise where these stipulations would meet the description given them by other courts, viz., a "cutthroat" claim in building contracts liable to entrap the unwary contractor (*Elgin v. Joslyn*, 36 Ill. App. 301), "a shabby defense to set up" (*Myers v. Sarl*, 14 Eng. Ruling Case Law, 656).

This disposes of items 28, 29, 30; and it might likewise suffice for the orders 1-26 hereinbefore discussed. However, as some effort was made to raise issue at the trial on orders 1-26, we have given appellants their opportunity for determination of the point involved.

2. Extras Caused by Reason of Failure of Plaintiff to Comply with Requirements of City Building Department.—The contract provides:

"Contractors shall take out all building permits, and owners shall not in any way be answerable for any loss or costs by reason of the violation of city ordinances or other laws by the contractor or any one working through or under it."

[7] The situation disclosed by the record is that after examination of the premises, and

from time to time as the work progressed, it developed that the premises were not of an original construction to permit the change contemplated, namely, the change to a moving picture house. The building had formerly been used for other purposes, and the building department of the city of Los Angeles informed the owners that the proposed changes could not be made in the building without some alterations in the structure itself. Through no fault of the contractor, and unconnected with its contract, these requirements had to be met. Accordingly the architect, after consultation with the owners, gave his written instructions to the contractor to proceed with these alterations as extras within the terms of the contract so providing. Obviously the contractor is entitled to his recovery, and particularly so in the contract here under review, where, as before indicated, the plans were general and the work to be performed left much to be determined as the plan progressed.

3. Items Charged as Extra Work that are Provided for by the Original Contract.—On these items we are content to accept the finding of the trial court, made upon sufficient evidence unnecessary to detail here. The claim of appellants hereunder is based upon a construction of certain provisions in the plans, in themselves general and indefinite. All of these items were considered by the architect as being extras, and he was designated by the owners as the sole arbiter of the question, and the trial court, as indicated, found that they were extras and allowed compensation therefor, which finding will not be disturbed.

4. Failure of Evidence as to Certain Items or Orders Allowed.—In these instances we find sufficient evidence, though conflicting, to sustain the finding of the trial court.

5. Credits for Items Omitted from Original Contract.—The work covered 30 items of extras and alterations, and the original contract involved an expenditure of \$20,000. After an attempt at analysis of some of the provisions in the original contract, appellants present their contention to this court as follows:

"Clearly the undisputed testimony demands some allowance for omitted work, and the finding to the contrary and the refusal of the court to allow any credit is wholly without support."

The functions of this court are perhaps sufficiently speculative in themselves without assuming new burdens. We will accept the finding of the trial court rather than attempt to locate and determine what this claimed "some allowance" might be.

6. Failure to Allow Set-off as for Damages for Delay in Completion.—The contract provides:

"Contractor agrees to complete the work hereby contracted for in sixty working days

from the date of the contract. It is further agreed that the said contractor shall not be held responsible for any delays caused by the owners or their representatives."

[8] The trial judge found:

"That the failure of said plaintiff to complete the work described in said original contract within the time therein specified is due wholly to the extra work which said plaintiff was required by said Bard and Berkowitz to do in connection with the original contract; and said plaintiff could and would have completed the work described in said contract within the time therein specified, except for the extra work which it was required to do by said Bard and Berkowitz. That said defendants have not nor has any of them been damaged in any amount by reason of the failure of said plaintiff to complete said alteration and remodeling work within the time provided in said contract."

The admitted fact is that the contractor took 14 or 15 additional days in completing the entire work, including the extras. The evidence shows, and it is not disputed, that the work would and could have been finished were it not for the extra work ordered by the owners.

Appellants cite the case of *Dermott v. Jones*, 64 U. S. (23 How.) 220, 228, 229, 16 L. Ed. 442. The case is not in point or at all illuminating as to the question here presented. The testimony shows that approximately 30 per cent. of the entire work was extras ordered by the defendants and which the contractor was obligated to perform at their direction. The evidence fully supports the finding of the court. Further, the only evidence as to damage was the testimony of Bard that the rental value of the premises was \$3,000 per month. Conceding the rental value to be as stated, there is not one word of direct testimony that there was any loss of rental, or that the premises were not in condition to be used for any period other than as we might draw the inference from the fact that the building was undergoing extensive repairs.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

82 Cal. App. 28

PEOPLE v. GHIO. (Cr. 1452.)

(District Court of Appeal, Second District, Division 1, California, March 24, 1927.)

1. Criminal law $\S$ 823(2)—In prosecution for violating statute relative to bets on races, instruction that contention was that conduct violated four laws held not misleading, in view of other instructions (Pen. Code, $\S$ 337a).

In prosecution, under Pen. Code, $\S$ 337a, relative to bets on races, instruction that state's contention, was not that four acts were committed, but that same course of conduct violated four laws, held not misleading, in view

of remainder of instructions, especially where jury acquitted on three of four charges.

2. Criminal law $\S$ 29—Bookmaking, occupying room with bookmaking paraphernalia, receiving bets on races, recording bets, permitting use of room for such purposes, and making or accepting bets held separate felonies (Pen. Code, $\S$ 337a).

Bookmaking, occupying room with bookmaking paraphernalia to record bets in races, receiving bets on races, recording bets on races, owner permitting room to be used for such purposes, and making or accepting bets on races, are separate felonies, though they are all defined in Pen. Code, $\S$ 337a.

3. Gaming $\S$ 96—In prosecution for violating statute relative to bets on horse races, it is unnecessary to show that race was run (Pen. Code, $\S$ 337a).

In prosecution, under Pen. Code, $\S$ 337a, relative to bets on horse races, it is not necessary that prosecution shall prove that any actual horse race was run, since statute includes purported, as well as actual, contests of speed.

4. Criminal law $\S$ 823(4)—Instruction it was immaterial what day offenses were committed, if error, held harmless, in view of other instructions (Pen. Code, $\S$ 337a).

In prosecution for violating four subdivisions of Pen. Code, $\S$ 337a, relative to bets on races, charged, in separate counts, instruction that it was immaterial as to what day or days offense or offenses charged were committed, if within one year from filing of information, if error, held not reversible, in view of other instructions, including instruction as to rule of reasonable doubt.

5. Criminal law $\S$ 665(1)—Exclusion of witnesses is in court's discretion.

Motion to exclude witnesses is addressed to sound discretion of trial court.

6. Criminal law $\S$ 1169(3)—In prosecution for receiving bets on horse races, any error in testimony that defendant had "card" room held cured by defendant's testimony.

In prosecution for receiving bets on horse races, any error in officer's testimony that there was card room in rear of defendant's premises, fitted with two card tables, as against motion to strike "card" as conclusion, held cured by defendant's testimony on direct examination that he was licensed to run card room.

7. Gaming $\S$ 97(1)—In prosecution for receiving bets on horse races, evidence that witness placed bet for purpose of securing evidence held admissible; "bet"; "wager" (Pen. Code, $\S$ 337a).

In prosecution, under Pen. Code, $\S$ 337a, for receiving bets on horse races, evidence that witness placed bet for purpose of securing evidence held admissible, since words "bet" and "wager," as used in such section, do not require kind of agreement contemplated by law of contracts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bet; Wager—Wagering Contract.]

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Joe Ghio was convicted of receiving bets on horse races, and he appeals. Affirmed.

B. F. Tyler, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

McLUCAS, Justice pro tem. Defendant was charged in two informations with violations of section 337a of the Penal Code. By stipulation of counsel the cases were tried together. Information No. 47988 charged the defendant with the crime of violation of subdivision 3 of section 337a of the Penal Code on or about the 5th day of March, 1926, by receiving bets on horse races. Information No. 47989 is not included in the record; but it appears from the instructions of the court that this information charged the defendant in three separate counts with violations of certain subdivisions of section 337a of the Penal Code on or about the 3d day of December, 1925, as follows: With occupying a room for the purpose of recording bets on horse races and selling pools thereon, with receiving bets on horse races and with recording bets on horse races. The jury returned a verdict of guilty as to the charge in information No. 47988, and a verdict of not guilty as to the charges in information No. 47989. Defendant appeals from the judgment following the verdict on information No. 47988.

Thomas E. Remington, a police officer of San Diego, testified that on March 3, 4, and 5, 1926, he went to defendant's place of business, which consisted of a cigar and candy store, with a card room in the rear; that at said time horse races were being run at Tia Juana; that on his first visit the officer placed with defendant a bet of \$1 on a Tia Juana horse race; that on the next day he placed a similar bet with the defendant, and that on March 5th he placed a third bet with the defendant; that at each time the defendant made a notation of the bet on a scratch pad and telephoned the names of the horses, the initials of the witness, and the amount of the bet; that the witness was familiar with bookmaking; and that he went to defendant's place of business for the purpose only of securing evidence. It further appears that Officer Ward gave to Officer Remington money with which to place bets with the defendant; and that on one occasion during the early part of March he saw Officer Remington enter the defendant's store. Certain bookmaker's paraphernalia were found at defendant's place of business and received in evidence. The defendant testified that he had not placed any bets with the complaining witness, and that he did not have any knowledge of the bookmaker's paraphernalia which were found concealed in his place of business.

[1, 2] Appellant complains of certain instructions. The trial court instructed the jury that:

"It is not the contention that there were four different acts here committed by the defendant at the time and places mentioned in the information. The contention is that the same act, same course of conduct, violates four different laws."

Appellant urges that the jury was confused and misled by the language used in this portion of the instruction. The remainder of the instruction reads as follows:

"It all relates to the same set or series of acts; and it will be for you to determine whether or not he is guilty of one, two, three, or four of these charges, or whether he is not guilty of any one of them. And unless you are satisfied, as I have said, beyond a reasonable doubt that he has committed one or more of these acts, then it will be your duty to acquit him on all four of the charges."

We do not believe the jury was confused or misled by this instruction, especially when it is remembered that the jury found the defendant not guilty as to the three counts charged in information No. 47989 and guilty only as to the count charged in information No. 47988. Section 337a of the Penal Code contains six subdivisions, and is so framed that one set or series of acts might constitute a violation of each or all of said subdivisions. By its provisions the following acts are made felonies: In subdivision 1, bookmaking or pool selling; in subdivision 2, occupying a room with bookmaking paraphernalia for the purpose of recording bets on races; 3, receiving bets on races; 4, recording bets on races; 5, owner permitting room or building to be used for any of the preceding purposes; 6, making or accepting bets on races. Each of these constitutes a separate offense, as if it had been enacted in a separate section of the Code. In *re Roberts*, 157 Cal. 472, 108 P. 315; *People v. Plath*, 166 Cal. 227, 135 P. 954.

[3] Appellant next complains of the following instruction as not being in accord with the spirit of section 337a of the Penal Code:

"It is not necessary, in connection with any one of these counts, that the prosecution shall prove that there was any actual horse race run. If the other elements of the offense have been established beyond a reasonable doubt, the question of whether the horse race was actually run at Tia Juana, or anywhere else; it is not necessary that that should be proven by the prosecution."

In *People v. Sutherland*, 59 Cal. App. 462, 210 P. 965, the defendant was convicted of violation of subdivision 4 of section 337a of the Penal Code, and the court said, page 463 (210 P. 966):

"It was not necessary that it be actually established that the races upon which bets were being taken were actually being run at the

time. *People v. Carroll*, 54 Cal. App. 684, 202 P. 885."

The language of section 337a of the Penal Code includes purported as well as actual contests of speed. We find no error in this instruction.

[4] Appellant's next contention is that the court erred in giving the following instruction, for the reason that part of the jurors might believe that one of the acts constituting the offense had been committed, while other jurors might believe that other acts constituting the offense had been committed. The instruction reads:

"The court instructs the jury that it is wholly immaterial as to what day or days the offense, or offenses, charged in the information was committed, if at all, provided you believe from the evidence that the offense, or offenses, were committed, and that the same was committed within one year prior to the filing of the information in this case."

Appellant loses sight of the fact that each count charged a different offense under different subdivisions of section 337a of the Penal Code. In *re Roberts*, supra; *People v. Plath*, supra. In *People v. Wyett*, 49 Cal. App. 289, 193 P. 153, the information contained two counts charging different crimes, and a similar instruction was given. The court said (page 291 [193 P. 154]):

"The foregoing instruction was expressly disapproved in the case of *People v. Elgar*, 36 Cal. App. 114, 171 P. 697, and would seem to be subject to the strictures made upon it in that case. The trial court, however, fully instructed the jury in other portions of its charge with respect to the duty of each member of the jury to be satisfied beyond a reasonable doubt as to the guilt of the defendant upon the first of said counts, and also and in a separate and distinct charge as to the second of said counts in the information. It would seem, therefore, that, taking the charge of the court as a whole, the jury could not have been so far misled by the indefiniteness of the above instruction as to have expressly found the defendant guilty upon each of said counts separately, but that their verdict as to each was the result of their unanimous conclusion as to his guilt upon each of said counts. We do not, therefore, feel that we should reverse this case upon that ground."

In the instant case the jury was fully instructed as to the rule of reasonable doubt. Each of the counts, defendant's plea thereto, and the issues raised were fully set forth in the instructions to the jury. The jury were told that the burden was upon the prosecution to prove one or two or all of the material allegations in the informations to their satisfaction and beyond a reasonable doubt. We find no reversible error in this instruction.

[5] Defendant's motion to exclude witness was denied. This is a matter addressed to

the sound discretion of the trial court. *People v. Garbutt*, 197 Cal. 200, 239 P. 1080. Nothing appears in the record indicating an abuse of such discretion.

[6] Appellant asserts that the trial court erred in certain rulings on the admission and rejection of evidence. Officer Remington testified that there was a card room in the rear of defendant's premises which was fitted up with two card tables. Defendant's motion to strike the word "card" as a conclusion of the witness was denied. The witness testified that he was a police officer and had visited the premises on several occasions. Any possible error in the admission of such evidence was cured by the defendant's testimony on direct examination that he was licensed to run a card room with a freeze-out card game. Apparently the testimony of the police officer was a conclusion founded on fact.

Exception is taken to the ruling of the court that it was not necessary to prove that races were actually run on the different dates charged in the information. The exception is not well taken. It was not necessary that it be actually established that the races upon which the bets were being taken were actually being run at the time. *People v. Sutherland*, 59 Cal. App. 462, 210 P. 965; *People v. Carroll*, 54 Cal. App. 684, 202 P. 885.

[7] Officer Remington testified that he went into the defendant's premises for the purpose of securing evidence. Appellant urges that such testimony did not support the conviction of violating section 337a of the Penal Code in that it was impossible to bet or wager without the cooperation of both parties. The words "bet" and "wager," as used in section 337a of the Penal Code, do not require the kind of agreement contemplated by the law of contracts under which there must be an actual meeting of the minds of the contracting parties in order to form an agreement. So to hold would be to allow the escape from punishment of the defendants in all cases in which others might feign to be their accomplices and in which no evidence against the defendant exists except that coming from feigned accomplices. *People v. Fitzpatrick* (Cal. App.) 247 P. 601.

Finally, appellant excepts to the ruling of the court admitting the testimony of Officer Burk that races were being run at Tia Juana during the month of February, 1926. In view of the fact that we have herein held that the prosecution was not required to prove that races were run on any particular day or at all, we deem it unnecessary to comment on this objection.

It is ordered that the judgment be affirmed.

We concur: CONREY, P. J.; HOUSER, J.

82 Cal. App. 91

**MURATA et al. v. VERNON SCHOOL DIST.
et al. (Civ. 5549.)**

District Court of Appeal. Second District,
Division 2, California. March 28, 1927.
As Modified April 22, 1927.

Schools and school districts § 154—Children in territory annexed to city which original district continued to tax held under validating statute not entitled to attend city schools (Pol. Code, § 1576, as amended by St. 1917, p. 208; St. 1925, p. 233).

Children resident in area of former school district annexed to city of the sixth class, which cities can have only one school district within their territory under Pol. Code, § 1576, as amended by St. 1917, p. 208, held nevertheless not entitled to attend city's public schools, where annexed territory continued to be de facto part of original school district, being taxed as part thereof, under St. 1925, p. 233, confirming and validating boundaries of such school districts.

Application for mandamus by Toruk Murata and others against the Vernon School District and others, as trustees and principal thereof, to compel the admission of petitioning minors to the public schools of defendant district. Writ denied.

Thomas V. Cassidy, of Huntington Park, and Emmet H. Wilson, of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and Pierce Works, Deputy County Counsel, both of Los Angeles, for respondents.

CRAIG, J. This is an original proceeding in mandata to compel the admission of the minor petitioners herein to the public schools of the Vernon City school district.

The following facts are undisputed: The territory in which the petitioners reside was, prior to February 20, 1914, outside of any incorporated city, and situated in what was then known as the Fruitland school district of Los Angeles county. On that date the area involved herein was duly annexed to the city of Vernon, which at that time was, and now is, a city of the sixth class. However, no change was in fact made in the boundaries of the Fruitland school district at the time of the annexation. It is recited in respondents' return:

"That at all times referred to herein the said district was, and now is, a duly organized and existing school district of the state of California, and that at all such times the said district was bounded by duly established and existing boundary lines within which, until December 6, 1926, was included the territory involved herein; that within one year prior to July 23, 1925, there was levied in said district, and in the territory involved herein, a school tax which purported to be, and which was, for

the school purposes of the said Maywood school district. * * *

In 1917 section 1576 of the Political Code was amended (St. 1917, p. 208), to provide that: "In no instance shall the territory within an incorporated city of the sixth class be in more than one school district." In 1925, a law was enacted (Stats. p. 233), declaring that the boundaries of every school district as established one year prior to July 23, 1925, are confirmed and validated, provided that within such year a school tax for the purposes of such district shall have been levied therein.

A situation quite similar to that here presented was before us in the case of *Matot v. Inglewood School District*, 71 Cal. App. 557, 235 P. 667, the only difference in the facts being that in the last-named case the territory involved was annexed to the city of Inglewood after the enactment of the amendment to section 1576.

Petitioners herein urge us to recognize the theory, as they construe the decision in the *Matot* Case, that the territory in the Fruitland school district which was annexed to the city of Vernon became ipso facto a part of the Vernon school district, and, further, that, this being true, the validating act of 1925 could have no application to such territory.

In view of the undisputed facts as above outlined, it is not material to this decision to determine whether or not the territory involved became de jure part of the Vernon school district as argued by petitioners. Since the uncontested facts are that after such annexation this territory continued to be at least de facto a part of the Fruitland school district, and was at all times within one year prior to July 23, 1925, included in such district, and a school tax purporting to be and which was for the purposes of said Maywood school district, levied in the territory in question, we have a condition which exactly and fully meets the provisions of the validating act of 1925. It is clear that the last-named act was intended to apply to just such a situation. Had no school tax been levied within the territory involved within the year prior to July 23, 1925, or were any other element lacking from those required by the statute of that date to bring the case within its provisions, it would then be necessary for the determination of the issue presented in the instant proceeding to decide whether or not the territory was annexed to the Vernon school district through the enactment of the statute of 1917; but since the allegations which we have quoted from respondents' return are uncontested and meet all of the requirements of the validating act of 1925, the rights of the parties herein hinge alone upon the issue thus presented, and the conclusion is inevitable that the territory in which the petitioners reside is not a part of

the Vernon school district, and that the writ of mandate should be denied.

Presiding Justice Works, being disqualified, does not participate in the foregoing opinion.

The writ is denied.

I concur: THOMPSON, J.

82 Cal. App. 96

PEOPLE v. PATTERSON. (Cr. 1376.)

(District Court of Appeal, First District, Division 2, California. March 30, 1927.)

1. Burglary $\Leftrightarrow$ 10—Evidence that defendant, unarmed and without assaulting any one, entered uninhabited building and stole therefrom held insufficient to sustain conviction for burglary in first degree (Pen. Code, § 460).

Where, in burglary prosecution, evidence showed that defendant entered uninhabited building and stole plumbing fixtures therefrom, but failed to show that while doing so he was armed with deadly weapon or that he assaulted any person, evidence held insufficient to support conviction of burglary in first degree, as defined in Pen. Code, § 460.

2. Burglary $\Leftrightarrow$ 10—Burglary in the nighttime is not necessarily burglary in first degree (Pen. Code, § 460).

Under Pen. Code, § 460, burglary in the nighttime is not necessarily burglary in the first degree.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

John Patterson was convicted of burglary in the first degree, and he appeals. Reversed.

Frank A. Curtin, of Fresno, for appellant. U. S. Webb, Atty. Gen., and Lionel B. Browne, of San Francisco, for the People.

STURTEVANT, J. [1, 2] The defendant was found guilty of burglary in the first degree. From the judgment of conviction he has appealed, and has brought up a copy of the "record of the action" (Pen. Code, § 1207) and a certified copy of the reporter's notes as transcribed.

The appellant presents two points; one, that the evidence was insufficient to sustain a verdict of burglary in the first degree, and the other point is that the trial court gave to the jury an erroneous instruction defining burglary in the first degree. The two objections may properly be considered together. The undisputed evidence was to the effect that the defendant entered an uninhabited dwelling and stole therefrom the plumbing fixtures. There was no evidence to the effect that when he entered the building or at any other time he was armed with a deadly weapon, or that during the commission of the offense that he

assaulted any person. Our statute is as follows:

"**Burglary Defined.**—1. Every burglary of an inhabited dwelling house or building committed in the nighttime, and every burglary whether in the daytime or nighttime, committed by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree. 2. All other kinds of burglary are of the second degree. 3. This section shall not be construed to supersede or affect section four hundred sixty-four of the Penal Code." Pen. Code, § 460.

However, the trial court instructed the jury as follows:

"You are further instructed that burglary is of two degrees. If committed in the nighttime, it is burglary of the first degree, and if committed in the daytime, it is burglary in the second degree. If you find the defendant guilty, you must specify in your verdict the degree in which you find him guilty. You are further instructed that the phrase 'nighttime,' as used in this connection, means the period between sunset and sunrise."

The trial court also instructed the jury that it might find the defendant guilty of burglary in the first degree, of burglary in the second degree, or not guilty. The evidence was insufficient to support a judgment of conviction for the crime of burglary in the first degree. Furthermore, the instruction purporting to define burglary in the first degree was an erroneous statement of the law.

The appellant makes an additional point, but it becomes unnecessary to consider it.

The judgment is reversed, and the cause is remanded for a new trial.

We concur: KOFORD, P. J.; NOURSE, J.

CITY OF LOS ANGELES v. GLASSELL et al.*
(Civ. 5332.)

(District Court of Appeal, Second District, Division 2, California. March 29, 1927. Hearing Granted by Supreme Court May 26, 1927.)

1. Appeal and error $\Leftrightarrow$ 110—Order denying motion for new trial is not appealable.

No appeal can be taken from order denying motion for new trial.

2. Eminent domain $\Leftrightarrow$ 200—In proceeding to condemn land for playground, city was required to prove that clerk gave notice by publication to assessment district of hearing of referees' report.

In action by city to condemn land for playground purposes, failure to prove that clerk gave notice by publication, required by law, to assessment district of time and place set for hearing of referees' report held fatal defect, no presumption arising that notice was actually published.

3. Eminent domain ☞167(4)—Statutory provisions for benefit of landowners are strictly construed in their favor in condemnation proceedings.

Proceedings in condemnation being in invitum, statutory provisions therefor are strictly construed in favor of property owners as to every requisite having semblance of benefit to landowner.

4. Evidence ☞83(1)—Presumption that official has performed his duty does not extend beyond official's own acts.

Application of presumption that official has performed duty cannot extend beyond acts of official himself.

5. Evidence ☞83(2)—No presumption arose in condemnation proceedings that newspaper publisher printed and published notice of hearing referees' report.

In proceedings to condemn land for playground purposes, no presumption arose that publisher of newspaper had printed and published notice of hearing referees' report, required to be given; publisher not being official and no presumption arising concerning his acts.

6. Eminent domain ☞169—Land could not be condemned by city, under initial ordinance declaring condemnation was for public park and final ordinance defining purpose as for public playground, legislative intent being uncertain (Park and Playground Act of 1909, § 5).

Land could not be acquired by city by condemnation, under Park and Playground Act of 1909 (St. 1909, p. 1067), § 5, under ordinance of intention stating land was to be taken for public park purposes and final ordinance declaring property was to be taken for playground; intention of city council being impossible to ascertain.

7. Statutes ☞207—Where statutory provisions are contradictory, rule that statutes should be interpreted to have effect does not apply.

Rule that statutes should be so interpreted as to give them effect held not to apply, where provisions of statute are flatly contradictory.

8. Eminent domain ☞169—City can condemn lands only for purpose for which council has directed acquisition.

Condemnation proceedings by city must fail unless purposes are not only lawful, but those for which city council has directed lands to be acquired by public.

9. Municipal corporations ☞111(1)—Court cannot supply defect resulting from contradictory provisions of ordinances.

Where legislative intent is left undetermined by contradictory provisions in ordinances, defect cannot be supplied by court.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by the City of Los Angeles against Andrew Glassell, Una E. G. Moss, Louis A. Clarke, M. E. Latham, and others, to con-

demn land for public playground purposes. From a judgment for plaintiff and an order denying a motion for new trial, the defendants named appeal. Appeal from order denying motion for new trial dismissed, and decree appealed from reversed.

J. E. Hannon, B. R. Berlin, and Ernest U. Schroeter, all of Los Angeles, for appellants.

Jess E. Stephens, City Atty., Donald M. Keith and Leslie K. Floyd, Deputy City Attys., all of Los Angeles, for respondent.

CRAIG, J. [1] This is an action in condemnation. It was first tried before referees, and on exception taken to their report was retried in the superior court of Los Angeles county. The appealing defendants moved for a new trial on various grounds, and have appealed from those parts of the interlocutory decree affecting them, and from the order denying their motion for new trial. Such an order is not appealable. Heine Piano Co. v. Bloomer, 183 Cal. 398, 191 P. 900.

Numerous irregularities appear throughout these proceedings. No doubt some of them are of such a nature as not to result in prejudice to the appellants, or of a character which would be fatal to the validity of the proceeding. However, we think that certain errors are vital.

[2] It appears to be admitted that no evidence was offered at the trial to prove that the clerk gave notice by publication, as required by law, to the assessment district of the time and place set for the hearing of the referees' report. The respondent relies upon the presumption that official duty has been regularly performed, and insists that, since no objection was made as to lack of the required notice, this presumption is sufficient support for the finding of the court that:

"Due and legal notice of the time and place fixed for hearing the said report had been duly made and given as required by law."

[3] Proceedings in condemnation are in invitum, and statutory provisions for the same are strictly construed in favor of the property owners. 20 Cor. Jur. p. 877; McCarty v. Southern Pac. Co., 148 Cal. 211, 82 P. 615. This applies to "every requisite of the statute having the semblance of benefit to the landowner." 20 Cor. Jur. p. 882. The publication of the notice is jurisdictional in a proceeding in condemnation. Stanford v. Worn, 27 Cal. 171. This statute requires a special form and method of notice to the district before the hearing on the referees' report. The application of the presumption that an official has performed his duty cannot extend beyond the acts of the official himself.

[4, 5] In part, the requirement here is that the street superintendent shall cause notice to be published, for a period of 5 days, in a

daily newspaper published and circulated in the municipality where the property is situated. It still remains for those having control of the newspaper to actually publish the notice as required. The law does not provide that the street superintendent shall print and publish notice, but only that he cause the same to be published in a newspaper, etc. The publisher of the newspaper is not an official, and no presumption arises concerning his acts.

The facts presented on this point are similar to those in the County of Sutter v. McGriff, 130 Cal. 124, 62 P. 412, in which it was decided that the presumption as to the performance of official duty could not be indulged further than to establish that the official had complied with such requirements as were within his power. On the contrary, legal requisites not under his authority are unaffected by that presumption.

In a proceeding to condemn land it has been held that the presumption of regularity cannot be invoked to establish jurisdictional facts. *Cook v. Manasquan*, 80 N. J. 206, 76 A. 310. Also, in a proceeding to open a road, the facts showing compliance with the statute as to notice must be established affirmatively. *Taylor v. Todd*, 48 Mo. App. 550. To the same effect is *Crawford v. Frio County* (Tex. Civ. App.) 153 S. W. 388, in which it was held that the burden is on the public to show affirmatively that the necessary notice has been given the landowner, and that no presumption will be indulged. It was also held in that case that the appearance of an objector and his participation in the proceeding does not waive the objection that the jurisdictional requirements as to notice have not been complied with.

[6] In the instant case, the city council passed an ordinance of intention, in which it was declared that the lands sought to be condemned were to be taken for public park purposes. Thereafter a final ordinance was enacted, ordering the acquisition by condemnation of these lands for public playground purposes.

In a proper effort to clarify the situation and to discover the true intention of the city council, respondent first resorts to the Park and Playground Act of 1909 (Stats. 1909, p. 1066), under which this proceeding was begun, and calls attention to the fact that in section 5 thereof it is provided that the final ordinance "need not describe the property to be taken, nor the assessment district, but must refer to the ordinance of intention for all particulars." The contention is then advanced that this provision includes the purposes for which the land is sought to be taken, among the other particulars. We cannot agree with this argument. The "particulars" to which reference is made are clearly those concerning the description of the property and the assessment district. A mere reading of the provision indicates that this is true, and

the enumeration is one to which the maxim *ejusdem generis* applies. But respondent contends that, since the final ordinance in its title declares that the property is to be taken "for the condemnation of certain lands situate in the city of Los Angeles for public playground purposes, as contemplated by Ordinance No. 43114 (New Series), of said city," it is apparent that the use of the word "playground" was a mere clerical error because the purposes announced in the resolution of intention were "park purposes." But this reasoning may just as well lead to the opposite conclusion. It all depends upon the premise which is adopted. The language found in the title of the final ordinance might reasonably indicate that the real intention was to take the property for playground purposes, and that the city council were under the impression that this had been declared in the first ordinance.

Respondent further points out that section 2 of the ordinance ordering the acquisition of the lands directs that the city attorney bring the action for condemnation of the property "to be taken for the improvement therein, and in section 1 hereof mentioned." It is obvious that this but results in "confusion worse founded." By "the improvement therein" reference is made to the resolution of intention and to park purposes, but by "section 1 hereof" the declaration is renewed that the land is to be taken for playground purposes, for such is the statement contained in said "section 1 hereof."

Thus far every sign pointing to park purposes as the design of the city council is balanced by another sign pointing toward playground purposes. There is one other place in the record where the purposes are mentioned. It appears that a resolution extending the time to file a complaint for the condemnation of the land was enacted. In this it is recited that the purposes contemplated in Ordinance No. 43114 (N. S.) being the resolution of intention, are "public park purposes." This, of course, was true, and if the matter were to be determined by the number of times public park purposes were mentioned as against playground purposes, it would make the balance favor the former, but as establishing the real intention of the lawmakers it adds very little. We think the whole situation is one of hopeless uncertainty.

[7] It is true, as contended by respondent, that it is a cardinal rule of statutory construction that statutes should be so interpreted as to give them effect rather than result in their defeat, but this rule fails to furnish guidance in a case where the provisions of the statute are flatly contradictory. In this instance, if the principal object were merely to condemn the lands without regard to the purposes for which they were to be used, the court might, in effect, direct that this be done without regard to such purposes;

but here the entire proceeding falls unless the purposes are not only lawful, but those for which the city council has directed the lands to be acquired by the public.

[8, 9] We cannot give effect to the proceedings which have been taken without determining the true intention of the lawmakers. Where the intention is left undetermined the court cannot supply the defect and declare for what purpose the lands shall be used. To uphold such loose proceedings as are contained in this record would be to ignore fundamentals of law intended to uphold substantial guaranties for the protection of private property rights.

Appellants attack the legality of this proceeding upon eight other grounds, but, in view of our conclusion concerning the two defects which we have discussed, it will be unnecessary to pass on these other assignments.

The appeal from the order denying motion for new trial is dismissed.

The decree appealed from is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

82 Cal. App. 17

PEOPLE v. PARSONS. (Cr. 1457.) ★

(District Court of Appeal, Second District, Division 2, California. March 23, 1927. Hearing Denied by Supreme Court May 19, 1927.)

1. Criminal law ⇨998—Motion to vacate judgment on plea of guilty as without jurisdiction, because without preliminary examination, held late and without merit (Pen. Code, §§ 995, 996).

Motion to vacate judgment entered on a plea of guilty, on ground that information was filed without legal authority because no preliminary examination was had, made over three years and seven months after entry of plea of guilty and sentence, *held* properly refused, since filing of information gave court jurisdiction and objection came too late, in view of Pen. Code, §§ 995, 996.

2. Criminal law ⇨13—Statute denouncing offense of unnatural copulation held not unconstitutional, as vague and indefinite (Pen. Code, § 288a).

Pen. Code, § 288a, providing that any person participating in the act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment, *held* not unconstitutional, as vague, uncertain, and indefinite.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

H. G. Parsons was convicted of violation of Pen. Code, § 288a. From an order refusing to vacate the judgment, he appeals. Affirmed.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

THOMPSON, J. A complaint was issued charging the defendant with the degenerate crime denounced by section 288a of the Penal Code. At the time of his arraignment upon the complaint the defendant expressed a desire to waive his legal rights and confessed to the committing magistrate his guilt of the offense charged. Whereupon the justice of the peace ordered that he be held to answer before the superior court. The information was filed on February 10, 1923. On the same day the defendant pleaded guilty to the offense as charged in the information, and was sentenced for the term provided by law on February 13, 1923. On October 2, 1926, or after the lapse of more than three years and seven months, the defendant made a motion to vacate and set aside the judgment of conviction on the grounds, among others: (1) That the information was filed without authority of law because no preliminary examination was had; (2) that section 288a of the Penal Code is unconstitutional, for the reason that it is vague, uncertain, and indefinite—which two grounds are the only reasons assigned in support of his appeal from the order made November 15, 1926, denying his motion to set aside the judgment.

[1] Appellant reasons that no examination was held by the committing magistrate, and that the superior court was therefore without jurisdiction to hear the charge contained in the information, hence he may raise the objection at any time. Assuming that in legal effect there was no preliminary examination, the law has heretofore been determined contrary to appellant's views. The Supreme Court, in the case of *Ex parte McConnell*, 83 Cal. 558, 23 P. 1119, speaking through Mr. Chief Justice Beatty, in a case where exactly the same contention was raised, says:

"The filing of the information gave the court jurisdiction to proceed in the case, and the section of the Code cited [Pen. Code, § 995] provides the exclusive method of trying the question whether the information was founded on the necessary preliminary examination and commitment."

Also in the case of *People v. Ronsse*, 26 Cal. App. 100, 146 P. 65, where it was argued that no preliminary examination had been had, because the person assuming to act as magistrate was not in fact invested with the powers of that office, it was held that the objection made after plea, at the time of the trial, and again after verdict, came too late. It is there pointed out that a defendant is precluded by section 996 of the Penal Code from raising the objection, unless made before the plea is entered.

[2] Appellant's second contention that section 288a of the Penal Code, which reads as follows:

"Any person participating in the act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding fifteen years,"

—is unconstitutional, is probably inspired by the opinion found in the case of *In re Lockett*, 179 Cal. 581, 178 P. 134, which dealt with the act when it contained words of a foreign language, not contained in our English dictionaries. But what may have been said with reference to the act as it existed prior to its amendment in 1921 (St. 1921, p. 1633) has no present application. Counsel says that only one of the parties may be guilty of an offense under the wording of the act, and that for that reason it is vague and uncertain. We do not so understand the words "any person participating in the act." Nor do we find anything else uncertain or indefinite.

The order is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

82 Cal. App. 155

CLINE v. DIMMICK. (Civ. 4228.)

(District Court of Appeal, Second District, Division 2, California. April 1, 1927.)

1. Innkeepers ⇐ 11(11)—Statute limiting innkeeper's liability to certain amounts for each container refers to container as single piece of baggage at time of loss (Civ. Code, § 1859).

The limitations on an innkeeper's liability to stated amounts for each trunk, valise, traveling bag, box, and contents, provided by Civ. Code, § 1859, refer to conditions of such containers at time of loss as single pieces of baggage, and do not limit liability to those amounts for containers and contents when unpacked.

2. Innkeepers ⇐ 11(11)—Hotel keeper's notice of nonliability, which did not specify furs, held not to relieve him of liability for fur cape (Civ. Code, § 1860).

Innkeeper's notice that he would not be responsible for loss of money, jewelry, or other articles of value taken from rooms, and that safe deposit boxes were provided for valuables and money, did not comply with Civ. Code, § 1860, providing for notice specifying fur garments, so as to relieve hotel keeper of liability for loss of fur cape.

3. Innkeepers ⇐ 11(11)—Statute limiting liability of innkeeper must be strictly complied with (Civ. Code, § 1860).

Civ. Code, § 1860, providing for limitation of liability of innkeepers for valuables where fireproof safe is maintained and guests notified to place them therein, must be strictly complied

with to relieve innkeeper of his common-law liability.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Virginia Cline against F. M. Dimmick, an innkeeper, for damages for loss of personal property. Judgment for plaintiff, and defendant appeals. Affirmed.

Schweitzer & Hutton, of Los Angeles, for appellant.

Lewinson & Barnhill and E. E. Morris, all of Los Angeles, for respondent.

WORKS, P. J. Plaintiff sued defendant, who was an innkeeper, for the loss of certain articles of personal property and apparel which were taken from her room while she was a guest at his hotel. Plaintiff had judgment, and defendant appeals.

Section 1859 of the Civil Code reads, in part:

"The liability of an innkeeper * * * for losses of * * * personal property, * * * placed by his guests * * * under his care, is that of a depository for hire; provided, however, that in no case shall such liability exceed the sum of one hundred dollars for each trunk and its contents, fifty dollars for each valise or traveling-bag and contents, and ten dollars for each box, bundle, or package and contents so placed under his care, and all other miscellaneous effects including wearing apparel and personal belongings, two hundred fifty dollars; unless he shall have consented in writing with the owner thereof to assume a greater liability."

Section 1860 of the same Code provides:

"If an innkeeper * * * keeps a fireproof safe and gives notice to a guest * * * that he keeps such a safe and will not be liable for money, jewelry, documents, furs, fur coats and fur garments, * * * unless placed therein, he is not liable, except so far as his own acts shall contribute thereto, for any loss of or injury to such articles, if not deposited with him to be placed therein. * * *"

Most of the articles lost by respondent, practically all of them of value, were contained, when brought into the hotel, in a leather hat box. The box itself was not taken and the trial court allowed respondent judgment for many times the value of "ten dollars for each box, bundle, or package and contents" prescribed by section 1859. Appellant contends that the judgment was excessive and that the recovery of respondent for the loss of the articles brought into the hostelry in the hat box should be limited to the value stated in the excerpt just made from the section.

[1] It is said that the enactment must be construed as relating to a box and its contents upon its arrival at an inn, no matter if the box be unpacked and its contents be placed about the room or in the closet of a guest upon his quarters being assigned to

him, and if a part or all of the contents be then stolen and the box be untouched. We cannot so construe the statute. To follow appellant's argument to its logical conclusion is to say that respondent cannot recover at all for the loss of the articles taken into the hotel, as the statute refers to a box and its contents, and in the present instance the box was not taken. The argument of appellant also leads to the absurdity that, if prospective guests come to a hotel door with a large box containing wearing apparel of fine texture and great value, they must unpack at the portal and exhibit their finery, not only to the inspection of the innkeeper, but to the curiosity of bystanders, or suffer a great loss if the box be unpacked after an arrival in rooms assigned, or if it be broken open there, and a portion only of the goods in it be stolen:

"Before the enactment of sections 1859 and 1860 of our Civil Code, in this state, an innkeeper was held to his common-law liability as an insurer of the goods of his guests. * * * Sections 1859 and 1860 of our Civil Code were enacted on the same date. Together, they were intended to relieve the innkeepers in this state of the burden of their common-law liability. * * * If an innkeeper does not comply with the conditions of statutes exempting him from his common-law liability, the common-law liability is imposed." *Baxter v. Shanley-Furness Co.*, 193 Cal. 558, 226 P. 391.

We think the Legislature, in section 1859, has not employed language appropriate to an intent to limit the common-law liability of innkeepers to the extent claimed by appellant. In using the expressions, "each trunk and its contents," "each valise or traveling bag and contents," "each box, bundle, or package and contents," we think the Legislature contemplated conditions to exist at the time of a loss and not at the time when trunk, valise, or box might be taken into a hotel. Such a construction avoids the difficulties above pointed out. Further, it seems to be demanded by the terms of the section, although it must be admitted that the language of the enactment is not altogether plain. The section refers to liability for a "loss." The liability accrues at the time of a loss and the Legislature doubtless intended that the expression "box, bundle, or package and contents" should relate to a condition existing at that time. In other words, we think the expression contemplates the loss of a container and its contents as a single piece of baggage.

[2, 3] The trial court found that appellant did not comply with the provisions of section 1860 of the Civil Code, providing for a certain notice to guests at hotels. The only evidence as to notice was that a certain printed placard was posted in respondent's room and that she read it before her property was taken. The notice read:

"The proprietor will not be responsible for the loss of money, jewelry, or other articles of value taken from the rooms. Individual safe deposit boxes, in the fire and burglar proof safe, located in the office, are provided for the safe-keeping of valuables and money."

The principal article lost by appellant, upon the score of value, was a fur cape, and it is the loss of this garment that respondent has in mind in taking exception to the finding of the court. It will be observed that section 1860 provides for notice that an innkeeper, under certain circumstances, "will not be liable for money, jewelry, documents, furs, fur coats and fur garments, or other articles of unusual value and small compass." We think the notice posted by appellant did not comply with the statute. Under the enactment there was no more reason for inserting the words "money, jewelry" in the notice than for inserting a reference to fur garments. It naturally might not have occurred to appellant that the words "other articles of value," following the words "money, jewelry," were intended to cover such an article as her fur cape. Further, she was not likely to have thought that the management of the hotel expected to care for fur capes in "individual safe deposit boxes, in the fire and burglar proof safe," especially as it was said that the boxes were for the safe-keeping of "valuables and money." In addition to all this, it has been decided in many cases that statutes like section 1860 must be strictly complied with. Some authorities go even further:

"A literal compliance with the statute is generally held necessary to effect the limitation. This is true not only as to providing the iron safe required, but also as to giving all notices required by the statute exactly as provided." 32 C. J. 522.

See, also, *Gillett v. Waldorf Hotel Co.*, 136 Wash. 615, 241 P. 14.

Judgment affirmed.

We concur: CRAIG, J.; THOMPSON, J.

DAWSON et al. v. SAN DIEGO ELECTRIC RY. CO. (Civ. 4832.)★

District Court of Appeal, Second District, Division 1, California. April 1, 1927.

Hearing Denied by Supreme Court May 31, 1927.

1. Appeal and error ⇨930(1)—Appellate court is bound to resolve conflict in evidence in favor of party receiving verdict and to construe it favorably to him.

Where verdict was for plaintiff on conflicting evidence, appellate court had to assume as true evidence adduced at trial in her favor and to construe it in her behalf as favorably as was reasonably possible.

2. Negligence ⇨122(1)—Burden of establishing contributory negligence rests upon defendant.

Defense of contributory negligence is an affirmative one, and burden of establishing such defense rests upon defendant.

3. Negligence ⇨136(9)—Question of contributory negligence is one of law only where no other deduction can be drawn from evidence.

It is only where deduction to be drawn from evidence is inevitably that of plaintiff's negligence that court is authorized to declare presence of contributory negligence on part of plaintiff and thereupon withdraw case from jury.

4. Street railroads ⇨99(7)—Motorist must yield to street car's right of way, where reasonably prudent man would foresee collision.

Where street car has right of way under city ordinance, automobile driver must yield if, when he starts across tracks, relative position of two vehicles is such that reasonably prudent man would foresee that collision was likely to occur unless one or the other stopped.

5. Street railroads ⇨117(24)—Contributory negligence of truck driver struck by street car held for jury.

In action for damages for death of truck driver resulting from collision of truck with street car, question of truck driver's contributory negligence held for jury.

6. Trial ⇨252(8), 253(4)—Instruction that truck driver killed by street car was negligent if he drove above certain speed held properly refused, in view of evidence, and where it did not cover other provision of statute relied on (Motor Vehicle Act, § 22[a]).

In suit for damages for death of truck driver killed by street car, instruction that driver was guilty of negligence if he operated truck within intersection of streets above certain speed held properly refused, where there was no evidence that he drove truck at such speed within intersection, and where other provision relating to warning signs in Motor Vehicle Act (St. 1919, p. 220) § 22(a), relied upon, was not covered by refused instruction or evidence.

7. Street railroads ⇨118(11)—Instruction on negligent speed of truck driver struck by street car held properly refused as too indefinite.

In suit for death of truck driver struck by street car, instruction that driver was guilty

of negligence if he operated truck at certain speed held properly refused because it was too indefinite as to place or location at which it might be inferred truck was being operated.

8. Street railroads ⇨118(3)—Instruction stating duty of street car motorman to sound gong held proper.

In suit for damages for death of automobile driver struck by street car, instruction that it was duty of defendant's motorman to sound gong when approaching certain street, which duty was required by ordinance, held proper.

9. Appeal and error ⇨1050(1)—Admitting evidence of habits of care in driving of truck driver struck by street car, where there were eyewitnesses, if error, held not prejudicial.

In suit for damages for death of truck driver struck by street car, admitting evidence of driver's habits as to care in driving, where there were eyewitnesses, and where testimony of eyewitnesses as to his conduct at time of accident coincided with such evidence, if error, held not prejudicial.

10. Evidence ⇨492—Admission of evidence street car was traveling at faster than ordinary rate and faster than truck struck held not error.

In suit for damages for death of truck driver struck by street car, permitting evidence that at or immediately preceding time of accident street car was traveling at speed "faster than ordinary rate," and that street car "was going the faster of the two vehicles," held not error.

11. Appeal and error ⇨1046(5)—Comment by trial judge that witness on street car at time of collision would know where it took place held not prejudicial error under circumstances.

Comment of trial judge to effect that, because witness was on street car when collision occurred, she would know where it took place, held not prejudicial error, where cross-examination established that her answer as to where collision occurred was not based upon actual knowledge from seeing collision, but from what she felt at time and from what she afterwards saw of accident, and where other witnesses fixed it at approximately same position.

12. Appeal and error ⇨201(2)—Where no objection was made to court's remark at any time during trial nor exception noted, point was not available on appeal.

Where no objection was taken to court's remark, either at time it was made or at any time during trial, nor any exception noted thereto, point was not available on appeal.

13. Appeal and error ⇨1046(5)—Court's remark, made as mere pleasantry, held not prejudicial error, especially in view of instructions.

Court's remark, "I don't see how you find your way home," to witness, who was uncertain as to which direction was east and which was west, and was unable to state whether accident occurred on east or west side of center of intersection, made as mere pleasantry, held not prejudicial error, where court instructed

jury not to consider anything said or done by court as indicating court's opinion as to what were facts in case.

14. Evidence ⚡219(3)—Permitting plaintiff, suing for death of husband, to testify whether defendant had paid her any compensation, held not error.

In suit by wife for damages for death of her husband, permitting her to testify concerning whether or not defendant had ever paid her any compensation for loss sustained held not error.

15. Death ⚡99(4)—\$10,000 for death of husband earning \$120 per month, held justified.

In suit by wife for damages for death of her husband, evidence that deceased's health was good, that he was earning \$120 per month at time of death, and that, had he lived for full term of his life expectancy, he would have earned \$19,396.80, held to sufficiently establish deceased's pecuniary worth and to justify verdict for \$10,000.

16. Appeal and error ⚡1004(1)—Unless verdict is so plainly excessive as to suggest passion, prejudice, or corruption on jury's part, it cannot be disturbed as excessive.

Verdict cannot be disturbed on ground that it is excessive, unless it is so plainly and outrageously excessive as to suggest, at first blush, passion, prejudice, or corruption on part of jury.

17. Street railroads ⚡114(1)—Evidence held to justify conclusion street railroad was guilty of negligence as to truck driver free from negligence.

In suit for death of truck driver struck by street car, evidence held to warrant jury in concluding that defendant was guilty of negligence and that driver was free from negligence proximately contributing to happening of accident.

18. Appeal and error ⚡1003—Appellate court cannot consider evidence to determine weight as to any issue in pleadings or in whose favor it preponderated.

Appellate court cannot consider evidence for purpose of determining its weight as to any issue in pleadings or in whose favor evidence as a whole it preponderated.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by Susan M. Dawson and another against the San Diego Electric Railway Company for damages for the wrongful death of her husband. From a judgment for plaintiffs, defendant appeals. Affirmed.

Hearing denied by Supreme Court; PRES-
TON; J., voting for a transfer.

Read G. Dilworth, of Coronado, and V. F. Bennett, of San Diego, for appellant.

P. A. Whitacre, of San Diego, and W. J. Stanton, of Coronado, for respondents.

HOUSER, J. Action by plaintiff Susan M. Dawson for damages resulting from the death of her husband William E. Dawson.

It appears that the cause of the death of William E. Dawson was a collision which occurred at a street intersection between a light automobile truck driven by said Dawson and an electric street car which was owned and operated by the defendant.

[1] The evidence with reference to the happening of the accident was conflicting, but was decided by the jury in favor of plaintiff. In such circumstances the rule is that, on appeal from a judgment, the appellate court is bound to assume as true the evidence adduced at the trial in favor of the plaintiff and to construe it in his behalf as favorably as is reasonably possible. *Palladine v. Imperial Valley F. Lands Ass'n*, 65 Cal. App. 727, 225 P. 291; *Aubel v. Sosso*, 72 Cal. App. 57, 236 P. 319; *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 P. 951; *Hassell v. Bunge*, 167 Cal. 365, 139 P. 800; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157; *Dunphy v. Dunphy*, 161 Cal. 380, 119 P. 512; *Showers v. Zanone*, 7 Cal. Unrep. 263, 85 P. 857; *Carteri v. Roberts*, 140 Cal. 165, 73 P. 818; *Smith v. Hampshire*, 4 Cal. App. 8, 87 P. 224.

With such rule in mind, for many of the purposes of this appeal it becomes necessary to consider the following conclusions and inferences only which, notwithstanding the conflict in the evidence, the jury was entitled to deduce from evidence produced by plaintiff: Immediately before reaching the intersection of the two streets in a busy portion of the city where the accident in question occurred, Dawson had been driving the truck in a prudent and careful manner at a rate of speed between 8 and 10 miles per hour; that as he approached such intersection he slackened the speed of his truck to between 4 and 6 miles per hour, and looked to both his right and to his left; that it was a sunshiny day, and nothing intervened to obstruct his view, and that after he saw the approaching street car, he misjudged either its distance from the intersection, or its speed, or both such distance and such speed, and concluded that he had ample time to pass in front of such street car in safety to himself; that, in essaying such crossing, he was driving his truck at a rate of speed not in excess of that provided by any state statute or city ordinance of the city wherein the accident occurred; that in the circumstances then and there present he did not realize the danger that threatened him, nor the imminent peril of his situation until it was too late either to stop his truck in time or to increase the speed of the truck sufficiently, to avoid the collision; that immediately preceding the accident the street car of defendant which collided with Dawson's truck was traveling down a grade of 6% per cent., and, considering the condition then and there present, was being operated at a fast and unusual or at a high and dangerous rate of speed, to wit,

of not less than 25 miles per hour; that the gong on said street car was not sounded to give warning of its approach; that, although it was a sunshiny day and although no object interfered with an opportunity for a clear view of whatever was either within or approaching the intersection for a considerable distance, the motorman in charge of the street car did not see Dawson until "like a flash" the truck appeared in front of him (the motorman) within 5 or 10 feet; that the accident occurred to Dawson's right of the center of the intersection; that in the collision the truck was struck in about its middle, with the result that the body of the truck was torn from the chassis—the wooden portion thereof being thrown to one side of the street and the heavy portion of the chassis and Dawson being thrown to the front and to the curb on the opposite side of the street, a distance of 75 feet; that Dawson was rendered unconscious by reason of the collision; that both his legs were broken above the knees, his right arm sustained a compound fracture above the elbow, and the back of his skull was crushed; that, although the emergency brakes on the street car were operated most effectively, the street car traveled after the collision for a distance of between 180 and 220 feet before it was stopped.

Appellant first advances the point that the evidence proves the contributory negligence of Dawson in failing to yield to the defendant the right of way across the street intersection in accordance with the provisions of a local city ordinance, which gave such a preference to street cars over other vehicles.

[2, 3] It is settled law that the defense of contributory negligence is an affirmative one, and that the burden of establishing such a defense rests upon the defendant. *Bidwell v. Los Angeles, etc., R. Co.*, 169 Cal. 780, 148 P. 197; *Zibbell v. Southern Pacific Co.*, 160 Cal. 241, 116 P. 513; *Schneider v. Market Street Ry. Co.*, 134 Cal. 482, 66 P. 734; *Hutson v. Southern California R. Co.*, 150 Cal. 701, 89 P. 1093. It is also well established that the contributory negligence of a plaintiff can be said to exist in those cases only where no deduction or inference from the evidence other than the plaintiff's negligence can be drawn by the jury, and that, even where the facts in the case are clear and undisputed, "if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." It is only where the deduction to be drawn from the evidence is inevitably that of plaintiff's negligence that the court is authorized to declare the presence of contributory negligence on the part of the plaintiff and thereupon withdraw the case from the jury. *Johnson v. Southern Pac. R. Co.*, 154 Cal. 285, 97 P. 520; *Seller v. Market Street R. Co.*, 139 Cal. 268, 72 P. 1006; *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513.

[4] With reference to the effect of the provisions of the ordinance which gave the right of way at the intersection to the defendant, the law appears to be well stated in the syllabus of the case of *Virginia R. & Power Co. v. Wellons*, 133 Va. 350, 112 S. E. 843, as follows:

"Where a street car had the right of way under a city ordinance, it is the duty of an automobile driver to yield if, when he started across the tracks, the relative position of the two vehicles was such that a reasonably prudent man would have foreseen that a collision was likely to occur unless one or the other stopped."

To the same effect, see *Virginia R. & Power Co. v. Hill*, 120 Va. 397, 91 S. E. 194.

The questions, then, to be considered are whether from the evidence reasonable minds might draw different conclusions upon the question of plaintiff's negligence, and whether, as plaintiff started across the intersection, as a reasonably prudent man he should have foreseen that a collision was about to occur, unless either the truck or the street car was stopped. The evidence of the witnesses produced by plaintiff showed that the street car was traveling at from four to six times the speed at which the truck was traveling after it entered the intersection; that the distance from the curb line of each of the intersecting streets to the center of the street was approximately 26 feet. It is therefore apparent that at the time the truck entered the intersection the street car was from 104 to 156 feet away from the center of the intersection. The evidence further shows that Dawson was habitually a careful man, and that on this occasion as he approached the intersection he slackened the speed of the truck and looked in the direction from which the street car was coming. Touching upon the law affecting a situation of such a character, it is said in the case of *Clark v. Bennett*, 123 Cal. 275, 278, 55 P. 908, 909:

"It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross such a track in the crowded parts of a city where there is practically always an approaching car; and in such case, as street cars go at a comparatively slow rate of speed and are quickly stopped, the question of negligence would depend upon the proximity or remoteness of the car, and upon all the other circumstances surrounding the occurrence. In such a situation the traveler cannot be held to exercise the very highest prudence and judgment; it is sufficient if he exercises that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise."

In the case of *Scott v. San Bernardino Valley, etc., Co.*, 152 Cal. 604, 93 P. 677, the principle is discussed by the court, and the conclusion reached, that, in a situation resembling that presented in the instant case, the question of whether the plaintiff was guilty

of negligence which contributed proximately to the happening of the accident is one for the determination of the jury. And, to the same effect, see the following cases: *Schneider v. Market Street R. Co.*, 134 Cal. 482, 66 P. 734; *Kernan v. Market Street R. Co.*, 137 Cal. 326, 70 P. 81; *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 596, 112 P. 53; *Runnels v. United Railroads*, 175 Cal. 528, 166 P. 18; *Commonwealth Bonding, etc., Co. v. Pacific Electric R. Co.*, 42 Cal. App. 373, 184 P. 29; *Mann v. Scott*, 180 Cal. 550, 182 P. 281; *Carbaugh v. White Bus Line*, 51 Cal. App. 1, 195 P. 1066.

[5] It is therefore manifest that in the circumstances of the instant case the question of Dawson's contributory negligence was one exclusively for the jury to determine; and consequently that the point presented by appellant with reference thereto cannot be sustained.

[6] It is next urged by appellant that the trial court erred in refusing to instruct the jury in effect that, in the event the jury found certain stated facts were true, if Dawson operated his truck within the intersection of the two streets at a greater rate of speed than 10 miles per hour he was guilty of negligence. However, no foundation in fact existed upon which to base such requested instruction. No witness testified that Dawson was driving his truck at such a rate of speed within the intersection. Moreover, without going into details of the provisions of section 22(a) of the Vehicle Act (Stats. 1919, p. 220), upon which appellant relies as authority for the requested instruction, on an examination of the statute it appears that, among other things, it provides for a given rate of speed for vehicles "in traversing any steam, electric or other railway crossing at grade," provided that theretofore the governing body of the municipality wherein such "railway crossing" is situate shall have placed and maintained "warning signs," etc. The attention of this court is not directed to any evidence in the case touching the condition as to the placing and maintaining of the "warning signs" mentioned in the statute; nor is such condition covered by the instruction which was refused by the trial court. Assuming, without deciding, that the statute to which reference has been had is applicable to the situation here presented, it is clear that, if it applies in one part it should also apply in the other; and consequently, if the rate of speed is controlled by such statute, the regulation requiring "warning signs" is also a condition which must be met. For such reasons we think that the instruction was properly refused.

[7] Appellant also suggests error in that the trial court refused to give an additional instruction that, "if you also find from the evidence that William E. Dawson was operating said truck at a speed of 15 miles per hour or 22 feet per second, he was guilty of negli-

gence," etc. The proposed instruction was properly refused, for the reason that it is indefinite as to place or location at which it might be inferred that the truck was being operated.

[8] Appellant predicates error in that the trial court instructed the jury that:

"It was the duty of the defendant's motorman to sound his gong when approaching Thirteenth street (one of the intersecting streets) so as to give notice to persons desiring to cross said street of the approach of the street car. * * *"

As such duty was required by an ordinance of the municipality in which the street car was being operated, the instruction was a proper one to be given to the jury. *Driscoll v. Market St. Cable Ry. Co.*, 97 Cal. 553, 565, 32 P. 591, 133 Am. St. Rep. 203; *Schneider v. Market Street Ry. Co.*, 134 Cal. 482, 486, 66 P. 734.

[9] It is next urged by appellant that error was committed by the trial court in admitting, over defendant's objection, evidence of habit of Dawson as to care in driving his truck. It is not claimed that under no circumstances is such evidence admissible; but, because of the fact in the instant case that there were eyewitnesses to the accident, it is insisted that "there was no justification in law for admitting the evidence referred to"—citing *Wallis v. Southern Pacific Co.*, 184 Cal. 662, 195 P. 408, 15 A. L. R. 117; 10 R. C. L. § 127, p. 955; 6 *Thompson on Negligence*, § 7140; 1 *Elliott on Evidence*, § 172.

It is manifest that in the instant case the particular phase of the inquiry was directed, not to Dawson's habit regarding the driving by him of an automobile over a street intersection, but was directed particularly to what he actually did on the occasion in question. His habit may have been to be very careful at such times, and yet on the occasion under consideration he may have shown the greatest carelessness. But, however that may have been, the testimony as to Dawson's habit apparently coincided with the testimony of the witnesses introduced by plaintiff regarding Dawson's conduct at the time the accident occurred. And, while evidence of his habit may have added weight to the testimony given in his behalf, the language used by the court in *Wallis v. Southern Pacific Co.*, 184 Cal. 662, 665, 195 P. 408, 409 (15 A. L. R. 117) to wit: "If the fact of the existence of habits of caution in a given particular has any legitimate evidentiary weight, the party benefited ought to have the advantage of it for whatever it is worth, even against adverse eyewitnesses; and, if the testimony of the eyewitnesses is in his favor, it would be at least a harmless cumulation of evidence to permit testimony of his custom or habit"—would seem to indicate that the error, if any, was not prejudicial to defendant's substantial rights.

[10] It is also contended by appellant that

the trial court erred in permitting certain witnesses to testify that at or immediately preceding the time of the accident the street car was traveling at a speed "faster than the ordinary rate," and that the street car "was going the faster of the two vehicles." No authorities are cited by appellant to sustain its position. On the other hand, the authorities are numerous in principle which uphold the admissibility of such evidence. *Overtom v. Chicago & E. I. R. Co.*, 181 Ill. 323, 54 N. E. 898; *Ill. Central R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 522; *Ottoby v. Mississippi Valley Trust Co.*, 197 Mo. App. 473, 196 S. W. 428; *Johnsen v. Oakland, S. L. & H. E. Ry. Co.*, 127 Cal. 608, 60 P. 170; *Scragg v. Sallee*, 24 Cal. App. 133, 140 P. 706; *Cargall v. Riley*, 209 Ala. 183, 95 So. 821; *Schultz v. Starr*, 180 Iowa, 1319, 164 N. W. 163; *Parker v. Boston & M. R. R.*, 84 Vt. 329, 79 A. 865.

[11] Error is also predicated on the fact that the trial court overruled an objection to a question propounded to a witness as to where the accident took place, and in connection therewith allege prejudicial misconduct committed by the judge of the trial court in commenting on the knowledge of such witness.

The bill of exceptions herein shows that, after the witness had stated that, at the time the accident occurred, she was sitting on a side seat "on the front end of the car on the left-hand side of the car next to the motor-man, * * * the very front seat," she was asked the question as to where the collision took place, to which question she answered:

"Well, I would say, from the appearance of all things, that the radiator, the front end of the truck, was on the street car track. The whole front part would be on the track, and the rear end would be about where the pimple, the traffic pimple, would be; just about the middle of the street crossing."

Before the question was answered, the defendant interposed a general objection, and included therein the further specification that no foundation had been laid for the question. In response thereto, the judge of the trial court stated in effect that he thought the required foundation would "develop"; that "it was obvious that a person on a street car would know where a collision took place; she might feel it, under the conditions she testified to." On cross-examination, the witness stated:

"The first I knew anything of the collision was when the two cars hit. I did not see them hit or come together, but I felt it. If I remember correctly I was looking at my sister, back up toward Twelfth street, just before the time of the impact.

"Q. You have explained on direct examination that the front of the truck was across the track and the rear of the truck was about what you described as the pimple there? A. I say I would judge, from the position of the way that the truck was hit, that that would be where

the truck would be. I did not say I saw it there. I did not see the truck hit."

While perhaps the remark made by the judge, to the effect that, because the witness was on a street car at the time the collision occurred, she would know where it took place, was not a correct deduction, the cross-examination to which reference has been had satisfactorily established that her answer as to where the collision occurred was not based upon her actual knowledge derived from witnessing the collision, but was from what she felt at the time and from what she afterwards saw of the accident. Her testimony, therefore, in regard to the place where the accident took place, was of no particular value one way or the other. Other witnesses who clearly saw the collision testified fully regarding its location, and fixed it at approximately the position indicated by the testimony of the witness to which objection was made. In such circumstances, we think that the comments made by the trial judge regarding the testimony of the witness could not have affected the verdict.

[12] It appears that one of the witnesses produced by the defendant at first was uncertain in her testimony as to which direction was east and which direction was west, and was likewise unable to state whether the accident occurred on the east side or on the west side of the "wart" in the center of the intersection. In response to a question asked of her by the judge of the trial court as to whether she knew "the east and west," the witness replied, "I do, sometimes;" whereupon the judge rejoined, "I don't see how you find your way home; Broadway runs east and west, but Thirteenth street north and south." The witness, being thus instructed, then testified as to the direction in which the street car was moving and as to the place where the accident occurred. Appellant now assigns as prejudicial error the remark made by the judge that "I don't see how you find your way home." But, in view of the fact that no objection was taken to the remark either at the time it was made or at any time during the trial, nor any exception noted thereto, the point is not available on appeal.

In the case of *People v. Ferrara*, 18 Cal. App. 271, 274, 122 P. 1089, 1090, the court said:

"As to the claimed misconduct of the court, no objection having been taken to the remark at the time, the possibility of injury to the defendant cannot now be considered. *People v. Walker*, 15 Cal. App. 400, 114 P. 1009; *People v. Mayes*, 113 Cal. 618, 45 P. 860; *People v. Davenport*, 17 Cal. App. 557, 120 P. 451; *People v. Ruef*, 14 Cal. App. 576, 114 P. 48, 54."

[13] However, in all probability the remark was considered as a mere pleasantry and of no importance as affecting any issue before the court; at any rate, it was of trivial consequence. Moreover, at the close of the case

the jury was instructed by the court that it should—

"not consider anything that may have been said by the court, nor any act of the court during the progress of this trial, as indicating any opinion of the court as to what are or not the facts in the case, or what has or has not been established, or whether the witness who is testifying is testifying truthfully or not. Those are matters left entirely to your discretion, and the court has not by any word or action intended to convey to you any information or impression as to the court's opinion in these matters of fact. Consequently, if you have in your mind any word that you think expressed some opinion of the court on matters of fact, you should dismiss it from your mind as improper of consideration."

It is therefore manifest that the defendant was in nowise prejudiced in its substantial rights by reason of the incident to which reference has been had.

[14] It is also contended by appellant that:

"The court erred in overruling the objections of defendant to and in refusing to grant the motion of defendant to strike from the record testimony of plaintiff concerning whether or not defendant had ever paid her any compensation for loss sustained."

We are unable to see any error in connection with the matter to which appellant has referred, nor are we able to perceive in what manner such evidence could prejudicially affect the defense to the action.

[15, 16] Appellant presents the further point that "evidence of pecuniary worth of deceased and consequent damage not sufficiently established to justify verdict." The evidence showed that Mr. Dawson's "hearing and eyesight were both good; prior to his death he was in perfect health every way; he was earning \$120 a month at the time of his death. He was a good husband and made a good living, and was always tending to his own affairs"—also that, had he lived for the full term of his life expectancy, he would have earned the sum of \$19,396.80. In such estimate, no account was taken of the loss by plaintiff of the society, comfort, support, and protection which she would have received but for the negligence of the defendant. In the circumstances we think Mr. Dawson's "pecuniary worth" was sufficiently established to justify the verdict in the sum of \$10,000. The rule is established by a host of authorities that a verdict cannot be disturbed on the ground that it is excessive, unless it is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." *Hale v. San Bernardino, etc., Co.*, 156 Cal. 713, 106 P. 83. No such conditions are even suggested by appellant as having been present in the instant case.

[17, 18] Appellant's final attack is based

upon the alleged insufficiency of the evidence to support the judgment. From what heretofore has been stated herein, the jury was warranted in concluding that the defendant was guilty of negligence, and that Mr. Dawson was free from negligence proximately contributing to the happening of the accident. Those are the ultimate essentials in the maintenance of an action of this character. It is clearly outside the province of this court to consider the evidence for the purpose of determining its weight as to any issue in the pleadings, or in whose favor the evidence as a whole preponderated.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

82 Cal. App. 131
MEYERSTEIN v. GREAT AMERICAN INS.
CO. et al. (Civ. 5470.)★

District Court of Appeal, First District, Division 1, California. April 1, 1927.

Hearing Denied by Supreme Court May 26, 1927.

1. Insurance ⇨146(3)—Where language of insurance policies is capable of two interpretations, it is to be construed liberally in favor of insured.

Where the language of an insurance policy may be understood in more senses than one, it is to be construed liberally in favor of the insured, and any ambiguity is to be interpreted most strongly against the insurer.

2. Insurance ⇨163(2)—"Additions," in fire insurance policy, held to cover water tank and laundry not physically connected with principal building.

Where insurance policy covered frame building and additions, the word "additions" was held to include water tank and laundry not physically connected with building except by pipe lines.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Addition.]

3. Insurance ⇨146(1)—Construction of insurance policies is question of what was intended by the parties.

In ascertaining what property is covered by an insurance policy, the intent of the parties will be the decisive question.

4. Insurance ⇨163(2)—Water tank and laundry held to be intended as property covered by word "additions" in insurance policy.

Where insurance policy recited that it covered frame building and additions, including fences, walk, and sidewalks, held that it was the intent of the parties that all the property within inclosure, including water tank and laundry, was to be covered by the word "additions," although not physically connected with the frame building.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Actions by Alfred L. Meyerstein against the Great American Insurance Company and the Phoenix Insurance Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Goodfellow, Ells, Moore & Orrick, of San Francisco, for appellants.

Edwin V. McKenzie, of San Francisco, for respondent.

TYLER, P. J. This is an action to recover a certain sum of money under the terms of two fire insurance policies. The property insured belonged to plaintiff and was used by him as a country home. It was situated at Woodside, San Mateo county, and consisted of several buildings located on a tract of land of some 20 acres. The buildings consisted of a dwelling house, a garage with living rooms on the second floor, which was occupied by female help, and a third building, containing on the first floor a laundry, and on the second two bedrooms and a bath which was used for the male help. Immediately alongside of the house containing the laundry was a wooden tower, 60 feet in height, on which was mounted a 10,000-gallon redwood water tank. The garage and laundry building were entirely separate frame buildings, situated some 70 feet distant from the main dwelling. The tank frame was also an entirely separate structure, and it, too, was some 70 feet distant from such dwelling. The water tank supplied all the buildings with water through pipes. Between the several houses were concrete paths connecting one with the other. The entire premises, including the three buildings and the water tower and tank, were inclosed by a fence marking the entire tract owned by plaintiff. On the 7th day of October, 1918, plaintiff caused the property to be insured by defendant companies. The policies are identical in form, and the printed portion thereof is the California standard form fire insurance policy provided for by statute. Attached to the policies were slips describing the property insured. The coverage clauses in each of the policies, so far as they refer to the buildings, contained the following recitals:

"\$4,000. On the frame building and additions, including equipment, foundations, platforms, porches, * * * and fixtures, belonging to or forming part of the building and additions thereto, and also including * * * walks and sidewalks located on, in, and around the premises. * * * \$250. On frame building occupied as a private garage situate on same premises. * * *"

On each of the policies there appeared in typewriting the following:

"Detached at Woodside, San Mateo, Cal.

"Permission granted to make alterations and repairs to above-described building and to build additions, this policy to cover therein and or thereon according to its respective items.

"This policy shall also extend and apply, under its respective items, to cover all material and supplies in and or about the within described premises to be used in the construction, reconstruction, alteration, and repairing of property mentioned above."

On September 19, 1920, a fire occurred on plaintiff's premises which destroyed the laundry building, tank, and tank frame, but which did no damage to the main dwelling or garage. Proof of loss was made. The insurance carriers denied liability on the ground that the portions of the premises destroyed were not covered by the policies, and this action followed. It will be noticed that while the main dwelling and garage are mentioned in the policies, no specific mention is made of the laundry building or the tank and its frame. It was plaintiff's contention at the trial that the laundry and tank were included in the coverage under the head of "additions" to the main building, and as such they were covered by the language of the policy. The lower court sustained this contention. It found that the loss amounted to the sum of \$5,103. Judgment was accordingly rendered against each of the defendants for one-half of the total loss. It is from such judgment that this appeal is taken. The sole question here presented is, Was it the intention of the parties, by the use of the word "additions" in connection with the main building, to thereby intend to cover the separate laundry building and tank?

Primarily, it may be said that an insurance policy is a contract of indemnity for loss, and, as in the case of construction of contracts, generally the main object, where there is doubt or ambiguity, is to determine in what sense the words employed are used or intended. Words are seldom construed by courts literally, but are adjudged according to the context and the approved usage of language; technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, are to be construed according to such peculiar and appropriate meaning or definition. Code Civ. Proc. § 16. In the case of *Taylor v. Northwestern Nat. Ins. Co.*, 34 Cal. App. 471, 167 P. 899, it is said some flexibility of meaning must be given to the language of standard forms of insurance, the rigid language of which must be interpreted in the light of the common understanding of the parties in order to do justice between them; that the construction of a policy of insurance is to be ascertained from the whole instrument, the nature of the property to which the language of the policy is to be applied, the purposes for which the property is ordinarily to be used and its situation; that policies of insurance should be interpreted most strongly against the insurance carriers because of the fact that they draw the contracts. See, also, *O'Neil v. Cal-edonian*, 166 Cal. 310, 135 P. 1121; *Greer*

Robbins v. Ins. Co., 47 Cal. App. 65, 190 P. 187.

[1] Where, then, the language may be understood in more senses than one, the rule of law is that an insurance policy is to be construed liberally in favor of the insured, and any uncertainty or ambiguity in the contract is to be interpreted most strongly against the insurer. *Northy v. Bankers' Life*, 110 Cal. 547, 42 P. 1079; *Victoria S. S. Co. v. Western Assur. Co.*, 167 Cal. 348, 139 P. 807.

[2] This, of course, does not mean that these rules will authorize a court to disregard the plain and unequivocal terms of the policy, and make a new contract for the parties. The word "additions" may and is often intended to cover structures not physically connected with or attached to the principal building. The adjudicated cases on the subject, where this word has been employed, are numerous, and it has been generally held that, where, as here, the buildings were in existence at the time of the issuance of the policy and were used in connection with the main building, they are included within the meaning of that term. The question is what was intended by the parties to be covered by the policies.

[3, 4] In the coverage clause of the instant case it is recited that the policy covers the frame building and additions, including the fences, walks, and sidewalks, located on and in or around the premises "situate detached at Woodside," and under the clause relating to the insurance on the personal property it is recited that all betterments and additions paid for by the assured and contained in the main building and additions thereto are included in the coverage clause. Permission was also given to make repairs and alterations to the property insured. It seems manifest to us that the clear intent of the parties was to include in the coverage clause all the property within the inclosure. It specifically included the fences and the walks between the houses located on and "around the premises." The tank and its tower was the source of the water supply to the various buildings and was connected by pipe lines to the several houses, and they were part of the premises. As suggested by counsel for respondent, had the tank been located on the roof of the residence proper, there could be no possible question but that it would be included in the policy. Considering the fact that plaintiff was given express authority to make alterations, and the alterations when so made would be covered by the policy, to give to the instruments the construction contended for by appellants would be to render meaningless the word "additions," for there was nothing else of an insurable nature within the inclosure to which it possibly could apply. In our opinion, the case is on all fours with *Taylor v. Northwestern Nat. Ins.*

Co., 34 Cal. App. 471, 167 P. 899. In that case the policy, among other things, provided for insurance on a one-story frame building and additions. There was located on the premises a shed used for storage purposes, which was disconnected from the main building, it being a separate structure. The shed was destroyed by fire, and the contention was there made, as here, that the word "additions" should be construed as intended to cover only such additions to the store building as were structurally connected therewith. The trial court concluded otherwise, and held that the construction contended for would be too narrow a one to be placed upon the language of the policy. The case was affirmed on appeal, this court holding that the shed was an addition to the store, within the meaning of the word "addition" as it was used in the policy. A transfer of this case was denied by the Supreme Court.

We conclude, therefore, that the language employed in the coverage clauses of the policies is general and comprehensive enough to include the property destroyed, and that it was so intended by the parties.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

82 Cal. App. 174

BOOTH v. FRIEDMAN et al. (Civ. 5833.)★

District Court of Appeal, First District, Division 2, California. April 4, 1927.

Hearing Denied by Supreme Court June 2, 1927.

1. Appeal and error ⇨837(11)—Appellate court must consider testimony of plaintiff suing executors of deceased, in absence of objection or motion to strike out such testimony (Code Civ. Proc. § 1880, subd. 3).

Where, in action against executors of deceased to recover on alleged obligation of deceased to pay plaintiff certain moneys, there was no objection or motion to strike out testimony of plaintiff under Code Civ. Proc. § 1880, subd. 3, appellate court must consider it in determining whether finding was supported by evidence.

2. Guaranty ⇨105—Signers on guaranty are liable for proportionate share of obligation assumed, in absence of contrary showing.

Where guaranty was to be signed by three persons, signers are, between themselves, liable for one-third of obligation assumed, in absence of contrary showing.

3. Guaranty ⇨106—Finding that deceased, at time of plaintiff's executing guaranty agreement, obligated himself to pay one-third thereof, held supported by evidence.

Finding, in action against executors of deceased on alleged obligation of deceased to pay proportionate share of guaranty paid by plaintiff, to effect that deceased at time of ex-

execution of guaranty agreement by plaintiff agreed that he would be obligated for one-third thereof, *held* supported by evidence.

4. Guaranty $\Leftrightarrow$ 105—Joint guarantor on paying obligation has cause of action to require others to contribute (Civ. Code, § 1432).

Under Civ. Code, § 1432, whenever one of joint guarantors pays obligation of guaranty, cause of action requiring others to contribute arises.

5. Trial $\Leftrightarrow$ 404(1)—Finding, if possible, should be construed to give judgment force and effect.

Finding should be so construed, if possible, so as to give judgment force and effect, and not to overthrow it.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by F. E. Booth against Helen E. Friedman, as executrix, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Byrne & Lamson, of San Francisco, for appellants.

J. H. Morris, of San Francisco, for respondent.

STURTEVANT, J. Claiming that M. S. Eisner, deceased, was at the time of his death under obligation to pay the plaintiff certain moneys, the plaintiff commenced this action against the defendants as executors of the estate of the deceased. The trial court made findings in favor of the plaintiff, and a judgment in accordance with those findings was entered. From that judgment the defendants have appealed and have brought up a bill of exceptions. On the appeal the appellants attack certain findings as not being supported by the evidence. Before taking up a consideration of those attacks it is necessary to recite some of the facts.

Prior to the year 1920 the Novelty Products Company, a corporation, had been engaged in the manufacture of toys. It had a paid-up capital of \$100,000. B. D. M. Greene was president and manager. Under his solicitation \$2,500 of the stock was sold to M. S. Eisner, deceased, and \$2,500 was sold to F. E. Booth and \$2,500 was sold to H. G. Maxson. B. D. M. Greene was the holder of \$45,000, and other stockholders each held \$2,500, more or less, making in all about 25 stockholders. In January, 1920, the Novelty Products Company owed the Bank of Italy on certain promissory notes. The bank was asking for security. On that date, after certain conversations held, F. E. Booth, M. S. Eisner, and B. D. M. Greene signed a written guaranty in the sum of \$10,000 in which they recited:

"We hereby promise and agree to pay to you at any time upon demand, in United States gold coin, the full amount of principal and in-

terest due to you from said the Novelty Products Company at the time of said demand, not exceeding the sum of \$10,000."

On March 14, 1920, F. E. Booth was in Europe, and a similar paper in the sum of \$5,000 was signed by M. S. Eisner and B. D. M. Greene. On May 17, 1920, under similar circumstances, the latter two signed another guaranty in the sum of \$3,000. Later, when F. E. Booth had returned, the bank asked that it be given one guaranty and that the others be taken up. On November 12, 1920, a document identical in form, but in the principal sum of \$18,000, was signed by F. E. Booth alone and was delivered to the bank, and thereupon the bank surrendered the three guaranties for \$10,000, \$5,000, and \$3,000, respectively. Thereafter F. E. Booth was compelled to pay the bank. Having paid the bank, he made his claim to the executors to be reimbursed to the extent of one-third of the amount so paid by him. The claim was rejected, and thereupon he brought this suit, and in his complaint he pleaded his cause of action in accordance with the claim theretofore presented by him.

Whenever the bank asked for a guaranty, B. D. M. Greene communicated the request to the decedent. In turn, the decedent acted alone or took the matter up with F. E. Booth and later communicated with B. D. M. Greene. Each of the first three guaranties was on the printed form of the Bank of Italy; each was in duplicate; when B. D. M. Greene received them he signed one copy only and delivered both copies into the hands of M. S. Eisner; and when M. S. Eisner or F. E. Booth, or both, had signed, the signed copy was returned to B. D. M. Greene and he delivered it to the bank. All of these steps were taken as to the one sued on except this—the record shows that B. D. M. Greene never saw either copy after he delivered them to M. S. Eisner. It does not show who delivered it to the Bank of Italy. Although B. D. M. Greene was the principal witness of the plaintiff, he testified that he could not account for his signature not being on the guaranty dated November 12, 1920. There was no evidence explaining its absence. There was no evidence, oral or written, accounting for the absence of M. S. Eisner's name from the same document except the testimony of F. E. Booth hereinafter set forth.

The appellants claim that the sixth finding is not supported by the evidence. That finding is as follows:

"That at the time of the execution of said \$18,000 guaranty agreement and thereafter, and in consideration of the execution thereof by said F. E. Booth, as aforesaid, the said Milton S. Eisner agreed and acknowledged that he was responsible for, and would pay to, F. E. Booth, one-third of any amount which the said F. E. Booth might be obliged to and did at

any time actually pay to the said Bank of Italy by virtue of and because of the execution of said \$18,000 guaranty agreement by the said F. E. Booth, and that said Milton S. Eisner would pay to the said F. E. Booth said one-third of such amount whenever and at such time as the said F. E. Booth paid to the Bank of Italy such sums as the said F. E. Booth became liable for to the said bank because of said \$18,000 guaranty agreement."

The appellants claim there is no testimony in the record to the effect that the deceased promised to pay one-third of the amount paid to the bank by F. E. Booth, that there is no testimony in the record that the deceased authorized F. E. Booth to make any payment to the bank, and that there is no testimony in the record that the deceased would repay F. E. Booth "whenever and at such time as" F. E. Booth might pay the bank.

Before proceeding further it should be stated that the F. E. Booth Company had on its books an account of other transactions and of moneys loaned by it to the Novelty Products Company, but none of those matters comes within the scope of this litigation. However, some of the conversations held between the decedent and representatives of the F. E. Booth Company were concerned with the book account and not with the guaranties held by the bank.

When the plaintiff was introducing its case in chief it called F. E. Booth as a witness. The defendants interposed an objection to his testimony. Code Civ. Proc. § 1880, subd. 3. The objection was sustained, and the witness withdrew.

Between the time that the first guaranty was signed and his death, the decedent held conversations from time to time with B. D. M. Greene, James G. Jessie, secretary of the F. E. Booth Company, and H. G. Maxson, assistant general manager of the F. E. Booth Company. The last two took the stand and testified to certain admissions made by the decedent. Some of those admissions tended to support the case of the plaintiff. When the plaintiff rested the defendants called certain witnesses and offered proof of statements made by F. E. Booth and by some of his witnesses inconsistent with the theory of the plaintiff's case. In rebuttal F. E. Booth took the stand and testified as to his recollection as to the connection in which those inconsistent statements were made by him. Among other things in his direct examination, he testified:

"I don't know whether it was that particular day or at a subsequent meeting, but I told them why this \$18,000 note was signed, and I told them further that Eisner had asked me, in view of the fact that I owned twice as much stock as he did, and in view of the further fact that he didn't want to entangle his financial affairs—he had had some difficulty, he told me, and I told them, with some sheep business and one thing and another—and he asked me as a favor

if I would not let his name be off of that note, but that he assured me on his word that this responsibility would not be rubbed out; that it would remain just the same as if his name was on that. All this I explained to young Milton and to Mr. Friedman."

The defendants made no objection and made no motion to strike out, but proceeded to cross-examine the witness. On cross-examination, among other things, the witness testified:

"At the first one I did not realize that Eisner's name was not on that paper. Had I known that at the time there would not have been any doubt in my mind. Subsequently I recalled that Eisner had requested his name to be left off for the reason that I have given. I had not recalled it up to that time. Subsequently I remembered that Eisner's name was not on that note, and that he had asked me as a favor and explained the reason."

[1, 2] As there was no objection to or motion to strike out the foregoing testimony, we must consider it. *Kinley v. Largent*, 187 Cal. 71, 200 P. 937. The foregoing evidence shows that from the beginning each guaranty was to be signed by three. Nothing to the contrary appearing, the signers, as between themselves, would be liable for one-third of the obligation assumed. *Bunker v. Osborn*, 132 Cal. 480, 482, 64 P. 853. When the bank asked for one guaranty in the place of the first three, B. D. M. Greene signed it and delivered the document into the hands of M. S. Eisner for the signatures of M. S. Eisner and F. E. Booth. Nothing was said by any one showing that B. D. M. Greene was to be released from liability. Nothing was said to the effect that the liability of M. S. Eisner would be increased or decreased, but it was said that it would remain the same as if his name was on the new guaranty dated November 12, 1920. It cannot be claimed, therefore, that there was no evidence that the liability of the decedent was not fixed at one-third.

Under all of the facts it is patent that, upon the demand of the bank, F. E. Booth was bound to pay the bank. As his name was the only name on the guaranty, he was the sole maker. When he requested that his name be left off, M. S. Eisner impliedly waived his right to participate in settling the account with the bank, and at the same time he expressly promised to respond to his portion of the amounts so paid by F. E. Booth to the bank.

[3, 4] The uncontroverted evidence was to the effect that M. S. Eisner agreed to bear his burden and that the same should be the same as if his name was on the guaranty dated November 12, 1920. If his name had been on it, it is clear, as we have shown above, that he would have been liable to the extent of one-third. Whenever one of the joint guarantors paid, he would have at once a cause of action against the others requiring

the others to contribute. Civ. Code, § 1432. The respondent by his pleading claimed no additional or modified liability on the part of the decedent. It may be conceded that there was no direct evidence that F. E. Booth was to be repaid at the time he made his payment. It must also be conceded that there was no direct evidence to the contrary. The respondent's pleading, and the findings made in response thereto, but followed the time of repayment which the law implied. We cannot say the findings were not supported by the evidence on this particular matter.

[5] The appellants claim that neither the findings nor the judgment are supported by the pleadings, and the findings do not support the judgment. They call attention to paragraph 5 of the complaint and to paragraph 6 of the findings, and they claim the latter is narrower than the former. That is true, but if we look at other findings we discover that there is a finding responsive to every allegation contained in the complaint. In this same connection the appellants assert that the agreement as set forth in the findings may be so construed as to bring it within the statute of frauds. That is possible, but the rule is well settled that findings should be so construed, if possible, as to give the judgment force and effect, not to overthrow it. *Breeze v. Brooks*, 97 Cal. 72, 77, 31 P. 742, 22 L. R. A. 257. Following that rule, we have no trouble in saying that the point made by the appellants is not well founded.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

82 Cal. App. 109

BOSS v. SILENT DRAMA SYNDICATE et al.
(Civ. 4574.)

District Court of Appeal, Second District, Division 1, California. March 30, 1927.

1. Licenses ⚡39—Trustee's sale of shares in common-law trust without permit is void (Corporate Securities Act, §§ 12, 14).

Under Corporate Securities Act (St. 1917, pp. 679, 680), §§ 12, 14, trustee's sale of unit shares in common-law trust company without permit from corporation commissioner is void.

2. Contracts ⚡107—Generally, act penalized by statute is void.

Generally, act for doing of which statute prohibits or attaches a penalty is void.

3. Licenses ⚡39—Trust syndicate and officers issuing share certificates without permit are responsible to good-faith purchasers, though syndicate acted through mistake (Corporate Securities Act, § 12).

Not only trust syndicate exceeding its power in issuing certificate for shares without permit required by Corporate Securities Act (St.

1917, p. 679), § 12, but officers issuing them, are legally responsible to purchasers in good faith for implied representation that certificate is genuine, though syndicate's act be done through mistake without fraudulent intent.

4. Licenses ⚡39—Issuance of certificate for shares in trust syndicate without permit, in reliance on corporation commissioner's statement that none was necessary, and offer to issue valid certificate on securing permit after purchaser commenced action for fraud, held not available defenses (Corporate Securities Act, § 12).

Neither fact that certificate for shares was issued in good faith by trust syndicate, without permit required by Corporate Securities Act (St. 1917, p. 679), § 12, in reliance on corporation commissioner's statement that no permit was necessary, nor fact that it secured permit several months after purchaser commenced action for damages and by amended answer offered to issue valid certificate, is available defense; especially in absence of showing that such certificate was worth amount of plaintiff's investment.

5. Licenses ⚡39—Trust syndicate cannot affirm or ratify issuance of share certificate without permit (Corporate Securities Act, § 12).

Issuance of certificate for shares in trust syndicate without permit being void under Corporate Securities Act (St. 1917, p. 679), § 12, was incapable of later affirmation or ratification by syndicate.

6. Licenses ⚡39—Evidence held to support judgment for purchaser, suing trust syndicate and owner of shares purchased for fraud in issuing certificate therefor without permit (Corporate Securities Act, § 12).

Evidence that plaintiff paid owner \$500 cash for shares in trust syndicate without notice or knowledge that certificate therefor was void because issued without permit required by Corporate Securities Act (St. 1917, p. 679), § 12, and relied on genuineness thereof to his damage, held sufficient to support judgment for plaintiff, in action against owner and syndicate for fraud, as against contention that plaintiff relied solely on owner's representations.

7. Licenses ⚡39—Purchaser of shares in trust syndicate for cash at par held to have relied on validity of certificate issued without permit (Corporate Securities Act).

One purchasing shares in trust syndicate for cash at par value held to have relied on validity and genuineness of certificate therefor, and hence entitled to recover damages for fraud in issuing certificate without permit required by Corporate Securities Act (St. 1917, p. 673).

8. Licenses ⚡39—Statement on certificate that shares in trust syndicate were issued pursuant to trust agreement did not place purchaser on notice of issuance without permit (Corporate Securities Act).

Statement on face of certificate for shares in trust syndicate that they were issued pursuant to conditions in trust agreement did not place purchaser on notice that certificate was issued without permit from corporation com-

missioner under Corporate Securities Act (St. 1917, p. 673); being merely implied representation that certificate was genuine and that syndicate had right to issue it.

9. Licenses $\hookrightarrow$ 39—Purchaser of shares certificate issued without permit acquired no beneficial interest in trust syndicate and was damaged by payment therefor (Corporate Securities Act).

Purchaser of shares in trust syndicate, issuing certificate therefor without permit required by Corporate Securities Act (St. 1917, p. 673), acquired no beneficial interest in syndicate, and was damaged by payment of money without consideration in reliance on implied false representation of certificate's genuineness; sale being absolute nullity.

10. Damages $\hookrightarrow$ 69—One recovering damages for issuance of certificate for shares in trust syndicate without permit held entitled to interest from day of issuance (Civ. Code, § 3287; Corporate Securities Act).

Under Civ. Code, § 3287, purchaser of shares in trust syndicate issuing certificate therefor without permit required by Corporate Securities Act (St. 1917 p. 673), was entitled to interest on amount of damages recovered from day that certificate was issued.

Appeal from Superior Court, Los Angeles County; Victor R. McClucas, Judge.

Action by Otto J. Boss against the Silent Drama Syndicate, an unincorporated association, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Neil S. McCarthy, of Los Angeles, for appellants.

Harry K. Sargent, of Los Angeles, for respondent.

HOUSER, J. At the time when the cause of action herein accrued the defendant Silent Drama Syndicate was an unincorporated association operating by virtue of a trust agreement under which defendants Graydon and Brown were its trustees. The business or property of the syndicate was divided into shares of the par value of \$100 each, of which one Keady was the owner of 220 shares evidenced by a certificate of stock to that effect. For the sum of \$500 in cash paid to him by Otto J. Boss (the plaintiff herein), Keady sold to Boss 5 shares of such syndicate; and thereupon Keady surrendered his certificate of 220 shares to the defendant Silent Drama Syndicate, which association, in lieu of said 220 shares, issued a certificate of stock to plaintiff for 5 shares and a second certificate to Keady for 215 shares. Approximately 16 months thereafter plaintiff brought an action against all of said defendants for damages to him arising out of the fraud and deceit of said defendants in issuing the said certificates of stock. From a judgment rendered in favor of plaintiff, defendants appeal.

[1] It is admitted by appellants that at

the time of issuing the certificate of stock to plaintiff no permit had been issued by the commissioner of corporations of this state by which the Silent Drama Syndicate was authorized to sell, offer for sale, negotiate, or issue any certificate of the said syndicate as provided by the Corporate Securities Act (Stats. 1917, p. 673).

In the case entitled *In re Girard*, 186 Cal. 719, 200 P. 593, the facts with reference to the association therein involved were similar to those herein. It was held (syllabus) that:

"A sale by trustees, without a permit from the corporation commissioner, of unit shares or unit interests in a common-law trust company organized in pursuance of a declaration of trust executed between the trustees, is a violation of the Corporate Securities Act."

Section 12 of the Corporate Securities Act provides that:

"Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void. * * *"

And by section 14 of the same act a penalty is prescribed as to "every officer, agent, or employee of any company, and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner. * * *"

[2] Furthermore, as is stated in the case of *Smith v. Bach*, 183 Cal. 259, 191 P. 14, "the general rule * * * is that where a statute prohibits, or attaches a penalty to, the doing of an act, the act is void." See, also, *Domenigoni v. Imperial Live Stock & Mortgage Co.*, 189 Cal. 467, 209 P. 36.

[3] While, as suggested by appellants, much authority is available to the point that in an action for deceit, intentional fraud, rather than constructive fraud, is a necessary element to the maintenance of an action, nevertheless, with reference to the act by a corporation acting in excess of its powers in issuing certificates of stock, it appears to be well-established law that not only the corporation, but as well its officers so issuing such stock, are legally responsible therefor to purchasers in good faith, even though the act by the corporation be done through mistake and without any fraudulent intent. 5 *Fletcher's Encyc. Corporations*, § 3493; 1 *Cook on Corporations* (6th Ed.) § 292; 14 *Cor. Jur.* p. 468.

In the case of *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 P. 950, it appeared that the secretary of a corporation fraudulently issued a certificate of stock therein to himself and that the vice president of the corporation, acting in the absence of the president thereof, negligently affixed his signa-

ture to such certificate; that the certificate also bore the official seal of the corporation; that about two months after such certificate had been issued the secretary borrowed a sum of money from Green (the plaintiff) for which the secretary gave his promissory note to Green and pledged said certificate of stock as security for the payment of said note. It was held that the corporation was liable. In discussing the matter and in commenting upon a case theretofore decided by the Supreme Court of the state of Washington, the court said, in part:

"Furthermore, we think the Washington court mistook the basis of the liability of the corporation for fraudulently issued stock. It does not arise from anything that occurs in the making of a subsequent transfer. It comes from the false issue itself, which is the act of the corporation officers within the apparent scope of their authority, which, in effect is a representation by the corporation itself to the purchaser from the original holder that the false stock is genuine. * * *

[4, 5] In principle, we can see no difference between the case last cited and the instant case. In the Green Case, money was loaned in good faith on a false representation by the corporation issuing the stock; and in the instant case, instead of a loan being made on the stock, it was purchased outright on what in law amounted to a false representation. In the one case, the lender of the money had a right to rely upon the implied representation made by the corporation that the certificate of stock was genuine; and in the instant case, the plaintiff had a similar right not only as to the original certificate for 220 shares standing in the name of Keady, but as well in the new certificate issued by the association to plaintiff. We are of the opinion that neither the fact that the certificate was issued in good faith by the association and in reliance upon a statement made by the corporation commissioner to the effect that no permit was necessary to enable the association to issue such stock, nor the fact that several months after the action was commenced by plaintiff the Silent Drama Syndicate secured from the corporation commissioner the necessary permit and thereupon, by amended answer to the complaint, offered to issue to plaintiff a valid certificate for the 5 shares which he had purchased, is available to the defendants as a defense to plaintiff's cause of action. As declared in numerous cases cited in each of the several authorities heretofore noted herein, the question of good faith by a corporation in issuing what in law is a void certificate of stock is wholly immaterial; and the offer by the corporation of reimbursement to plaintiff by issuing a new certificate to him (especially in the absence of a showing that such corporate certificate was at least equal in value to the amount of

plaintiff's investment) would also be unavailing as a defense. The cause of action had accrued to plaintiff long before any attempt was made by the association to obtain the permit necessary to enable it to legally issue its certificate of stock. Besides, the original act having been void, it was incapable of later affirmance or ratification by the association. In addition thereto, it is clear that between the date when the certificate of stock was originally issued and the date of its offer to plaintiff to reissue to him a valid certificate, the association had no right to speculate on whether the value of its stock would remain stationary or whether it would increase or decrease. While it may be assumed that when plaintiff purchased the stock it was worth its face value, there is no evidence upon which a conclusion could rightly be based that at the time the defendants offered to reissue to plaintiff a valid certificate of stock in lieu of the void certificate, the stock was worth par, or, indeed, had any value whatsoever.

[6] It is also urged by appellants that in purchasing the stock in question plaintiff did not rely upon the representations made by the association, but relied solely upon representations made to him by Mr. Keady. With reference to the facts, the finding by the trial court was that:

"Plaintiff paid to one L. Y. Keady \$500 in cash for said certificate in good faith and without any notice or knowledge that the said certificate was illegal and void and believed and relied upon the genuineness thereof to his damage."

It thus appears that the evidence was sufficient to support the conclusion reached thereon by the trial court.

[7] Appellants advance the further contention that in purchasing the certificate of stock plaintiff did not rely upon its validity and genuineness. But it is manifest that to attribute such a state of mind to the purchaser of stock in a corporation would import to him a mentality bordering on imbecility. It would seem incredible that anyone in his right mind would buy stock in a corporation or an association of the character of the defendant syndicate if even a suggestion were present regarding the validity or genuineness of the certificate representing the shares of stock which he was about to purchase. Had plaintiff exchanged some "wild-cat" mining stock or other commodity of equally doubtful value for the certificate in question, the transaction might have afforded some basis for appellants' criticism. But in view of the fact that plaintiff's purchase was for real money, and that, far from buying the stock at a discount, he paid par value for it, little if any doubt can exist as to the estimate which plaintiff placed upon the genuineness and validity of the certificate of stock purchased by him.

[8] Furthermore, it is claimed by appel-

lants that because on the face of the certificate there appeared a statement to the effect that the shares represented thereby were issued pursuant to the conditions contained in the trust agreement and declaration of trust, the purchaser was placed on notice and required to make an independent investigation. But the difficulty with such a conclusion is that both by statute and by judicial declaration the certificate was void. It is manifest that, so far as the purchaser was concerned, such a statement represented nothing other than an implied representation on the part of the association that the certificate was genuine and that the association had the right to issue it. In other words, the language of the "notice" conveyed to the mind of the purchaser the fact that in accordance with the powers vested in the trustees by the provisions of the trust agreement, the trustees were issuing certificates of shares or units in the trust property as evidence of the ownership therein of the respective holders of such certificates; but which from a legal standpoint, without the necessary permit from the corporation commissioner so to do, was an act forbidden by law and consequently was of no validity.

[9] Appellants advance the further point that plaintiff is the equitable owner of an undivided beneficial interest in the trust estate which he contracted to purchase from Keady, and that he has not been damaged by reason of the premises.

But it is difficult, if possible, to understand how any beneficial interest in the association could have been transferred to plaintiff by virtue of a transaction which was void not only by the provisions of the statute, but as well by judicial determination, as hereinbefore set forth. If equitable interests in unincorporated associations could be sold and transferred without the neces-

sity of complying with the provisions of the statute, the entire purpose of the statute would be rendered nugatory and of no effect. If any meaning is to be credited to the language of the statute regarding the invalidity of attempted sales of "securities" of such an association without first having obtained from the corporation commissioner the necessary permit to make the same, it must be that such language carries the significance that any such act is an absolute nullity and consequently transfers no rights, nor incurs any obligations or duties so far as the person is concerned to whom such attempted sale is made. Without any consideration moving to him, plaintiff was induced to and did pay his money on what in law was a false representation upon which he relied. His damage follows as a matter of course.

[10] It is finally urged by appellants that plaintiff should not have been allowed interest on his claim prior to judgment. Section 3287 of the Civil Code, in part provides that:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. * * *"

It is clear that plaintiff's "right to recover * * * vested in him upon a particular day," to wit, on the same day that the purported certificate of stock was issued to him; hence his right to interest from such day is controlled by statute. On principle, to the same effect, see *Tome v. Parkersburg R. R. Co.*, 39 Md. 36, 17 Am. Rep. 540; *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

No prejudicial error appearing, the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

82 Cal. App. 88

(255 P.)

**HARRIS v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.
(Civ. 5597.)**

District Court of Appeal, Second District, Division 1, California. March 28, 1927.

1. Prohibition ☞23—Order denying motion to transfer trial for judge's prejudice, which was denied, held conclusive in prohibition proceedings.

Where, in reply to motion and affidavit for order transferring trial on account of prejudice of judge, judge filed counter affidavit denying all material facts set forth, court would not review order denying motion in prohibition proceedings.

2. Records ☞7—Affidavit held "filed," where turned over to file clerk before hearing, though register failed to disclose filing.

Where department clerk marked fully executed affidavit "filed" and delivered it to file clerk in customary manner before hearing of motion, affidavit held filed, though register of actions failed to disclose filing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, File.]

Application by Jay Butler Harris for writ of prohibition, to be directed to the Superior Court in and for the County of Los Angeles, Hugh J. Crawford, Judge, to prevent respondent from hearing and determining a certain cause pending before it. Writ discharged.

Haas & Dunnigan, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Ray C. McAllaster, Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, J. This proceeding is founded upon an alleged "prejudice and bias" of Hon. Hugh J. Crawford as judge of the superior court in and for the county of Los Angeles against petitioner, which, if established, would prevent petitioner from having a fair and impartial trial in an action now pending in said court.

Prior to the filing of the petition herein petitioner, as plaintiff in the action, made and presented his motion therein for "an order transferring the trial * * * to a judge * * * other than Hon. Hugh J. Crawford. * * *" The grounds specified in the notice of motion were the prejudice and bias of said judge which, as alleged, would result as hereinbefore indicated. The motion was supported by an affidavit which specified the particular facts from which it was claimed by the plaintiff that the prejudice of the said judge against him would appear and legally follow. In reply to such affidavit Judge Crawford made and filed his counter affidavit, in which, in force and effect, he completely and specifically denied each of the material facts set

forth in the affidavit presented by the plaintiff, and, in addition thereto, alleged that "he has never had, nor does he now have, any feeling of animosity toward said plaintiff and never has had and does not now have any prejudice or bias or dislike or contempt against and concerning the said plaintiff, and alleges that he is qualified in all respects to act as presiding judge over the trial of this action, and that the said plaintiff has had and will continue to have a fair and impartial trial and hearing herein before affiant."

On the hearing of the motion it was denied.

[1] The law relating to such a condition as is hereinbefore set forth is clearly stated in the syllabus in the case of *Estudillo v. Security Loan & Trust Co.*, 158 Cal. 66, 109 P. 884, as follows:

"An order refusing a change of venue, requested on the ground of the alleged bias and prejudice of the trial judge, will not be reviewed on appeal, when the statements contained in the moving affidavits tending to show bias are fully met by counter affidavits. Under such circumstances, the finding of the trial judge, on the question of his own disqualification, is conclusive on appeal."

To the same effect are *Swan v. Talbot*, 152 Cal. 142, 94 P. 238, 17 L. R. A. (N. S.) 1066; *McEwen v. Occidental Life Ins. Co.*, 172 Cal. 6, 155 P. 86; *Estate of Kasson*, 141 Cal. 33, 74 P. 436; *People v. Rodley*, 131 Cal. 240, 63 P. 351; *People v. Phillips*, 30 Cal. App. 31, 157 P. 1003, 1005.

It therefore appears that the conclusion reached by Judge Crawford as to whether he was either prejudiced against the plaintiff or biased in favor of the defendant in the action before him is conclusive in the present proceeding.

[2] The question is also incidentally presented regarding the status of the filing of Judge Crawford's affidavit with the clerk of the court. The register of actions fails to disclose that such affidavit was ever filed. However, the affidavit filed herein by one of the department clerks of the superior court is to the effect that, prior to the hearing of the motion to which reference has been had, Judge Crawford subscribed and swore to the affidavit in question before said clerk and directed him to file the affidavit in the action to which it referred, and that thereafter and on the same day the clerk marked the affidavit "filed," and delivered the same to the file clerk of the county clerk of the county of Los Angeles, state of California, in the manner usually and customarily employed by deputies by said office assigned to the several departments of said superior court."

Respecting such a situation, in the matter entitled *Estate of Sankey* (Cal. Sup.) 249 P. 517, 519, it is said:

"The actual indorsement of the instrument is not a necessary part of the filing, but is mere

evidence of that fact. An officer is presumed to have performed his duty, and one may not be prejudiced by the mere failure of an officer to perform his ministerial duty. When the instrument is deposited with the proper officer, at the proper place for the purpose of filing, in contemplation of law it is deemed to have been filed. *Edwards v. Grand*, 121 Cal. 255, 53 P. 796; *Smith v. Biscailuz*, 83 Cal. 344, 21 P. 15, 23 P. 314; *Estate of Carroll*, 190 Cal. 105, 111, 210 P. 817; 3 Words and Phrases, First Series, p. 2768."

The point advanced by petitioner, therefore, that the counter affidavit of Judge Crawford was never filed, is not tenable.

On the hearing of the petition for the writ herein a demurrer thereto was presented by respondents on the specified ground of its ambiguity; also that the petition as a whole failed to state facts sufficient to show any cause for the granting of the writ of prohibition. The demurrer is overruled.

As it is apparent that petitioner is not entitled to the relief for which he prayed in his petition, it is ordered that the writ be and it is discharged.

We concur: CONREY, P. J.; YORK, J.

DOUGLAS v. SOUTHERN PAC. CO. ★

WHITE v. SAME.

(Civ. 4402.)

(District Court of Appeal, Second District. Division 2, California. March 29, 1927. Hearing Granted by Supreme Court May 26, 1927.)

1. Railroads — 398(1)—Evidence held to justify recovery for injuries to persons on pile of ties struck by car.

In action against railroad for injuries and death, alleged to have resulted when some part of car being switched struck pile of ties on which plaintiff and decedent were sitting, evidence held sufficient to justify recovery.

2. Appeal and error — 1170(9)—Instruction, authorizing recovery for injuries if employees operated train negligently, held prejudicial as inconsistent with other instructions (Const. art. 6, § 4½).

In action against railroad for injuries and death, alleged to have resulted when some part of car being switched struck pile of ties on which plaintiff and decedent were sitting, instruction, authorizing recovery if injuries were caused by negligence of employees operating train, held prejudicial, within Const. art. 6, § 4½, as inconsistent with other instructions on subject of contributory negligence.

Appeal from Superior Court, Los Angeles County; Chas. S. Burnell, Judge.

Separate actions by Louise Marie Douglas, as administratrix of the estate of Dean Che-

ney Douglas, and by S. I. White against the Southern Pacific Company. On death of S. I. White, Jennie H. White, as his administratrix, was substituted as party plaintiff. Judgments for plaintiffs, and defendant appeals. Reversed.

W. I. Gilbert, of Los Angeles, for appellant.

Eugene C. Campbell, of Long Beach, for respondents.

THOMPSON, J. On May 7, 1921, the defendant and appellant was switching a steel gondola-type car at the Los Angeles harbor, when some part of the car struck a pile of ties which were stacked alongside of the tracks and upon which Dean Cheney Douglas and the original plaintiff, S. I. White, were sitting, and resulting in the death of Douglas and the injury of White. The exact cause of the accident is very much in doubt. There was testimony, which was also positively denied, that a piece of iron extended out from the side of the car a couple of feet and that the whole pile of ties was knocked out of place about 1 foot. There is other testimony that, which the ties were of the same length and stacked so as to clear the edge of the car by 6 or 8 inches, one of them, about 15 minutes prior to the accident, was observed to be shorter than the others as the witness saw it from the end away from the tracks. This would authorize the inference under the circumstances, especially as several witnesses testified that only one tie had been knocked off the pile, that it had been pushed over and protruded sufficiently far to be struck. The engine and car were traveling, according to the prevailing testimony, under 6 miles an hour, although one witness testified that he had told plaintiff's counsel that they were running between 20 and 25 miles an hour. The lookout was not on the forward end of the car, but on the rear of the gondola near the top, from which point he claimed vantage in ability to see.

Under these circumstances, action was commenced to recover damages for the death of Douglas by the administratrix of his estate, and by White to recover damages for the injury suffered by him. The actions were tried together, and the jury returned a verdict in the action brought by the administratrix in the sum of \$5,000 and in favor of White in the sum of \$4,500. The defendant appealed from the judgments entered on the verdict, and by stipulation a single bill of exceptions is filed for use in the consideration of both causes. Since the appeals were taken S. I. White has died, and Jennie H. White, as administratrix of his estate, has been substituted as plaintiff.

[1] The appellant complains that the evidence is insufficient to support the verdicts, and in support of this contention recites a

stipulation that the defendant had no control of the platform upon which the ties were piled or over the ties, but that the platform was under lease to the Banning Company, a stranger to the defendant, hence that the defendant was only charged with operating its cars over and along the tracks with ordinary care. Aside from the fact that the jury were entitled to say from the evidence already recited that the crew in charge of this car failed to use ordinary care if they failed to observe a protruding tie, there was the other evidence of a piece of iron which stuck out 2 feet from the side of the car, which would also be sufficient to justify the verdicts.

[2] However, there is a much more serious question raised by appellant with respect to the instructions. The judge gave the following instruction:

"It is admitted by defendant in this case that A. J. Beck, E. L. Carr, G. J. Clouth, D. Frazer, and Leslie Straight were employees of defendant and were acting within the scope of their employment at the time of the accident. If you should find that the injury to one plaintiff and the death of the other were caused by the negligence of these employees, or either of them, while operating defendant's engine and car, at the time of or immediately prior to the accident, your verdict should be for plaintiffs and against the defendant, since an employer is bound by the acts of his employee while acting within the scope of their employment, and their negligence is, in law, deemed to be the employer's negligence."

It will be noted that the jury was directed to return a verdict for the plaintiffs and against the defendant, in the event they found that the death and the injury were caused by the negligence of either of the employees. The appellant claims that the instruction is inconsistent with other instructions given by the trial judge on the subject of a pleaded defense—contributory negligence. These other instructions properly told the jury that, if White and Douglas did not use ordinary care for their own protection and such negligence contributed to their injuries, they should find for defendant, regardless of defendant's negligence. The respondents assert that there was not sufficient evidence to warrant the jury in saying that there was contributory negligence, and, further, that the instructions should be read as a whole and the inaccuracies of one cured by the others. There was sufficient testimony to justify the jury in saying that the negligence of plaintiff in the one case and the negligence of the deceased in the other had contributed to the injury and the death, respectively. They were sitting on the ties in a position to observe whether they were in danger by reason of a tie being out of position, or even to observe the iron extending from the side of the car, had they directed their attention to it. Many times previously they had been on the ties, knew their proximity to the tracks, and that the tracks were being used for the

purpose of switching. The jury should have passed upon this question, whether they did or not.

There appears to be some uncertainty in the adjudicated cases upon the question as to whether an instruction such as the one given in this case is cured by instructions covering the omitted condition. There is, in fact, no occasion for uncertainty or confusion concerning the principle involved. If we mentally situate ourselves in the place of a juror—on the receiving instead of the delivery end of the battery—and assume that we know no law other than that expressed in the instructions, the question may be resolved by asking ourselves whether the subsequent instructions harmonize and elucidate the inaccuracies in a previous instruction, or whether they conflict with or create confusion in our minds. In the former case, the error is cured; in the latter case, the error is not cured.

We have examined all of the authorities cited by respondents. Many of them do not direct a verdict under conditions specified, but merely fail to state all the law applicable to the subject. In these instances, of course, the instructions supplement each other and must be read together. Those authorities do not call for further analysis here. We do direct attention, however, to the case of *Parkin v. Grayson Owen Co.*, 157 Cal. 41, 49, 106 P. 210, 214, in which this language is used to point the distinction:

"It is true that instructions are to be read and considered as a whole, but there is no room here for the application of the principle stated in *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, 34 P. 618, 36 P. 407, and other cases, that 'the fact that when taken separately some of them may fail to enumerate in precise terms and with legal accuracy propositions of law does not necessarily render them erroneous; but it is sufficient if all the instructions taken together, and not being *inconsistent with each other or confusing*, shall give to the jury a fair and just notion of the law upon the point discussed.' The said instructions are *inconsistent and confusing*. The direction that a violation of the ordinance follows from the determination of one fact by necessary implication *excludes* the consideration of *other facts and circumstances*.'" (Italics ours.)

The case from which we have quoted involved a determination of whether a team of horses had been hitched pursuant to an ordinance, and one instruction in effect told the jury that if one of the horses was not hitched it was in violation of the ordinance, and in two subsequent instructions the judge properly directed the jury that they should take into consideration all of the facts and circumstances to determine whether or not the team was hitched.

The case of *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, 34 P. 618, 36 P. 407, appears at first reading to be quite in point that,

where the jury is told to return a verdict for plaintiff and the instruction omits proper reference to the plea of contributory negligence, it may be cured by subsequent instructions covering that subject. The first-quoted instruction in that opinion says:

"If the jury believe from the evidence that the defendant was guilty of negligence as charged in the complaint, and that the plaintiff was injured thereby, your verdict should be for the plaintiff. * * *"

The next instruction informed the jury "that, in *determining the question of negligence* in this case," they should take into consideration whether plaintiff used "ordinary care and prudence in the situation in which she found herself placed." (Italics ours.) In other words, the court immediately defined its use of the word "negligence" in the first instruction, and limited it by saying that in order for it to be the cause of the injury it must be freed of contributory negligence on the part of plaintiff. The opinion therefore does not present as clear a case of inconsistent and confusing instructions as first appears, and justifies the language used by the court therein, that "It is sufficient if all of the instructions taken together," are not "inconsistent with each other or confusing."

The case of *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 P. 287, is determined on the authority of *Stephenson v. Southern Pacific Co.*, supra, and *Anderson v. Seropian*, 147 Cal. 201, 81 P. 521. The last-named precedent, however, should not be considered as bearing directly upon the question herein involved for the reason that it simply states the rule that:

"If it appears therefrom that the jury were fairly and fully instructed on all the law applicable to the facts in the case, the judgment will not be reversed simply because the particular instructions, taken alone, may not have embodied all the law applicable."

It does not appear that there was a direction to return a verdict on certain conditions; nor that there was a conflict.

Ingalls v. Monte Cristo Oil Co., 23 Cal. App. 652, 139 P. 97, relied upon by respondents, uses the following language:

"It is contended on behalf of defendant that instruction 2 given by the court is erroneous because it tells the jury that if they find certain facts, then the plaintiff is entitled to a verdict; and that the court thus instructed in favor of the plaintiff regardless of whether the defendant knew or ought to have known of the unsafe and dangerous condition of the roof, and also regardless of the fact as to whether plaintiff did not have the same means of knowledge of the defect, if any existed, as did the defendant. It is further claimed that the instruction is erroneous because in conflict with instruction No. 4, which was a full statement, including these elements omitted from instruction 2. We are of opinion that instruction 2 is aided, rather than destroyed, by instruction 4. A similar situation with regard to instructions

was under review in *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, 34 P. 618, 36 P. 407."

Instructions 2 and 4 therein mentioned are not set forth in full in the opinion, but we have examined the records in the case and find that instruction 2 did not omit the question of contributory negligence and that instruction 4 did elucidate and explain it.

So far we have considered those cases most firmly relied upon by respondents and which demanded careful analysis to prevent further confusion. The authorities relied upon by appellant which are pertinent are as follows: *Rathbun v. White*, 157 Cal. 248, 107 P. 309; *Pierce v. United States Gas & Electric Co.*, 161 Cal. 176, 118 P. 700; *Keena v. United R. R. of San Francisco*, 57 Cal. App. 124, 207 P. 35; and *Beyerle v. Clift*, 59 Cal. App. 7, 209 P. 1015. In the first case the trial judge erroneously instructed the jury that it was necessary for the defendant to overcome a presumption of fact by a preponderance of the evidence, instead of stating to them that the presumption was entitled to consideration by them in arriving at the ultimate fact. The Supreme Court determined that the error was not cured by an instruction that the burden was upon plaintiff to prove every material allegation by a preponderance of the evidence. It says:

"The different declarations of the court were not capable of being harmonized."

In the case of *Pierce v. United States Gas & Electric Co.*, supra, we find the following:

"It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true, must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state."

The cases of *Keena v. United R. R. of San Francisco*, supra, and *Beyerle v. Clift*, supra, present situations almost identical with the instant case. In both of these cases the court directed the jury to return a verdict for plaintiff if they believed the defendant was guilty of negligence in doing the acts complained of, and in both the court failed to include the element of contributory negligence, which defense had been pleaded. In both cases the trial judge had given, as here, appropriate instructions covering the question of contributory negligence; but in each case it was determined that the error was not cured by the subsequent instruction which "simply produced a clear conflict." We have examined the records in the case of *Beyerle v. Clift*, supra, and find that the concluding words of the instructions concerning contributory negligence were the same as those in this case, and that one instruction went even further in an effort to harmonize than in the present instance. In the instant case, the instructions

given by the court were not tied back to the erroneous instruction in explanation or as a limitation upon it, as was done in the Stephenson Case. There is no way for us to tell which instruction the jury followed. It may have determined that there was no contributory negligence, or it may have ignored that question and followed the instruction complained of.

We have already determined that there was sufficient testimony to warrant the jury in passing upon the question of contributory negligence. We cannot say, therefore, that there has been no miscarriage of justice, as is required by section 4½ of article 6 of the Constitution.

The judgments are reversed.

We concur: WORKS, P. J.; CRAIG, J.

82 Cal. App. 126

PEOPLE v. BROSE. (Cr. 1342.)★

District Court of Appeal, First District, Division 2, California. March 31, 1927.

Hearing Denied by Supreme Court May 26, 1927.

1. Larceny ⇨65—Evidence that guest was drugged and robbed while in defendant's apartment held sufficient to sustain conviction of grand larceny.

Evidence that guest, invited to defendant's apartment for dinner party, was drugged and robbed and prevented from communicating with police after becoming conscious, and that defendant left her apartment and took an assumed name, held to sustain conviction of grand larceny.

2. Criminal law ⇨742(1)—Credibility of witnesses giving conflicting testimony on grand larceny trial held for jury.

Where stories told by witnesses for the defense in the prosecution in grand larceny trial conflicted, the credibility of witnesses held to be a question for jury's decision, which appellate court will not disturb.

3. Larceny ⇨70(1)—Instruction defining liability of accessories held applicable on grand larceny trial, where guest was drugged and robbed at dinner party (Pen. Code, § 31).

Pen. Code, § 31, making those aiding and abetting in the commission of a crime principals, held applicable to case where guest was robbed at dinner party, and hence instruction defining liability of accessories under that section held proper.

4. Larceny ⇨70(1)—Instruction that principals only and not accessories could be convicted under grand larceny indictment held properly refused.

Defendant's instruction to the effect that principals only and not accessories could be convicted under an indictment for grand larceny held correctly refused.

5. Criminal law ⇨807(1), 829(1)—Highly argumentative instruction held properly refused, where such part as was sound law was covered by other instructions.

Where a proposed instruction was highly argumentative and was covered by other instructions in so far as it was sound law, refusal to submit to jury held no error.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Emma Brose was convicted of grand larceny, and she appeals. Affirmed.

Hearing denied by Supreme Court; CURTIS, J., voting for a transfer.

T. T. Califro and John D. Harloe, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted of the crime of grand larceny and has appealed on a typewritten record. She claims the evidence is insufficient to sustain the verdict and that the verdict is contrary to the evidence; that the verdict is contrary to law and the evidence; that the trial court misdirected the jury in a matter of law; and the trial court erred in the decision of questions of law arising during the course of the trial. The respondent has answered these points under two subtitles, namely, "Sufficiency of the Evidence," and "Instructions." We will take up the points in the form and order as last stated.

[1] As to the sufficiency of the evidence, it should be stated in the very beginning that the uncontradicted story is to the effect that on the evening of the 27th of October, 1925, in apartment No. 401 of the Braeburn Apartments, there were taken from the fingers of Eva Flemming, the complaining witness, six diamond rings of the total value of \$16,000. The point presented by the appeal raises solely the question as to who did the taking. On the trial Eva Flemming took the stand and was examined and cross-examined as to the facts. Among other things she testified that she was an insurance broker and in that capacity became acquainted in the fall of 1924 with the appellant and appellant's husband, Fred Brose. At that time, and indeed at nearly all times, she wore the rings continuously. After their first meeting Fred Brose took out an insurance policy through the solicitation of his wife, and caused Miss Flemming to issue the policy and accept his promissory note temporarily in payment of the first premium. Later the defendant caused Miss Flemming to issue to her an insurance policy and to accept a promissory note temporarily in payment of the first premium. In September, 1925, the defendant commenced extending invitations to Miss Flemming, asking her to attend parties and dinners. She extended many of them. On the 24th of October, 1925,

Jack Lorraine rented the Braeburn Apartment for the period of one week under the name of Mr. Laury. Jack Lorraine is referred to by both parties as a known crook. The defendant testified that she had known him some months and that Lorraine had been arrested and that the defendant had gone on his bail a short time before the following incidents occurred. On the evening of October 26, 1925, the defendant telephoned an invitation asking Miss Flemming to come to the apartment. She did so, and at that time she met Jack Lorraine, who was introduced to her as Mr. Barr, a friend from Chicago. Red Rafferty, Fred Brose, and Rachel Jones were also there. Miss Flemming remained until about midnight and then returned to her hotel. In the meantime she was invited to return to the apartment October 27th for dinner. She did so, and on that occasion she met the defendant, Fred Brose, Jack Lorraine, Red Rafferty, and Myrtle Pomyea. She arrived about 7 p. m. A big dinner was served at about 7:15. Among other things served to her was a cup of coffee, which, she testified, had a bad taste, but which she drank.

Miss Flemming testified that after dinner she helped to dry the dishes and then went into the living room and sat on a box couch and began to read a magazine. At that time she became unconscious, and the next thing she remembered was that appellant and Myrtle Pomyea were standing over her and saying that the apartment had been robbed. As she regained consciousness she looked at her watch and it indicated 9:30. All of the dinner guests above mentioned were still in the apartment. As soon as she observed that her rings were gone she wanted to telephone to the night clerk, to the police, etc.; however, one or the other of those present coaxed her not to do so, physically prevented her from doing so, or threatened her if she did do so. In the same manner she was restrained from leaving the apartment. She was detained there during the rest of that night and during the following day until evening time. She was then taken in an automobile to her hotel. On arriving at her hotel she promptly communicated with certain private detectives and the police, and with their help she immediately proceeded to make an investigation. During that evening they went from house to house, among others to the Braeburn Apartments. At that place they learned that Lorraine had already checked out. On going to apartment No. 401 they found that all luggage had been removed. Later in the night when Miss Flemming retired she discovered a spot on each one of her shoulders that appeared to be irritated, and the next day she went to her physician, who made an examination and testified at the trial. His testimony was to the effect that she had been given a hypodermic injection of chloral and that the effect of drinking chloral or of the

injections would be to produce drowsiness or unconsciousness, according to the amount taken.

At this point it should be noted that the indictment ran against Jack Lorraine, Emma Brose, and Fred Brose. No reason has been shown why Myrtle Pomyea and Red Rafferty were not included in the indictment. Jack Lorraine was never served, and so far as the record discloses has not been seen since October 29, 1925.

Myrtle Pomyea left the apartment before Miss Flemming left. Soon after Miss Flemming left the apartment Jack Lorraine crossed the bay to the Hotel Oakland to call on Myrtle Pomyea. Red Rafferty, Emma Brose, and Fred Brose also went over there. They all met and stayed at the Hotel Oakland during the night of October 28th. The next day, about noon, Emma Brose and Fred Brose returned to San Francisco. They did not go to their home on Twenty-Seventh avenue, but they took lodgings under an assumed name at the Hotel Ogden on Mission street. The foregoing story contains an abundance of evidence sufficient to support the verdict.

[2] The appellant says that the evidence would equally support a verdict against each and all of the other guests. That may be freely granted, but the argument does not lessen the weight of the above evidence as against the appellant. The appellant cites the testimony of her own witnesses and argues that the story disclosed by Emma Brose, Fred Brose and Myrtle Pomyea was so plausible as to discredit entirely the story told by Miss Flemming. That argument runs to the credibility of the witnesses. But that subject was a question for the jury. We are not at liberty to usurp the functions of the jury and state that the witnesses for the appellant were more credible than the prosecuting witness. The appellant cites and relies on *People v. Silva*, 48 Cal. App. 728, 737, 192 P. 330. The case is not helpful. It differed in its facts in many material respects.

[3-5] The trial court gave an instruction defining the liability of accessories as defined in section 31 of the Penal Code. The appellant objects to the instruction and cites *People v. Silva*, supra. In that case it was held that the instruction correctly stated the law, but was not applicable to the facts. It was applicable in the case before us. The appellant complains because the trial court refused her proposed instruction No. 11. There was no error in the refusal. It was not pertinent to any set of facts to be found in the evidence. The same remark applies to appellant's proposed instruction No. 12. She also complains because her proposed instruction No. 9 was not given. It should not have been. As worded, it was to the effect that principals only and not accessories could be convicted under the indictment. Again, she complains because her proposed

instruction No. 5 was not given. That instruction deals with a condition of the record where the evidence is susceptible of two reasonable interpretations, etc. The instructions, as given, are not numbered. However, we have read the entire charge of the court. It was full and complete both as to direct evidence and circumstantial evidence and covered the subject-matter of the proposed instruction No. 5. Finally, the appellant complains because her proposed instruction No. 2 was not given. In so far as it was sound law, the subject-matter was covered by other instructions. In part the proposed instruction was highly argumentative, and it was not error on the part of the trial court to refuse to give the instruction as it was presented.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

82 Cal. App. 35

BLANK v. RODGERS. (Civ. 5467.) ★

(District Court of Appeal, First District, Division 1, California. March 24, 1927. Hearing Denied by Supreme Court May 23, 1927.)

1. Principal and agent $\S$ 89(8)—Evidence held to support findings that plaintiff had expended money and rendered services in managing defendant's camp, and that he was ejected without reimbursement.

Evidence held to sustain findings that plaintiff had made improvements, performed services, and expended money in managing defendant's camp pursuant to an agreement, by which he was to have a 10-year lease for managing the camp, and that he was ejected without reimbursement.

2. Frauds, statute of $\S$ 138(1)—Oral agreement, void under statute, is properly pleaded to show circumstances of plaintiff's possession and expenditures.

Though oral agreement to give plaintiff a 10-year lease on property to be developed as a camp site was within the statute and void, it was proper to set forth its terms to show the circumstances under which plaintiff took charge of defendant's property, rendered services, made improvements, and spent money for her benefit, for which he seeks reimbursement.

3. Improvements $\S$ 4(1)—Complaint showing defendant's enrichment at plaintiff's expense, under void contract, held to support judgment reimbursing plaintiff for improvements made.

Where complaint showed that plaintiff made improvements on defendant's land under void oral agreement, and that defendant was thereby unjustly enriched, held that plaintiff was entitled to relief to the extent of the reasonable value of his improvements.

4. Principal and agent $\S$ 23(2)—Creation of agency may be proved by circumstantial evidence.

Direct evidence of plaintiff's agreement to act as agent of defendant in managing property to be developed as camp site held unnecessary, in order to afford a recovery for his expenditures, since the creation of an agency may be proved by circumstantial evidence.

5. Principal and agent $\S$ 22(1)—Agency cannot be proved solely by declarations of alleged agent.

The declarations of one claiming to have been another's agent are not sufficient to prove the agency.

6. Principal and agent $\S$ 89(8)—Evidence held to show ratification of plaintiff's acts as defendant's agent.

Where plaintiff acted as manager of defendant's camp, evidence of visits and conferences with defendant held to show ratification of plaintiff's acts as agent, whether or not they were, in fact, authorized.

7. Money paid $\S$ 1—Work and labor $\S$ 4(2)—Where plaintiff furnished money and rendered services under void contract, he may recover reasonable value, under contract implied by law.

Where the plaintiff paid money, rendered services, and made improvements upon defendant's land under a void oral agreement, held that he could recover reasonable value of the money expended, under a contract implied by law.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Charles A. Blank against Elizabeth A. Rodgers, in which defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

R. P. Henshall, of San Francisco, for appellant.

Norman A. Eisner, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. Defendant, cross-complainant, and appellant has appealed from a judgment entered against her in the sum of \$3,083.74, assigning four reasons why the judgment should be reversed by this court: (1) That the complaint does not state a cause of action and the findings do not support the judgment, for the reason that the complaint and findings both proceed upon the theory of the breach of a special contract, or the failure of consideration for that contract, and, as the contract alleged was void, there could have been no breach of it or consideration for it. (2) That there is no evidence in the record of the existence of the agreement because the evidence consists of declarations of an agent who thereby sought, first, to establish his agency, secondly, to prove the agreement, and, thirdly,

whose testimony is itself contrary to the very material parts of the agreement found. (3) That the cases relied upon do not support the judgment here. (4) That in any event a recovery here must be limited to whatever was done before September 10, 1921, because on that date the alleged agreement was fully repudiated, and it is the law that a party has a right to repudiate an agreement void under the statute of frauds.

The facts as testified to by respondent are substantially these: The appellant was the owner of certain real property known as the Rodgers ranch, or Camp Taylor, situated in the county of Marin, consisting of 3,228 acres, which for a long time had been unimproved land. The public had been accustomed for many years to freely picnic and camp upon this property. It had been entirely unproductive of revenue. In the early part of July, 1921, Frank J. Jones, the son-in-law of appellant, sent for respondent to come to his office, and when he arrived said to him that he had a very fine business proposition for him, something that was exactly suited to his abilities, and that he had practically picked him out of a number of others making application for a lease on the Camp Taylor property. He informed him that he was the manager of Mrs. Elizabeth A. Rodgers' property and that she was the owner of the Camp Taylor property; that he, being the manager of this property, had decided to run this Camp Taylor proposition along business lines, and that respondent was the man to do it—that he could rely upon him; that respondent would use his judgment, and that his integrity was above reproach. Jones wanted respondent to go there and make use of the property and camp site, to lay out camp sites and let them out to applicants, and to make improvements on the land; that it would be necessary for him to build tent platforms, and to put up tents and certain other buildings. There was even mentioned that a hotel would be the proper thing to erect to properly serve people who desired to come there; that he should work out a scheme of charges and charge the people so much. Of course, to do so Jones informed respondent he would have to offer them inducements, which he left to respondent's judgment. Jones informed respondent that this property had been running wild, and that people had camped there and had damaged the property, and that Mrs. Rodgers had gotten nothing out of it, not even the taxes; that Mrs. Rodgers "is willing to-day," if respondent would go on there, and patrol this property properly, and police it and keep out the hoodlum element, and put it on business lines to give him a 10-year lease on the property—the exact terms of this 10-year lease to be determined on the basis of what could be done.

Mr. Jones said to respondent: "Of course,

the camp for this season is now pretty nearly at the close"—it was near the end of July—"but you can get some idea as to what we may do in the future. You are going to put this on a business basis, but you will have to be there yourself. You can do whatever you please along business lines, and you will keep exact account of your receipts and expenditures, and on that basis we will then be able to determine the value of the lease to Mrs. Rodgers. We may put this thing on a flat rental, or we may put it on a progressive rental, or we may put it on a profit-sharing basis, but we cannot tell right yet."

Respondent thought the proposition over for several days, and on July 16th Jones took him over to see the property, and after several conversations with Jones, on July 20th respondent told Jones in the latter's office that he accepted the proposition, whereupon Jones dictated, had transcribed, signed and delivered to respondent the following memorandum upon the letter head of appellant:

"Office of Elizabeth A. Rodgers, 429 Davis St.,
"San Francisco, Cal., July 20, 1921.

"This is to certify that I have this day leased to C. A. Blank, San Rafael, 3,228 acres of Rodgers ranch, commonly known as Camp Taylor property, for purposes of camping, fishing, hunting, and picnicking. Mr. Blank is authorized to sublet the above-mentioned rights in any manner he sees fit and collect money therefor.

Elizabeth A. Rodgers,

"Per F. Jones, Manager."

At the same time Jones told respondent that the lease would provide that, in the event the property was sold, respondent would be reimbursed for the improvements he would make upon the property and be recompensed for the time put in and for the value of the unexpired lease.

Jones took respondent to the property the next day and had him deputized as a deputy sheriff in San Rafael. Respondent prepared for properly policing these grounds. He hired one deputy besides himself and an assistant and went to work with them. They patrolled the grounds and expelled all people who were there without authority, and who would not pay the fee set by respondent and were not willing to submit to the rules and regulations, and cleaned up the property, which work extended over many weeks; put up toilets for the accommodation of the campers, also a water system. They filled the reservoir about 2,000 feet from Camp Taylor and ran the water into Camp Taylor, paid for the water pipe, built crossings, a foot-bridge, lawns, and put up a living place for respondent—a kind of a bungalow with an open approach in front and two rooms behind and a kitchen, the front being used for store purposes. Respondent purchased a horse to be used in patrolling the property, put up platforms, tents and camp

stoves, built a stable and did other things, such as putting out fires, making improvements on the creek, cleaned up and deepened holes, built crossings, and picked out debris.

Respondent advertised the camping and picnicking facilities in the newspapers and got out rate cards and permits. He fixed the rates to be charged campers and hikers. He had receipt books printed so that each camper received the original and the carbon remained in the book as a voucher, and put up large signs on the property inviting people to come and camp and fish and see the manager.

From the time respondent went upon the property he reported to Jones continuously what he was doing. Jones also came to the property in company with appellant, Mrs. Rodgers, and alone. Respondent first met Mrs. Rodgers personally in September, 1921. She came to Camp Taylor accompanied by her daughter, Mrs. Jones, Mr. Jones and her chauffeur. Jones introduced respondent to Mrs. Rodgers. Respondent had temporary living quarters and an outdoor store on the property. There were signs everywhere. Respondent testified to the following conversation with Mrs. Rodgers:

"One of the specific conversations was that Mrs. Rodgers asked me for copies of my literature. She asked me if I wouldn't allow her to have some copies of my permits and my rate cards, and then I handed her such copies."

Mrs. Rodgers came again to the property on an afternoon in September, 1921, in company with her daughter, Mrs. Jones. She asked respondent to go over the property with her. There were many campers at the time and signs were posted up over the property notifying campers that they would have no right on the property except upon issuance of a permit by the manager, C. A. Blank, and that they would have to comply with the regulations. Mrs. Rodgers on this occasion suggested certain changes by way of improvement to the bridges, and when they came to where formerly stood the old home place she informed respondent that she did not want campers on that particular part. Mrs. Rodgers asked respondent to accompany her to the "Devil's Gulch ranch," a tract she had rented out for grazing purposes and separated from Camp Taylor by a fence. Some campers were camping on this property, and she requested respondent to remove the campers, fearing trouble with her tenant if any money were collected from campers permitted to camp on his ground.

Respondent kept account of receipts and disbursements, and his book of account, together with vouchers, was received in evidence. During September, October, and November respondent brought his book of account to San Francisco and submitted it to Mr. Jones. During these same months respondent and Jones conversed regarding the final lease. The substance of these conversa-

tions was that Mrs. Rodgers was not yet prepared to determine on the proper terms, and that was causing the delay. Towards the end of October respondent and Jones went together to see Mrs. Rodgers at the Palace Hotel. Mrs. Rodgers had visitors at the time, and a brief conversation took place in an anteroom. Mrs. Rodgers at that time asked:

"Did you bring Mr. Blank in connection with the Camp Taylor and the proposition of the lease and his account?"

Mrs. Rodgers at that time said she was not prepared to enter into the arrangement, that she had not decided on the terms, and the interview was rather short and the matters were postponed for some future time. At the same time respondent told Mrs. Rodgers that a man representing himself as Mr. Johnston, warden of San Quentin Penitentiary, refused to pay, and she told him that Johnston had no right to refuse to pay, and that she was going to instruct her lawyers to write him a letter informing him that all who were on the property must submit to Blank's authority and to the rules and regulations and pay the fee.

About a month later respondent and Jones went to see Mrs. Rodgers again. On this occasion the accounts were submitted. Respondent testified that Mrs. Rodgers asked him, "How much money did you take in?" and respondent stated the amount. "How much did you spend?" and the expenditures were considerably in excess of the moneys taken in, and Mrs. Rodgers remarked:

"Well, you are a nice business man—you spend more money than you have taken in."

On January 10, 1922, respondent and Jones again visited Mrs. Rodgers, and on this occasion respondent made a final demand for the lease, and Mrs. Rodgers positively refused to give it to him, and on February 24, 1922, she served written notice on respondent to quit, vacate, and deliver possession, and notified him if he did not do so action would be taken to eject him, whereupon respondent surrendered possession. During his occupancy the reasonable value of moneys expended, services rendered, and materials furnished by respondent, according to the record and found by the court, amounts to \$3,659.04, and he collected from campers and picnickers \$575.50.

[1] While the witness Jones testified that respondent was employed at \$75 per month as a caretaker, and in this respect there is a conflict in the evidence, the foregoing facts were testified to by respondent and are sufficient to support the finding of the court that defendant, on or about July 20, 1921, entered into an oral agreement whereby plaintiff was to go upon the land of the defendant, patrol and police it, keep out the hoodlum element, prevent the property from being damaged,

lay out camp sites, make various improvements, and rent out the camping and picnicking privileges for such amount as he should find to be reasonable. For performing the services and doing the things requested and agreed upon, defendant promised a 10-year lease; that the plaintiff performed the acts requested and agreed upon; that the sum of \$3,659.04 was and is the actual and reasonable value of the materials furnished, moneys expended, services rendered, and labor performed by plaintiff upon said premises, pursuant to said agreement. That all of the work done, improvements made, and money expended were beneficial to the said property; that the defendant, after the rendition of the services aforesaid, without cause, refused to carry out the terms of the agreement, demanded that the plaintiff quit, vacate, and deliver up possession; and that the plaintiff did vacate and surrender possession in compliance with said demand. That plaintiff collected while in possession \$575.50 from campers and picnickers, and has neither been paid nor reimbursed in any further amount. That whatever was done upon said premises was done by plaintiff pursuant to said agreement. That the consideration for which plaintiff made such expenditures and rendered said services has failed in its entirety, except as to said sum of \$575.50.

As to appellant's contention that the complaint does not state a cause of action and the findings do not support the judgment, there is no merit.

[2] The action is not one for damages for breach of contract; and while no action at law would lie on the contract itself, it being within the statute of frauds and void, yet it is proper to set forth the terms of the oral agreement in order to show the circumstances under which respondent went into possession of the premises and expended the money for which he sought reimbursement.

[3] Where one, entering upon land under an oral agreement subsequently repudiated, voluntarily makes improvements which he was under no promise to make, it is commonly held that he must plead and prove that the improvements enhanced the value of the land to the extent of the recovery sought, but the complaint here avers that it was part of the oral agreement that the plaintiff should do the very things for which he seeks compensation. From the declarations of the complaint there is thus a showing of an unjust enrichment of the defendant at the expense of the plaintiff, from which follows the legal conclusion that plaintiff is entitled to relief to the extent of the reasonable value of his improvements. *White v. Wieland*, 109 Mass. 291; *Parker v. Tainter*, 123 Mass. 185; *People's Nat. Bank v. Magruder*, 77 Fla. 235, 81 So. 443; *Ingram v. Corbit*, 177 N. C. 318, 99 S. E. 20; 1 *Tiffany on Landlord and Tenant*, 390.

If the agreement, instead of calling for improvements, had required respondent to plant and cultivate land, and if before the crop matured he was ejected, he would certainly be entitled to compensation for his labor and expenditures (*Crane v. Franklin*, 17 Ariz. 476, 154 P. 1036; *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318), and there is no essential difference between such a condition of affairs and the condition of affairs pleaded and found in the instant case.

[4] Appellant is in error in the second point urged that there is no evidence in the record of the existence of the agreement, because the evidence consists merely of the declarations of the agent himself as to his agency and as proof of the agreement, etc. It is true that, aside from the testimony of the witness Jones as to his agency, there is no direct evidence of his authority to act as the agent of appellant, but the principle is well established that the creation of an agency, like the extent of an agent's authority and the ratification of an unauthorized act, may be proved by circumstantial evidence. 1 Cal. Jur. 696.

[5, 6] There is no question or dispute upon the proposition that agency cannot be proved by the declarations of the alleged agent. Upon this question we quite agree with counsel for appellant and the authorities cited by him, but it would seem that the conduct and declarations of appellant are sufficient to establish the agency alleged, but if there be any question on this point they certainly established a ratification by appellant of the agreement entered into by Jones assuming to act as her agent with respondent. Jones was intrusted with her stationery upon which the memorandum of agreement was written. On her first visit to Camp Taylor after respondent assumed charge, when she was first introduced to respondent, she asked for copies of his permits and rate cards; she saw signs posted up all over the premises; she asked him to remove the campers from adjoining land under lease to a Mr. Dixon for cattle grazing, fearing trouble if respondent collected the rates as shown by his rate cards for camping privileges; she asked him not to permit campers where formerly stood the old home place; she saw the improvements he had placed on the premises, which, certainly, a caretaker receiving \$75 a month would not have erected; she was insistent that the warden of San Quentin prison should submit to respondent's authority, to his rules and regulations and pay the fees he had established. When respondent and Jones called upon her the first time at the Palace Hotel she asked Jones if he had brought Mr. Blank in connection with the Camp Taylor property and the proposition of the lease, and on respondent's second visit she told him he was a nice business man, that he had spent more money than he had taken in. These circumstances amply

justified the trial court in finding a ratification of the unauthorized acts of Jones as agent, if, in fact, they were unauthorized.

As to the claim that recovery cannot be had for anything furnished or expended after September 10, 1921, because on that date the alleged agreement was fully repudiated, it is sufficient to say that there is a conflict in the evidence on this question, respondent positively denying that he received notice to leave the property on September 9, 1921, and Jones admitted that he expected appellant to give respondent the lease until the occurrence at the Palace Hotel along towards the end of the year. That respondent was notified to leave the property on September 9, 1921, is inconsistent with the facts and circumstances, and is found by the court not to be true.

Appellant has cited numerous authorities to the effect that the lease or agreement to lease is void as being within the inhibition of the statute of frauds in that by its terms it was for a longer period than one year and was not reduced to writing, and to the point that, in order to bind a principal to an agreement affecting real property, which is required to be in writing, the authority of the agent must also be in writing, and, further, that the lease or agreement for the lease is void for uncertainty. We are in perfect accord with the authorities cited, but this is not an action to enforce specific performance of the lease or agreement, nor for damages for a breach of contract, but is based upon a contract which the law implies, where services are rendered and moneys and materials furnished at the request of another in consideration of a void promise. The promise made is a nullity, but the respondent is in no worse situation than if no promise whatever were made.

[7] The contract being void and incapable of enforcement in a court of law, yet respondent having furnished moneys, materials, and services in pursuance thereof, he may recover the reasonable value of the moneys and materials furnished and the services performed. This is the universal rule in cases where the contract is void for any cause not illegal. *Smith v. Administrators of Smith*, 28 N. J. Law, 208, 78 Am. Dec. 49, 51. In *Graham v. Graham*, 134 App. Div. 777, 119 N. Y. S. 1013, in a case where the contract was void by reason of the statute of frauds, the court says, in part:

"The complaint in this case alleges a parol contract to convey land unenforceable by the statute of frauds, a repudiation of that oral contract by the promisor, the payment of money and the performance of labor and service upon the faith of said contract by the plaintiff, and seeks to recover therefor. These allegations would seem to contain all the allegations necessary to a cause of action upon the contract which the law implies, where services are rendered under a contract void by

the statute of frauds which the promisor refuses to fulfill.

"If money has been paid, or services rendered, in the performance of a void contract by one party thereto, and the other party fails to voluntarily perform on his part, the injured party has no remedy at law upon the contract; he may, however, under such circumstances, disaffirm such contract, and maintain his action at law to recover back moneys so paid, or the value of services so rendered." *Fuller v. Reed*, 38 Cal 110; *Hill v. Den*, 121 Cal. 45, 53 P. 642.

In the case of a contract for services rendered at a reduced price in consideration of future employment, the future employment being too uncertain to be specifically enforced and therefore void, the plaintiff may disregard the promise for future employment and bring an action to recover the reasonable value for services actually rendered. *Davidson v. Laughlin*, 138 Cal. 320, 71 P. 345, 5 L. R. A. (N. S.) 579.

It would make no difference if the contract were void for uncertainty, or void because within the statute of frauds. It would be a nullity in either case, and in either case the law implies a contract to pay the reasonable value for materials furnished and services performed, where, as in this case, the promisor refuses to fulfill the contract. Of course, if the agreement were immoral or against public policy, a different situation would be presented, as the court under such circumstances would leave the parties as it found them.

We find no error in the record. The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

82 Cal. App. 62

PEOPLE v. FAY et al. (Cr. 1409.)

(District Court of Appeals, Second District, Division 2, California. March 25, 1927.)

1. Criminal law §511(2)—Testimony of accomplice in conspiracy to commit grand larceny held sufficiently corroborated to sustain conviction.

In prosecution for conspiracy to commit grand larceny, testimony of coconspirator and accomplice connecting defendant with the conspiracy held sufficiently corroborated by other testimony to sustain conviction.

2. Criminal law §511(1)—Corroborative evidence to support testimony of an accomplice need not be sufficient to establish guilt.

It is not required that corroborative evidence supporting testimony of an accomplice be sufficient to establish guilt, it sufficing if it connects defendant with the crime, even though, if standing alone, it is of little weight.

3. Criminal law ⚡424(1)—Evidence of conspirator's subsequent sale of bonds and cashing of checks held admissible in prosecution for stealing bonds.

Where information charged conspiracy to steal, and that defendants, in furtherance thereof, stole bonds from a named person, evidence of subsequent sale of bonds and cashing of checks received therefor by conspirators held admissible.

4. Criminal law ⚡1159(3)—Finding of jury on conflicting evidence that defendant was not intimidated in district attorney's office held conclusive.

In prosecution for conspiracy to steal, finding of jury on conflicting evidence that defendant was not intimidated in the district attorney's office at time statements and admissions were made by him is conclusive.

5. Criminal law ⚡543(2)—Evidence held to show diligence of district attorney in issuance of subpoena for state witness, authorizing admission of her testimony given at preliminary examination (Pen. Code, § 686).

In prosecution for conspiracy to steal, evidence that subpoena was issued for state witness three weeks before trial, and witness could not be located because she had removed from last address, without leaving forwarding address of information as to destination, held to show due diligence of district attorney within Pen. Code, § 686, in attempting to have her served, authorizing admission of her testimony given at preliminary examination.

6. Criminal law ⚡543(2)—"Diligence" within statute, requiring effort to locate witness before testimony at preliminary examination, is admissible (Pen. Code, § 686).

The term "diligence," as used in Pen. Code, § 686, requiring diligence in effort to locate witness within the state before his testimony given at preliminary examination can be admitted, is relative, and its application depends on facts in each particular case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Diligence.]

7. Criminal law ⚡1158(4)—Whether due diligence is exercised to locate witness before testimony at preliminary examination is admissible is for trial court's determination (Pen. Code, § 686).

Question whether due diligence, as required by Pen. Code, § 686, in effort to locate a witness within the state, before testimony given at preliminary examination is admissible, has been exercised, is for trial court's determination, and his ruling thereon will not be disturbed, if supported by substantial evidence.

8. Criminal law ⚡422(3)—Admitting evidence as to defendant's conversations prior to formation of conspiracy held without error.

Where defendant was charged with grand larceny, embezzlement, and conspiracy to commit grand larceny, and convicted of conspiracy, admitting evidence of his conversations with victim of conspiracy prior to formation thereof held not error, where evidence was admissi-

ble under some of the charges for which defendant was being tried.

9. Criminal law ⚡407(2)—Failure of defendant to reply when accusatory statement was read held admissible to establish admission of guilt.

In prosecution for conspiracy to steal, where written, accusatory statement by coconspirator was read in defendant's presence at the district attorney's office, defendant's failure to reply thereto, after being given opportunity, was admissible as evidence indicating an admission of guilt.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Hugh Fay and others were convicted of conspiracy to commit grand larceny, and named defendant appeals. Affirmed.

M. C. Spicer, of Los Angeles (Lyle Pendergast, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

CRAIG, J. The three defendants above named were charged by information in three counts with the crimes of grand larceny, conspiracy to commit grand larceny, and embezzlement, respectively. King and Fay only were tried at the time of the proceedings here presented for review. At the conclusion of the trial, and before the jury retired, the district attorney dismissed the charges of grand larceny and embezzlement. Thereafter the jury returned separate verdicts, acquitting King, and convicting Fay of conspiracy to commit grand larceny. The latter appeals from the judgment and an order denying his motion for a new trial.

It appears that in January of 1926 Mrs. Cassie L. Bush was the owner of \$4,700 worth of 7 per cent, gold bonds of the Witmore Hotel Company, consisting of four bonds of the face value of \$1,000 each, one of \$500 and two of \$100 each. Appellant admits, and the record supports the fact, "that Mrs. Bush suffered larceny of the bonds is clear."

The defendant Murphy testified for the people, in minute detail, as to conversations which he swore occurred between himself and his codefendants and two other men named Mott and Goss, and as to their movements before, during and after the bonds were fraudulently obtained from Mrs. Bush. In brief, he recited facts concerning the inception, progress, and consummation of a conspiracy between himself and the four last-mentioned persons to feloniously get possession of the securities, dispose of them, and divide the proceeds. The testimony of this witness was, substantially, that he had known Goss for about ten years, that Mott introduced him to King at San Diego in November or December, 1925; and that he be-

came acquainted with Fay at Long Beach late in January, 1926; that he met Fay, King, and Goss at Long Beach on February 3, 1926, at which time and place these four parties agreed that the witness should call upon Mrs. Bush on the following morning, and state to her that the Witmore Hotel Company bonds were called in; and that he had been authorized to take them up. He further testified that his companions stated that they could not perform this part of the transaction because each had previously interviewed the lady, and believed that she would not have further dealings with them. Murphy swore that they all agreed to, and did, meet at Los Angeles on the next day; that King furnished him with blanks upon which he was instructed to receipt to Mrs. Bush for the bonds in the name of "A. P. Bourk"; that they drove in Fay's automobile past Mrs. Bush's residence, which was pointed out to Murphy, and turned the corner, where the witness alighted, and walked back to the house.

From this point Murphy's testimony strikingly coincides with that of Mrs. Bush as to the manner in which her bonds were demanded, received, and receipted for. It thus appears that, when Murphy called, the prosecuting witness was in conversation with a neighbor; that he informed her of the purpose of his visit, whereupon she stated that her bonds were at the bank, and that she was not dressed to go into the city; that he remarked that he was "going down the street to see a party," and would return for her; that shortly thereafter Murphy did return with an automobile, conveyed Mrs. Bush to the bank, where she obtained the bonds, and both returned to her house. Murphy there received the Witmore bonds, receipted for them in the name of Bourk, and, when Mrs. Bush inquired about a check, he promised to pay for them on the following Saturday, which admittedly he did not do.

Mrs. Bush testified also that about ten days previously to Murphy's visit Fay had called upon her, ostensibly for the purpose of interesting her in stock of the American Magnesium Company, and that he was accompanied by a man whom he introduced as Ward; that a day or two thereafter Fay again called with another man whose name was not revealed; that upon each of these occasions she declined to consider Magnesium Company stock; and that Fay during each such visit informed her that her Witmore Hotel Company gold bonds were to be called in at a premium, notwithstanding the fact that she had not mentioned, and did not know how he learned, that she had them. Mrs. Bush further testified that following each of their respective calls, as heretofore related, she did not see any of the parties until after they were arrested.

Murphy's testimony proceeded, in substance, as follows: That his purpose in go-

ing "down the street" while Mrs. Bush dressed was to get Fay's Cadillac car, and that Fay, Goss, and King waited for him until his return with the bonds. He swore that he showed the bonds to his three companions, and that ways and means of disposing of them were discussed; that they finally drove to the home of King's sister, where they divided the bonds, each taking one of the \$1,000 issue, and that, by "flipping a coin," they determined that King should also hold the \$500 bond; that the witness, Goss, and Fay then returned to town, where Murphy entered Mott's car, which had been parked during the day, and drove to Long Beach. On the following morning, February 5th, according to Murphy, all four met again pursuant to prearrangement, and the witness and Goss were instructed by Fay and King to sell the bonds through a Mr. Smith, at the stock and bond house of A. C. Wagy & Co., which they did, receiving checks which they attempted to cash, but, being unable to do so, Mr. Smith, at the request of Goss and Murphy, had the checks so indorsed that the bank gave three cashier's checks in equal amounts therefor. The two last-mentioned conspirators returned to the machine, explained to Fay and King what had occurred, and thereupon Murphy, King, Fay, and Goss drove to Long Beach, where unsuccessful attempts at three different banks were made to open accounts from which they might draw funds. Murphy averred that finally he, Mott, and Goss departed for San Diego, where a bank account was opened, from which the witness received \$900, and other moneys were divided, including \$500 which Mott agreed to deliver to Fay and King at Los Angeles. Whether or not the latter received their share the witness testified that he did not know.

[1] The principal ground assigned for reversal here is that Murphy was a coconspirator, and therefore an accomplice, and that he was not corroborated in any way in his statements as to appellant Fay's connection with the crime.

The manner in which appellant learned that Mrs. Bush owned Witmore Hotel bonds is not revealed by the record, but it is significant that, as we have shown, Murphy did not appear upon the scene until after Fay had twice visited her, and had stated that they were to be called in, which later proved to be untrue. In addition to this concert of action, appellant, when arrested, was confronted by the other defendant, and a written statement which had been given by Murphy was read to them at the district attorney's office. Murphy was asked if such statement contained a true recital of the facts, to which he replied that it did. A deputy sheriff, who was corroborated by others, testified that he then asked the others if they had anything to say; that, if they did, it was the time to say it, but that Fay "never said a word."

The people's witness Pirrotte, another officer, testified that subsequently to Fay's arrest the latter voluntarily remarked that he had gotten into bad company, and asked the witness' help; that, when asked "How bad are you in?" Fay replied, "Well, we got the bonds. We divided them up, and the next morning we gave them all back to one man to sell, and King and I never got a cent out of it."

At the trial Fay stoutly denied that he knew anything about Mrs. Bush's bonds, or that he knew Murphy. One of the officers testified that appellant admitted having been at Long Beach with Goss and King, but stated that they went there in connection with certain oil leases which he later confessed that he knew nothing about. It appears that appellant also denied that he was acquainted with King, whose sister testified that she knew Fay, Goss, and Mott, and that they, with King, were at her residence on the night of February 4th. Murphy's testimony as to occurrences was further corroborated by people's witnesses Lamont of the California Bank at Los Angeles, Neal of the Bank of Italy at San Diego, Smith of A. C. Wagy & Co., and Symonds of the Hellman Commercial Trust & Savings Bank at Los Angeles. Further, in addition to the corroboration of Murphy and the conflicting statements of appellant, his own testimony was contradicted in many respects before the jury.

[2] As was recently held by this court, it is not required that the corroborative evidence offered to support the testimony of an accomplice be sufficient to establish guilt. It will suffice if it tends to connect the defendant with the commission of the crime, even though, if it stood alone, it would be entitled to but little weight. *People v. Wilson* (Cal. App.) 245 P. 781. We think, however, that the testimony of the defendant Murphy in the instant case was amply corroborated, and that the extensive citation of authorities upon this point is unnecessary.

[3] The count of the information upon which appellant was convicted charged that the defendants "did willfully, unlawfully, fraudulently, corruptly, and feloniously conspire, combine, confederate, and agree together to take, steal, and carry away property of one Cassie L. Bush," and that thereafter the said defendants "did willfully, unlawfully, and feloniously, and in furtherance of the conspiracy aforesaid, steal, take, and carry away from the said Cassie L. Bush" the bonds in question. Appellant contends that, the charge having been framed to consist only of a conspiracy to take, and the actual taking, of the property, on a day stated, it was error to admit evidence of the subsequent sale of the bonds and the cashing of the checks. Authorities are cited which might be construed as holding that the prosecution did more than was absolutely requisite, but none of them hold that such evidence

was inadmissible. A contrary view was expressed in *People v. Dean*, 66 Cal. App. 602, 226 P. 943, wherein it was said:

"It would seem to us that the conspiracy was not ended until the spoils had been divided, and if this be the rule, the testimony was properly admitted. But, however that may be, the outstanding fact upon this appeal is that the judgment in this case has done substantial justice. The record leaves no reasonable doubt of the defendant's guilt, quite apart from any testimony to which any objection is made."

While conversations occurring after the termination of a conspiracy are inadmissible, it was definitely held by the Supreme Court in *People v. Trim*, 37 Cal. 274, that, in a prosecution for conspiracy to commit arson, evidence or endeavors following the fire to collect the amount of the loss insured against was competent and properly received.

[4] It is next insisted that the trial court erred in admitting the testimony of five attachés of the district attorney's office as to statements and admissions of appellant, in that they were not of the free and voluntary character required by the rule in such cases. Each of the witnesses in question testified that such statements and admissions were freely and voluntarily made, without any threat, force, promise of immunity, or offer of reward, and a careful perusal of the record convinces us that the evidence was properly admitted. Fay testified to conduct on the part of the officers which he claimed was intimidating, but they all flatly contradicted him in this, and, the jury having determined the question adversely to the defendant, upon conflicting evidence, it became conclusive. *People v. Oliveria*, 127 Cal. 376, 59 P. 772; *People v. Saenz*, 50 Cal. App. 382, 195 P. 442.

[5-7] People's witness, Ruth Conde, a sister of the defendant King, testified at the preliminary examination, but was not present at the trial, and the district attorney offered her former testimony upon the ground that she could not be located. Counsel for appellant objected to the introduction of such evidence, contending that due diligence, as required by section 686 of the Penal Code, had not been exercised by the people in an effort to locate the witness within the state. Thereupon other witnesses were sworn, who testified to the following facts, which are not disputed: A subpoena was issued, and a search was commenced for the witness about three weeks before the date of the trial. Inquiries were made in the neighborhood of the residence where service was made prior to the preliminary examination, and at the place of business of the witness' husband. Both the house and the store were found to be vacant, and each bore a "for rent" sign. Investigators were informed by the landlord and by the neighbors that the Condes had departed without leaving any forwarding address or information as to their destination;

that Conde was "one of the worst kind of bootleggers," and that "no one in the neighborhood knows where they went." An officer later returned to the house, and he testified that it was then occupied by strangers. He inquired of the defendant King, and of appellant's counsel, each of whom stated that he did not know where the witness might be located, and endeavors to trace her through the records at the post office were unavailing. At the time of the trial further investigation was made at the instance of the court, but without success.

It is well settled in this state that the term "diligence," as intended by section 686 of the Penal Code, is a relative one, and its application to each particular case depends upon the facts therein presented. *People v. Ramos*, 52 Cal. App. 491, 199 P. 544; *People v. Boyd*, 16 Cal. App. 130, 116 P. 323; *People v. Johnson*, 13 Cal. App. 776, 110 P. 965. The question as to whether or not due diligence has been exercised is one for the determination of the trial court, and, when there decided, its ruling will not be disturbed upon appeal, if there is any evidence of a substantial character to support it. *People v. Lederer*, 17 Cal. App. 369, 119 P. 949; *People v. Lewandowski*, 143 Cal. 574, 77 P. 467; *People v. Wilson*, 26 Cal. App. 336, 146 P. 1048; *People v. Padilla* (Cal. App.) 254 P. 585.

There is no fact contained in the record which would suggest that the witness might have gone to any particular locality in the state. The nature of Conde's occupation and the manner in which he and his wife suddenly disappeared shortly before the trial might suggest that the witness was evading the service of process. Nothing known concerning them would give the slightest clue either to the direction in which they may have gone or the type of community in which they might take up their abode. Under such circumstances to have extended the search beyond the territory in which it was conducted would have been purely a hit and miss investigation, and to demand that such a search be made would be to require a search in every county and community of the state. From the facts presented we do not think the district attorney can be said to have been remiss in failing to take earlier steps to have her served. As was said in *People v. Melandrez*, 4 Cal. App. 396, 399, 88 P. 372, 373:

"The record discloses evidence showing that a considerable search had been made for the witness in and about the places that he had formerly frequented and that the officers had been unable to find him. We cannot say as a matter of law that this evidence was insufficient to reasonably satisfy the trial court that the witness could not be found in the state; and for this reason we cannot agree with appellant's contention that the deposition should have been excluded."

In *People v. Boyd*, *supra*, circumstances quite similar to those of the instant case were presented. It was there said:

"Counsel for appellant seem to think that, in order to disclose the 'due diligence' contemplated by the statute and necessary to be shown before the deposition of an absent witness taken at the preliminary hearing may be read in evidence at the trial, it must appear that a subpoena for such witness has been sent to every county in the state. In this they are mistaken.

"As is said in *Heintz v. Cooper*, 104 Cal. 670 (38 P. 512), 'diligence is a relative term incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phrases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed.'"

The case at bar is plainly distinguishable from *People v. Keller* (Cal. App.) 254 P. 580, recently decided by this court, wherein it appeared that, notwithstanding the fact that the investigator could have subpoenaed the missing witness twelve days before the trial at a hotel in San Diego, or two days thereafter at a hotel in Los Angeles, "absolutely nothing was done to insure the attendance of the most important witness for the prosecution" for a period of 15 days next preceding the day upon which the case was to be called for trial.

[8] Appellant further asserts that it was error to admit evidence as to conversations alleged to have occurred between himself and Mrs. Bush during the month of January, because they occurred, if at all, prior to the formation of the conspiracy as alleged in the information and testified by Murphy. At the time when such evidence was received the defendants were charged with grand larceny and with embezzlement, in addition to the crime of conspiracy to commit grand larceny. It was the theory of the prosecution that Fay personally laid the foundation for the commission of the offense, and thereafter delegated others to obtain the securities and the proceeds of their sale. Since the evidence complained of was therefore admissible under some of the charges for which appellant was on trial, it was not error to admit it. We are not prepared to hold, however, that the conspiracy between appellant and some of his codefendants had not actually been formed at the time he visited Mrs. Bush. There is no merit in this contention.

[9] The only remaining point presented consists of the argument that, when the accusatory statement heretofore mentioned was read in appellant's presence, the defendants King and Murphy also being present, at the

district attorney's office, appellant's silence did not constitute evidence of guilt, and that the circumstances were not such as reasonably to call for a reply. It appears that appellant had previously requested an opportunity to make a statement to the assistant district attorney, and that, when there questioned, he made various conflicting remarks. He was not coerced, but was given time to deny or affirm Murphy's version of the transaction, and was asked if he desired to make any statement about it, but he stood mute. The district attorney requested that, before offering the statement and proof of appellant's silence, the jury be instructed to disregard its substance; that the people offered merely "their silence or their act or conduct in relation to it as evidence." The jury were so instructed, and were again fully advised as to the law in such cases in the general instructions. Under these conditions appellant was not only fairly afforded an opportunity to reply, but his failure to do so must be regarded as evidence strongly tending to indicate an admission of guilt. Under such circumstances the testimony was clearly admissible to establish that fact as is indicated by innumerable authorities, among which are: *People v. Amaya*, 134 Cal. 531, 66 P. 794; *People v. Byrne*, 160 Cal. 217, 116 P. 521; *People v. Ong Mon Foo*, 182 Cal. 697, 189 P. 690; *People v. Bringhurst*, 192 Cal. 748, 221 P. 897; *People v. Hendricks*, 71 Cal. App. 730, 236 P. 214.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

82 Cal. App. 73

Ex parte NICHOLS (Cr. 1472.)

(District Court of Appeal, Second District, Division 1, California. March 26, 1927.)

1. Indictment and information ☞125(42)—Information charging conspiracy in two counts held to charge but one offense (Pen. Code, §§ 182, 519).

Information charging conspiracy to commit crime of extortion defined in Pen. Code, § 519, in one count, and conspiracy to falsely move and maintain suit, action, and proceeding in second count, held to involve single transaction and to charge commission of but one offense, under section 182.

2. Criminal law ☞982—On conviction under information charging only single offense of conspiracy, though in two counts, court could not grant probation and at same time sentence defendant to imprisonment.

On conviction under information containing only single charge of conspiracy in two counts, trial court had no authority to grant probation to defendant and at same time to

sentence her to term of imprisonment in state prison.

3. Criminal law ☞982—Where court, after conviction under two counts charging only single offense, granted probation, and at same time sentenced defendant, result was as though no judgment had been rendered.

Where court, after conviction under two counts containing only single charge of conspiracy, granted probation to defendant and at same time sentenced her to term of imprisonment in state prison, result was as though no judgment had been rendered.

4. Habeas Corpus ☞111(1)—Where court granted probation and at same time sentenced defendant to imprisonment for single offense, defendant was not entitled to release.

Where court, on conviction of what was single charge of conspiracy in two counts, granted probation to defendant and at same time sentenced her to term of imprisonment in state prison, defendant was not entitled to be released because of error.

Application by Gladys Nichols for writ of habeas corpus to be directed to the sheriff of Los Angeles County, to secure release of petitioner after conviction of conspiracy. Writ discharged, and petitioner remanded.

A. D. Orme, of Pasadena, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

HOUSER, J. Habeas corpus. In the first count of the information, petitioner was charged with "the crime of conspiracy to commit the crime of extortion"; and in the second count of the information with the "crime of conspiracy to falsely move and maintain a suit, action, and proceeding." On the trial of the action, petitioner herein was convicted on each of such counts. Under the first count, by order of the trial court, petitioner was placed on probation, and under the second count she was sentenced to a term in the state prison.

In this proceeding it is the contention of petitioner that, notwithstanding the fact that the information formally contained two counts, as a matter of law, but one offense was stated therein, that the order made by the trial court on the so-called first count of the information in granting probation to petitioner exceeded the jurisdiction of said court, and that the sentence imposed on petitioner under the second count of the information was in excess of the jurisdiction of said court and consequently was a nullity.

The prosecution of petitioner in the criminal action was authorized by section 182 of the Penal Code, wherein, among other things, it is provided that, if two or more persons conspire "(1) to commit any crime; * * * (3) falsely to move or maintain any suit, ac-

tion or proceeding * * *”—they shall be punishable as in said section prescribed.

[1] In the first count of the information, as hereinbefore set forth, petitioner was charged with the crime of conspiracy to commit the crime of extortion, in that she and two other persons named therein—

“did willfully, unlawfully, and feloniously, wickedly, and fraudulently conspire, combine, confederate, and agree with Carl H. Marks and Hilda E. Daws, and each with the other, to commit a felony, to wit, the crime of extortion, in the county of Los Angeles, state of California; that thereafter, and in furtherance of the conspiracy aforesaid, the said defendant Gladys Nichols, together with Carl H. Marks and Hilda E. Daws, did call up the said R. J. Johnson on the telephone and make an appointment for a demonstration of an automobile, and did go out with said R. J. Johnson for a demonstration, and did rent a room in the Crawford Apartments at No. 941 South Georgia street, in which the said R. J. Johnson was to be trapped with Hilda E. Daws, and did make an appointment with the said R. J. Johnson to go to said room with Hilda E. Daws, and did watch the said Hilda E. Daws and R. J. Johnson go up to said apartment, and did thereafter enter the said room and surprise the said R. J. Johnson therein in company with the said Hilda E. Daws, and did demand money from the said R. J. Johnson, and did threaten to sue the said R. J. Johnson for alienation of affections, and did hire and employ an attorney for the purpose of suing the said R. J. Johnson, and for the purpose of thereby and therein, as aforesaid, of extorting and obtaining money from the said R. J. Johnson, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California.”

Without setting forth the language of the second count of the information, it may suffice to state that thereby petitioner was charged with the commission of the crime of conspiracy to falsely move and maintain a suit, action, and proceeding by doing and performing substantially the same acts as were set forth in the first count, together with the additional allegation that petitioner and her confederates “did falsely pretend and represent that Carl H. Marks was married to Hilda E. Daws, and did thereby and therein conspire to falsely maintain a suit for alienation of the affections aforesaid.”

The act alleged to have been committed by the defendant in the first count of the criminal action by which a conspiracy to commit one criminal act was charged was therefore substantially restated in the second count by which the defendant was charged with having committed a different offense. The only difference between the allegations in the two counts was that in the second count the falsity of the pretension of the conspirators that Hilda E. Daws was the wife of Carl H. Marks was alleged, which allegation was omitted from the first count.

By section 518 of the Penal Code, extortion

is defined as “the obtaining of property from another, with his consent, induced by a wrongful use of force or fear. * * *” And the “fear” which will constitute extortion may be induced by a threat to do an unlawful injury to the property of the individual who is threatened. Section 519, Pen. Code.

In the count on conspiracy to commit extortion, the only injury with which the intended victim was threatened was that he would be sued for “alienation of affections” of Hilda E. Daws. Neither count of the information contains an allegation that the affections of Hilda E. Daws had been alienated by the intended victim; nor apparently, at least so far as may be determined from the information, had he committed any unlawful act. Had Hilda E. Daws been an unmarried woman, her “affections” could not have been alienated so as to create a cause of civil action in Marks or any other person. As specifically stated in the statute (section 519, Pen. Code), in order that the criminal act may amount to extortion, in effect the threat must be that, unless the intended victim comply with such demands as may be made of him, an unlawful injury will result to his property. It is plain that ordinarily, and in the absence of collusion, no unlawful injury would ensue to a man who was sued, or threatened to be sued, because he had alienated the “affections” of a married woman, and that, in the circumstances, the threatened unlawful injury to the intended victim in the criminal action here being considered arose solely because Hilda E. Daws was not the wife of Carl H. Marks; in other words, on the assumed facts herein, there could be an unlawful injury only in the event that no cause of action existed with reference to the feature of alienated affections. The gist of the offense was that money was demanded by the alleged conspirators for the purpose of preventing the bringing of an action that could not be maintained—which constituted the threatened unlawful injury to which reference is made in the statute.

In the case of *People v. Schmitz*, 7 Cal. App. 330, 369, 370, 94 P. 407, 419, 420 (15 L. R. A. [N. S.] 717), in denying an application for hearing in the Supreme Court after decision by the District Court of Appeal, the following language occurs:

“It is very clear that to constitute the crime of extortion committed by means of any threat to injure property of the person threatened, the injury threatened, as was, in effect, said by the learned district court, must be, in itself, unlawful, irrespective of whether or not the purpose with which the threat is made is to obtain money to which the person threatening is not entitled. * * * The word ‘unlawful,’ as used in this statute, qualifies the word ‘injury’ alone. If the injury threatened to property is one which the person threatening has an absolute legal right to do, he cannot be held to have threatened ‘to do an unlawful injury’ to the

property, even though his motive in making the threat is to obtain from the person threatened money to which he is not entitled, and, consequently, it cannot be held to be an injury within the provisions of sections 519 and 520 of the Penal Code. * * * What is meant by the term 'unlawful injury'? Giving to such term the broadest meaning possible under the authorities, it can include no injury that is not of such a character that, if it had been committed as threatened, it would have constituted an actionable wrong, an injury for which an action for the resultant damages could be maintained against the defendant, or which, if merely threatened, could be enjoined in equity if the remedy at law were deemed inadequate."

In the later case of *People v. Sanders*, 188 Cal. 744, 756, 757, 207 P. 380, 385, the ruling in the *Schmitz Case* was reaffirmed. In commenting thereon, it is said:

"This court in that case decided that the term 'unlawful injury' as used in section 519, subd. 1, of the Penal Code, had reference to injuries of such a character that if committed as threatened would have constituted an actionable wrong, and further held that the indictment in that case did not sufficiently show that the acts threatened, as stated therein, were not such as could and would have been lawfully done; and that in order to render an act which a person might lawfully do an unlawful injury to the person or property of another, such act must be threatened to be done by means which the law denounces as unlawful. * * *

It may therefore be taken as established law that, considering the first count of the information herein, one of the essential allegations was that an unlawful injury was threatened as to the property of the intended victim. The only unlawful injury which, solely from the context of such count, could possibly result to the intended victim was that a civil action would be brought against him for alienating the affections of Hilda E. Daws, not from her husband, because she had none, but from her coconspirator Carl H. Marks. If it be possible (which point is unnecessary of decision here) that said first count stated the commission of a criminal offense, it does so only by considering that it contains a sufficient averment of fact that Hilda E. Daws was not a married woman, and therefore that, by reason of the threatened civil action for the alienation of the affection of Hilda E. Daws, an unlawful injury was threatened as against the intended victim. So considered, in substance, the first count of the information would be identical with the second count thereof.

In the case of *People v. Johnson*, 22 Cal. App. 362, 134 P. 339, under the provisions of section 182 of the Penal Code, which is the same section under which the prosecution in the instant case was maintained, the defendant was charged in two counts with having committed the crime of conspiracy. In the first count thereof the accusation was that the defendant and two others had conspired to

commit a crime, to wit, to falsely accuse the named individual with having issued a check on a bank without having sufficient funds or credit at that bank to meet the check. As a part of the same transaction, the second count charged that defendant and said persons had conspired to pervert and obstruct the ends of justice by falsely charging the same person with the crime of drawing a check on a bank, knowing that he had not sufficient funds in it or credit at said bank to meet the check on its presentation.

Touching the point here in question, the court said, in part:

"In this case the indictment neither charged two offenses, nor does it appear that the acts which were described in the first count were different from those described in the second. To do all of the things enumerated in the different subdivisions of section 182 of the Penal Code amounts to a single offense only, and it is quite plain that the district attorney might have joined in one count of his indictment all of the matters which were made the subject of the two counts. * * *

With reference to the two counts in the information in the case here being considered, it is clear that the basis therefor was a single transaction and involved but one conspiracy.

In the case of *United States v. Weiss* (D. C.) 293 F. 992, in which one of the questions before the court was that of the right of the prosecution to charge several different criminal offenses where they arose out of one conspiracy, the following language appears:

"At the threshold it must be noted that the government cannot split up one conspiracy into different indictments, and prosecute all of them, but that prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. *Murphy v. U. S.* (C. C. A.) 285 F. 804 at page 816; *In re Snow*, 120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658; 16 *Corpus Juris*, 270, and cases there cited."

Perhaps the same thought is expressed in *People v. Frank*, 28 Cal. 507, 513, where, in speaking of the crime of forgery, the court said:

"Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense. * * *

See, also, *People v. Powell*, 50 Cal. App. 436, 438, 439, 195 P. 456.

And in the case of *People v. Jailles*, 146 Cal. 301, 79 P. 965, where it was charged in the first count of the information that by means of force and violence the defendant committed the crime of rape, and in the second count of the information the defendant was likewise accused of the crime of rape, by committing an act of sexual intercourse with the

same person described in the first count, who at the time of the commission of the offense was under the age of 16 years, the court held that the nature of the allegations of the information made it manifest that it was sought to charge but one offense, and that an attempt had been made "to set forth the same transaction in different ways," and added that:

"All these allegations might undoubtedly have been joined in one count, for there is nothing inconsistent in them, or the second count might have been entirely omitted, for testimony showing the existence of the facts alleged therein would have been sufficient to sustain a conviction under the allegations of the first count [citing cases]."

To the same effect, is the case of *People v. Eagan*, 116 Cal. 287, 48 P. 120.

Assuming that the authorities hereinbefore cited satisfactorily establish the conclusion that but a single transaction was involved in the aggregate of the allegations contained in both the first and the second counts of the information, and that the defendant therein was legally charged with the commission of but one offense, the question of the effect of the action of the trial court in granting the defendant probation as to the "first count" and sentencing her to state prison on the "second count" remains for consideration.

The case entitled *In the Matter of the Application Cyril J. O'Connor* (Cal. App.) 252 P. 730, is pertinent to the inquiry. With reference to the point involved, the court said:

"From this testimony it clearly appears that if the defendant was guilty, as the jury found him to be, of larceny by trick and device as charged in the first count, he cannot also be punished under the fourth count. But one transaction occurred between the parties in connection with the subject-matter which forms the basis of the prosecution upon these two counts. They not only relate to one and the same transaction, but the facts which constitute the larceny charge pleaded and established by the evidence are identical with those constituting the charge of obtaining money by false pretenses. Under such circumstances, the jurisdiction of the court was exhausted when it pronounced sentence upon the verdict returned on the first count, and habeas corpus is a proper remedy where it is claimed that the prisoner has been placed in jeopardy for the identical offense, because if such assertion be true it is not merely a matter of defense which if not properly sustained in the trial court would furnish ground for appeal, but goes to the continuance of jurisdiction of the trial court for any purpose."

In the case entitled *In re Fink* (Cal. App.) 250 P. 714, the defendant, who had been convicted of a felony, was granted probation, with the further order that he "be placed in the charge and under the supervision of the county probation officer, and requiring that he (the defendant) be placed and kept in the psychopathic ward of the county farm." Un-

der the authority of *People v. Mendosa*, 178 Cal. 509, 173 P. 998, it was held that "the last requirement of the court's order was illegal," and that the defendant should be discharged from custody.

[2-4] The instant case, then, stands as though the defendant had been convicted of but one charge of conspiracy; that the trial court granted her application for probation thereon, and at the same time sentenced her to state prison for the commission of the identical offense for the commission of which the defendant had been granted probation. In the *Mendosa Case* (178 Cal. 509, 173 P. 998), the judgment of the trial court was that the defendant be imprisoned in the state prison; that the sentence be suspended and the defendant remanded to the custody of the sheriff and confined in the county jail until the further order of the court; and, while it was held therein that such a judgment was illegal in that there was no authority in law for the action of the court in suspending the execution of the sentence and at the same time remanding the defendant to the custody of the sheriff to be confined in the county jail, and consequently that such judgment should be reversed, it was also ruled that the defendant was not entitled to a new trial by reason of such error, but that the trial court should again arraign defendant for judgment and thereupon proceed to pronounce a proper judgment on the conviction legally obtained. The error, therefore, was not fatal in the sense that it was prejudicial to the substantial rights of the defendant. It did not have the effect of exhausting the jurisdiction of the trial court so as to prevent it from pronouncing a new or different judgment. And so, in the case under consideration, it is manifest that on a conviction on what we have held was a single charge of conspiracy the trial court had no authority to grant probation to the defendant and at the same time to sentence her to a term of imprisonment in the state prison. The court might have done either the one thing or the other, but clearly not both of them. Like the judgment in the *Mendosa Case*, the defendant could not be under a sentence to the state prison and at the same time be either released on probation or remanded to the custody of the sheriff to be confined in the county jail. The two respective conditions of the judgment are so opposed one to the other that neither is capable of enforcement without doing extreme violence to, if not destroying, the other. The result is as though no judgment had been rendered. However, reasoning from the decision in the *Mendosa Case*, we are constrained to hold that the error committed by the trial court should not avail to the end that the release of the petitioner should be ordered. As is said in the *Matter of Smith*, 152 Cal. 566, 567, 93 P. 191, 192:

"It does not by any means follow that the prisoner must be discharged if the judgment

and commitment are void. * * * The contention on the part of the prisoner that the sentence pronounced * * * is utterly void for the purpose of committing him to the state prison, but is nevertheless valid for the purpose of vacating the bench warrant, and ending the felony case, is illogical in the last degree, and finds no support in the decisions which he cites."

The intention of the trial court in the premises is perfectly clear, and petitioner has suffered nothing so far as her substantial rights are concerned by reason of the error on which the petition is predicated.

In disposing of petitioner "as the justice of the case may require" (section 1484, Pen. Code), and in accordance with the practice as indicated in the Matter of Application of Lee, 177 Cal. 690, 171 P. 958, In re Bouchard, 38 Cal. App. 441, 176 P. 692, and In re Adams, 61 Cal. App. 239, 214 P. 467, it is ordered that the writ be discharged, and that the petitioner be and she is remanded to the custody of the sheriff of the county of Los Angeles, with directions to the superior court to arraign petitioner for judgment and thereupon to proceed in the manner required by law.

We concur: CONREY, P. J.; YORK, J.

82 Cal. App. 46

SCOTT v. LARSON. (Civ. 5576.)

District Court of Appeal, Second District, Division 1, California. March 24, 1927.

1. Appeal and error ⇨134(1)—On perfecting appeal from superior court's judgment, appellate court had jurisdiction, though judgment had not been formally entered (Const. art. 6, §§ 4, 5; Code Civ. Proc. § 939).

District Court of Appeal, on appeal from judgment of superior court under Const. art. 6, §§ 4 and 5, had jurisdiction immediately on perfecting of appeal, though judgment had not been entered or docketed in superior court, as appeal could not be dismissed on ground that it was taken after rendition of judgment, and before its formal entry under Code Civ. Proc. § 939.

2. Appeal and error ⇨32—Appellate court had jurisdiction of appeal from superior court judgment affirming municipal court judgment, notwithstanding failure of Legislature to provide procedure (Const. art. 6, §§ 4, 5).

District Court of Appeal had jurisdiction on perfecting appeal from superior court from judgment affirming municipal court judgment, amount being over \$300, under Const. art. 6, §§ 4 and 5, giving District Courts of Appeal appellate jurisdiction on appeal from superior courts, notwithstanding Legislature failed to provide appropriate legislation for hearing and determination by District Courts of Appeal as contemplated by section 5.

3. Courts ⇨203—Power given Legislature to provide means of appeal from superior courts could not abridge appellate jurisdiction given District Courts of Appeal (Const. art. 6, §§ 4, 5).

Power given Legislature under Const. art. 6, § 5, to provide appropriate legislation for hearing appeals by District Courts of Appeal from judgments of superior court, could not diminish or abridge provision of section 4, giving District Courts of Appeal jurisdiction on appeal from superior courts.

4. Constitutional law ⇨33—Failure of Legislature to carry out directions as to procedure cannot deprive litigants of rights granted by Constitution.

Failure of Legislature to carry out implied directions indicated in constitutional provisions with reference to details of practice or procedure cannot deprive litigants of substantial rights given under constitutional provisions.

5. Courts ⇨78—Where Legislature failed to provide method of procedure court granted jurisdiction by Constitution could regulate procedure.

Court granted jurisdiction by Constitution could, in absence of legislative provision, regulate practice and provide procedure necessary to protect litigants' constitutional rights by virtue of its inherent power.

6. Appeal and error ⇨456—After appeal had been perfected from superior court judgment affirming judgment of municipal court, stay bond being given, District Court of Appeal could restrain issuance of execution from municipal court (Code Civ. Proc. § 949).

On perfecting appeal to District Court of Appeal from judgment of superior court affirming municipal court judgment and on filing undertakings including stay bond, municipal court could be restrained by District Court of Appeal from issuing execution on judgment under Code Civ. Proc. § 949, providing perfecting of appeal by giving undertaking stays proceedings in court below on judgment appealed from.

7. Appeal and error ⇨456—After taking of appeal, appellate court has discretion to restrain court below from enforcing judgment.

If, after appeal, court below seeks to enforce judgment from which appeal is taken, appellate court, in its discretion, may grant special order restraining action of lower court in that regard.

Application by A. Larson for supersedeas to be directed to the municipal court of the city of Los Angeles to prevent execution of judgment pending appeal to the District Court of Appeal from judgment of the superior court affirming a municipal court judgment in an action wherein H. W. Scott was plaintiff and A. Larson defendant. Petition granted.

Harold C. Morton and Claude A. Shutt, both of Los Angeles, for plaintiff.

Newby & Palmer and Wm. Fleet Palmer, all of Los Angeles, for defendant.

HOUSER, J. Supersedeas. Briefly stated, the facts appear to be that in an action brought in the municipal court plaintiff recovered judgment against defendant for the sum of \$514.85. Defendant appealed to the superior court, where a judgment was rendered in affirmance of the judgment theretofore rendered in the municipal court. The papers and files in the action were thereupon returned to the municipal court, and execution issued therein on its judgment, which execution was returned unsatisfied. Thereafter defendant appealed to the District Court of Appeal from the judgment of affirmance rendered in the superior court, and duly filed the required undertakings on appeal, including stay bond, and for costs; after which plaintiff caused a second execution on the judgment to issue out of the municipal court, by virtue of which certain property of defendant was levied upon.

The prayer of the petition presented herein in effect is that the said levy be quashed, and that, pending the decision of the appeal to this court, the judges and officers of the municipal court be required to desist from the enforcement of said judgment.

[1] The petition sets forth the judgment which was entered in the superior court; and, while respondent denies that any judgment was ever entered or docketed therein, no authorities are cited by respondent which would indicate that in such matters the practice or procedure is such as to require a formal entry or docketing of such judgment before an appeal may be taken therefrom. The general rule relating to the time when appeals may be taken is to the effect that no appeal shall be dismissed on the ground that it was taken after the rendition of the judgment and before its formal entry. Section 939, Code Civ. Proc. See, also, the case of Aspegren & Co. v. Sherwood, etc., Co. (Cal. Sup.) 250 P. 400. And by judicial determination it has been held that, although the record on appeal be not filed until later, the appellate court acquires jurisdiction immediately upon the perfecting of the appeal. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 346, 139 P. 805. So far, therefore, as the present proceeding is concerned, it will be assumed that it is properly before this court.

[2] Again, without citing any authority therefor, respondent objects to the issuance of the writ herein on the ground that:

"The Constitution of the state of California, and the statutes of said state, do not provide a way or means for appeal from the superior court wherein an order has been entered affirming the judgment of the municipal court."

Generally, the Constitution provides that:

"The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three

hundred dollars, and does not amount to two thousand dollars. * * *" Section 4, art. 6, Const.

In addition thereto, among other things, section 5 of article 6 of the Constitution provides as follows:

"* * * The Legislature may, in addition to any other appellate jurisdiction of the superior courts, also provide for the establishment of appellate departments of the superior court in any county or city and county wherein any municipal court is established, and for the constitution, regulation, jurisdiction, government and procedure of such appellate departments, and for the hearing and determination by District Courts of Appeal of causes in which judgment has been rendered by the superior court or an appellate department thereof; provided, however, that the appellate jurisdiction of appellate departments of the superior court and of District Courts of Appeal shall not extend to the hearing and determination of actions at law in which the demand, exclusive of interest, is less than three hundred dollars. * * *"

As the action herein was one at law on a demand for \$660.70 and on which judgment was rendered for \$514.85, the jurisdiction of this tribunal on appeal from such judgment would seem to be indicated at least so far as the question of the amount involved is concerned.

[3-5] While the language of the constitutional provision is not characterized by such clarity and precision or directness in expression as might be desirable, it does contain statements which can leave no doubt that appeals to this court from judgments rendered on appeal to the superior court from judgments given in the municipal court were contemplated. Clearly, the Legislature is given some sort of power with reference to providing appropriate legislation affecting "the hearing and determination by District Courts of Appeal of causes in which judgment has been rendered by the superior court" on appeal from the municipal court where the amount involved is at least \$300. Such power, however, on the part of the Legislature, of whatever character or extent, in no event can diminish or abridge the constitutional guaranty. That is a right which must forever remain unaffected by legislative enactment. It can be modified, altered, or repealed only by and through the source by which it was originally provided. That the Legislature has failed to carry out the implied directions indicated in the constitutional provision with reference to possible details of practice or procedure can in no manner deprive interested litigants of their full rights respecting the hearing and determination by this court on appeal in proper cases from judgments rendered by the superior court on appeal to it from the municipal court. Were it otherwise, the plain intent of the beneficial provisions of the Constitution might be thwarted

and indefinitely delayed, either premeditatedly, through sheer procrastination, or neglect on the part of the legislators, or from the inability of the members in either House of the Legislature to agree, either among themselves or with the co-ordinate branch of the lawmaking body, upon the practice or the form of procedure or whatever regulatory measure which might be suggested or seem desirable. Human rights are not to be thus frittered away or utterly destroyed. The fiat of the people having gone forth, it should be obeyed. The failure of its agent, the Legislature, to perform its duty in arranging and providing for a detail in connection with the broader and more comprehensive privilege should work no injury or prejudice to nor lessen the right for which special constitutional provision has been made. In the absence of legislative provision therefor, the courts have inherent power to regulate the practice and to provide for every just want relative to procedure before them.

In the case of *People v. Jordan*, 65 Cal. 644, 4 P. 683, the principle is fully discussed, and the rule as announced in the syllabus is that:

"Where the Supreme Court has been given by the Constitution appellate jurisdiction in a particular class of cases, but the Legislature has prescribed no means for taking an appeal, the appellate court has inherent power to establish any appropriate system of procedure, and for such purpose may adopt rules, issue writs of mandamus and certiorari, or frame and issue any suitable writ, or adopt any mode of procedure already prescribed for bringing a cause before it."

Section 949 of the Code of Civil Procedure provides in effect that in cases of appeal of the character of that here involved "the perfecting of an appeal by giving the undertaking, * * * stays proceedings in the court below upon the judgment or order appealed from. * * *" No question is raised regarding the sufficiency of the undertaking given by the appellant herein. The difficulty, however, as suggested by petitioner, is not with the provisions of the statute, but lies in the fact that its provisions have been disregarded, in that, since the appeal has been perfected, respondent has caused execution to be issued and levied upon property belonging to petitioner, and which property respondent threatens to sell under said execution in satisfaction of the judgment recovered by him.

[6, 7] The law appears to be well settled that, if after an appeal the court below seeks to enforce the judgment from which the appeal is taken, the appellate court, in its discretion, may grant a special order restraining the action of such lower court in that regard. *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 306, 33 P. 123; *McAneny v. Superior Court*, 150 Cal. 6, 8, 87 P. 1020; *Southern Pacific Co. v. Superior Court*, 167 Cal. 250, 252, 139 P.

69; *Luckenbach v. Krempel*, 188 Cal. 175, 177, 204 P. 591; *Freeman v. Donohoe*, 188 Cal. 170, 174, 204 P. 593.

It follows that the petition should be granted. It is ordered that the levy of the second execution hereinbefore referred to be quashed, and that, pending the final decision of the appeal herein, the judges and officers of said municipal court refrain and desist from the execution of the judgment.

We concur: CONREY, P. J.; YORK, J.

82 Cal. App. 27

WELCH v. REESE (Civ. 5578.)

District Court of Appeal, Second District, Division 1, California. March 24, 1927.

1. Appeal and error ⇨123—Form of judgment as regards appeal is immaterial, if rights have been determined thereby (Code Civ. Proc. § 577).

Form of judgment, under Code Civ. Proc. § 577, from which appeal may be taken, is immaterial so long as it appears therefrom what rights, if any, of respective parties have been determined; test of sufficiency being substance rather than form of judgment.

2. Appeal and error ⇨84(2)—Judgment of superior court that judgment entered by municipal court be affirmed held sufficient final judgment as regards appeal (Code Civ. Proc. § 963).

Judgment of superior court that "judgment made and entered by the municipal court in the above-entitled cause be, and the same is hereby, affirmed," held sufficient in form and substance to authorize appeal therefrom under Code Civ. Proc. § 963, providing for appeal from final judgment in superior court in action brought there from another court.

3. Appeal and error ⇨456—Issuance of execution on municipal court judgment pending appeal from decision of superior court affirming judgment held quashed, and execution restrained pending appeal (Code Civ. Proc. § 963).

Action of municipal court in issuing execution on municipal court judgment, pending appeal under Code Civ. Proc. § 963, from decision of superior court affirming municipal court judgment, held to warrant interference by District Court of Appeal by order quashing levy and restraining execution pending appeal.

Application by Hettie Reese for super-sedeas to be directed to the municipal court of the city of Los Angeles to prevent execution of judgment pending appeal to the District Court of Appeal from a judgment of the superior court affirming a municipal court judgment in an action wherein Ethel Welch was plaintiff, and Hettie Reese defendant. Writ granted.

James, Pace, Smith & Younkin, of Los Angeles, for plaintiff.

S. C. Schaefer, of San Pedro, for defendant.

PER CURIAM. In this proceeding the facts and the prayer of the petition are similar to those set forth in the case of *Scott v. Larson* (Civil No. 5576) 255 P. 248, this day decided by this court. The only additional point presented is that the judgment by the superior court in affirmance of the judgment rendered by the municipal court is not such a judgment as is within the meaning and intent of section 963 of the Code of Civil Procedure, which provides for an appeal from a final judgment in the superior court entered in an action brought into the superior court from another court.

In the instant case that part of the judgment rendered by the superior court which is here material was as follows:

"Whereupon it is ordered, adjudged and decreed by the court that the * * * judgment made and entered by the municipal court * * * in the above-entitled cause be and the same are (is) hereby affirmed. * * *"

Section 577 of the Code of Civil Procedure defines a judgment as the final determination of the rights of the parties in an action or proceeding.

[1-3] The form of the judgment is of no consequence so long as it may be ascertained therefrom what rights, if any, of the respective parties in the action have been determined by the court. The test of its sufficiency must rest in its substance rather than in its form. *Hentig v. Johnson*, 8 Cal. App. 221, 96 P. 390; *Hoover v. Lester*, 16 Cal. App. 151, 116 P. 382; *Black on Judgments*, § 115; *Freeman on Judgments*, § 50.

The judgment by the superior court was clearly sufficient in form and substance to authorize an appeal therefrom. *Scott v. Larson* (Civ. No. 5576) 255 P. 248.

On the authority of the last-mentioned case, it is ordered that the levy of the execution by the municipal court be quashed, and that, pending the final decision of the appeal herein, the judges and officers of said municipal court refrain and desist from the execution of the judgment.

82 Cal. App. 159

NORMAN v. COGSWELL et al. (Civ. 5427.)

District Court of Appeal, Second District, Division 2, California. April 1, 1927.

1. Certiorari ⚡12—Certiorari lies only to review judicial or quasi judicial proceedings.

Only proceedings of a judicial or quasi judicial character may be reviewed by certiorari.

2. Certiorari ⚡21—Determination what newspaper should give notice of election for proposed fire protection district is reviewable by certiorari, being quasi judicial (*Hillyer's Consol. Supp. pt. 2, p. 2707*).

In proceedings for creation of fire protection district under *Hillyer's Consol. Supp. pt. 2, p. 2707*, determination by county board of supervisors that certain newspaper should give notice of the election is quasi judicial in character and subject to review by writ of certiorari.

3. Certiorari ⚡21—Determination by county board of supervisors that proper notice of election for proposed fire protection district was given is reviewable by certiorari; being "judicial" (*Hillyer's Consol. Supp. pt. 2, p. 2707*).

In proceedings for creation of fire protection district under *Hillyer's Consol. Supp. pt. 2, p. 2707*, determination by county board of supervisors that proper notice of election for proposed district was given in the newspaper which had been determined by them to be the one most likely to give notice to the electors, is judicial rather than ministerial, and subject to review by writ of certiorari.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial.]

4. Counties ⚡18—Publication of notice of election for proposed fire protection district in newspaper other than one designated held insufficient (*Hillyer's Consol. Supp. pt. 2, p. 2707*).

In proceedings for creation of fire protection district under *Hillyer's Consol. Supp. pt. 2, p. 2707*, publication of notice of election for proposed district in a newspaper other than the one designated by the board of supervisors for that purpose as the one most likely to give notice to the electors is insufficient.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Petition for writ of certiorari by George B. Norman against Prescott F. Cogswell and others to review an order of the Board of Supervisors of Los Angeles County creating the Moneta County Fire Protection District. From a judgment affirming the action of the Board of Supervisors and denying the writ, petitioner appeals. Reversed.

Lorrin Andrews, of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, and J. H. O'Connor, Asst. County Counsel, both of Los Angeles, for respondents.

THOMPSON, J. A writ of certiorari was issued by the superior court of Los Angeles county, directed to the board of supervisors of that county for the purpose of reviewing the proceedings leading up to the creation of the Moneta county fire protection district of Los Angeles county, under the provisions of "An act to provide for the formation, management, and dissolution of county fire protection districts, and annexations thereto,

setting forth the powers of such districts and providing for levying and collecting taxes on property in such districts to defray the expense thereof." Hillyer's Consolidated Supplement, pt. 2, p. 2707. From the return to the writ it appears that a petition was filed for the establishment of the district, and that the board of supervisors determined that it should be formed. Notice of the time and place fixed for "a hearing of the matter of the formation" was published, as required, in the Gardena Reporter, which newspaper was deemed by the board most likely to give notice to the inhabitants of the territory embraced in the resolution, of the proposed formation of the district. Written objections by 59 freeholders were presented and heard, and thereafter the board of supervisors decided to establish the district. The act provides that, where objections are filed by 25 or more freeholders, the board of supervisors must submit its decision to an election called by it for that purpose, and that it must give notice of the "resolution ordering the holding of such election" by publication "in the newspaper of general circulation in said proposed district, deemed by said board to be the most likely to give notice to the electors thereof of such proposed election." In this instance the board determined that the Moneta Observer was the paper most likely to give notice, and ordered the notice to be published accordingly. The notice, however, was not published in this last-named newspaper, but was published in the Gardena Reporter. The election was held, and subsequently the board, in accordance with the provisions of the act did "enter a finding to that effect upon its minutes," in which it declared that 94 votes were cast in favor of, and 85 votes were cast against, the creation of the district. The district was declared established. The judgment of the superior court affirmed the action of the board of supervisors, and this appeal is from that judgment.

[1] The appellant maintains that the board of supervisors was exercising quasi judicial functions in all of the steps taken by it up to and including its final determination that the votes cast were in favor of the creation of the district, that the publication of the notice of election in a newspaper other than the one designated was an insufficient notice, and that due notice is a prerequisite to the exercise of its jurisdiction thereafter. The respondents' answer is that the things done by the board up to the point where, after hearing, it determined that a district should be formed, are judicial in character, and that all of the things done by the board thereafter are only ministerial. It is conceded by both counsel that the writ of certiorari will not lie except to review proceedings of a judicial or quasi judicial character; hence it is unnecessary for us to do more than refer to the case of *People v. Board of Supervisors*, 122

Cal. 421, 55 P. 131, for a statement of that rule.

[2, 3] The main difficulty in this case is to determine whether or not the giving of the notice involved a quasi judicial act or was a necessary prerequisite to the performance of some quasi judicial act. It can hardly be denied that the determination that the Moneta Observer was the newspaper most likely to give notice to the electors was a quasi judicial finding. We may assume, for the purposes of this case, that the establishment of the boundaries was a legislative act, that the calling of the election and the canvass of the votes were purely ministerial; nevertheless, it remained for the board to do something beyond the mere canvassing of the returns before the board could, in the words of the act, "enter a finding" to the effect that a majority of votes had been cast at the election in favor of the creation of a district; it must, upon proper evidence, such, for example, as the proof of publication by affidavit of the publisher, decide that a proper notice had been given in the newspaper which it had already decided was the most likely to give notice to the electors. This determination cannot be said to be ministerial, but involves a consideration and weighing of testimony. It is judicial.

We find nothing in the case relied upon most strongly by the respondents (*Borchard v. Supervisors*, 144 Cal. 10, 77 P. 708) to conflict with these views. An examination of the statute involved in that action shows that the notice of election, which it is provided the supervisors "shall" give, must be published in a newspaper published in the boundaries of the proposed corporation, or "shall" be posted in four public places therein. There is no provision in the act there involved that it shall be in the newspaper *deemed* (italics ours) by the supervisors most likely to give notice to the electors. Perhaps more important than this is the fact that in the *Borchard* Case the court found that the notice had been properly given. And, aside from this, we also find that the organization of a district such as that in question here differs essentially from the organization of a municipal corporation. A fire protection district compares more logically with an assessment district for a certain definite and particular improvement. The formation of the district constitutes the steps preliminary to the assessment for the improvement, which in this case is fire protection organization and equipment. See *Pasadena Park Improvement Co. v. Leland*, 175 Cal. 511, 166 P. 341. We may fairly and reasonably assume that assessments will be levied for the purposes of the district by the board of supervisors, and all preliminary steps theretofore are requisite to the jurisdiction of the board to make such levy. This fact, we think, is of extreme importance, for, as was said in *Imperial Water Co. v. Supervisors*,

162 Cal. 14, 120 P. 780, quoting from Robinson v. Board, 16 Cal. 208:

"It is sufficient if they" (the board) "are invested by the Legislature with power to decide on the property or rights of the citizen. In making their decision they act judicially, whatever may be their public character."

The Imperial Water Co. Case also recites proceedings very similar to those here in these words:

"The proceedings provided for by the act comes clearly within these definitions. Section 1 designates the persons who may initiate the proceeding before the board. Stats. 1911, p. 509. Section 2 provides that such proceeding shall be begun by a petition presented to the board, signed by the required number of persons, representing the majority in value of the land, and setting forth the boundaries of the proposed district and the source of the water supply. Stats. 1911, p. 509. The petition, together with a notice of the time of the meeting at which it will be presented to the board, must then be published for two weeks. At that time supervisors must hear the same. They may change the boundaries as deemed advisable by including or excluding territory therefrom, but they must not exclude land irrigable from the proposed source, or include land which will not be benefited by irrigation therefrom. Any person whose lands may be irrigated from the proposed source may, in the discretion of the board, have such lands included within the district. The board must hear all relevant and competent evidence offered, and thereupon determine whether or not the petition is signed by a majority in number of the holders of lands within the proposed district susceptible of irrigation from the same source or system, and whether or not the lands held by such signers represent a majority in value of such lands within the district. Section 3. They must also determine the genuineness of the signatures to the petition and the sufficiency of the publication made. If all these facts are determined in favor of the petitioners, the board may then make an order fixing the boundaries of the district and *calling an election* to submit to the voters within the territory thus fixed the question whether the same shall be organized as a district under the law. Section 6. If the election is favorable, the board shall then *make an order declaring the territory organized as an irrigation district.*" (Italics ours.)

And then says:

"This scheme presents all the usual elements of a judicial proceeding, the notice, the hearing, the taking of evidence, and the judgment. The privilege of using a portion of the water from a common source upon a particular tract of land is one which directly and materially affects the value of the land, and is clearly a

property right of great value. *The right to be excluded from the burdens which the construction and operation of the waterworks will impose upon property within such a district is also a property right.* By this act the Legislature has committed to the board of supervisors the power to determine and dispose of these rights. The decision of such a matter, after notice and a hearing, is clearly the exercise of a judicial function. The circumstance that the facts are to be established as a foundation upon which the subsequent legislative act of creating a public corporation is to be based, does not destroy the judicial character of the determination nor take away the fact that it does affect private property injuriously or beneficially as the case may be. It is, therefore, a proceeding subject to be reviewed in certiorari." (Italics ours.)

It will be noted that the judgment mentioned in the last-quoted language of this case refers to the final order entered after election. And so in this case no final judgment could be entered until after the election. In the case of Broyles v. Mahon, 72 Cal. App. 484, 237 P. 763, which involved the creation of a high school district, the court says:

"It may be conceded that the creation of the proposed Chico high school district, as it will be after the annexation of the common school districts, is a legislative act; but it appears to be the law that where the legislature delegates legislative power to a local board and provides that it can be exercised only upon certain conditions and upon the ascertainment of certain facts by such board, after notice and hearing to interested parties, the proceeding thus authorized is of a judicial character which may be reviewed by writ of review. Imperial Water Co. v. Supervisors, 162 Cal. 14, 120 P. 780; 4 Cal. Jur. 1074, and citations, note 19."

[4] Having determined that the particular thing complained of in the instant case is subject to be reviewed in a certiorari proceeding, the next and final question is whether the publication of the notice was sufficient? We think it was not. It has been held that the publication of notice in a newspaper other than the one designated is equivalent to no notice at all. Chase v. Treasurer of Los Angeles et al., 122 Cal. 540, 55 P. 414. See, also, Stumpf v. Board of Supervisors, 131 Cal. 364, 63 P. 663, 82 Am. St. Rep. 350. In this instance it was not only not published in the paper designated, but was not published in the newspaper deemed by the board most likely to give notice to the electors.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

82 Cal. App. 240

BANK OF ITALY v. WETZEL et al.*
(Civ. 5370.)

District Court of Appeal, First District, Division 1, California. April 8, 1927.

Hearing Denied by Supreme Court June 6, 1927.

1. Evidence $\S$ 423(6)—In action on note not set out in pleadings, plea that defendants were guarantors did not plead matters which could not be proved without violating parol evidence rule.

In action on note, defendants' plea that they were mere guarantors and exonerated by acts of plaintiff did not plead matters which could not be proved without violating parol evidence rule, where note was not set out in pleadings.

2. Guaranty $\S$ 86—Defense in action on note that defendants were guarantors was not defective for failure to allege they were not indemnified by principal (Civ. Code, $\S$ 2819).

In action on note, plea that defendants were mere guarantors and exonerated by acts of plaintiff was not defective because it failed to allege that guarantors were not indemnified by principal for guaranty, notwithstanding Civ. Code, $\S$ 2819.

3. Bills and notes $\S$ 476(1)—Pleading $\S$ 8(4)—Plea that note was executed without any consideration whatsoever held good and not mere conclusion.

In action on note, defendants' plea that it was given "without any consideration whatsoever" is not mere legal conclusion of pleader, but states good defense.

4. Guaranty $\S$ 25(3)—Evidence held to support finding that note executed by bankers to buyers of bank to guarantee payment of paper was without consideration.

Evidence held to support finding that note signed by sellers of bank, but executed after sale, to guarantee payment of paper held by such bank, was without consideration.

5. Guaranty $\S$ 16(3)—Guaranty of payment of notes, not entered into at same time with original obligation, requires distinct consideration (Civ. Code, $\S$ 2792).

Guaranty of payment of notes, not entered into at same time with original obligation, held to require consideration distinct from that moving to makers of original notes, in view of Civ. Code, $\S$ 2792.

6. Guaranty $\S$ 21—Payment by guarantors of two notes guaranteed held not conclusive recognition of consideration for note given to guarantee payment of third note.

Where defendants gave note to guarantee payment of three other notes, their payment of amounts represented by two of such notes held not to operate as conclusive recognition of consideration for third guaranty note.

Appeal from Superior Court, City and County of San Francisco; L. T. Price, Judge.

Action by the Bank of Italy against H. E. Wetzel and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Louis Ferrari and J. J. Posner, both of San Francisco, for appellant.

Crosby, Naus & Crosby, Daniel Rygel, and George Naus, all of Oakland, for respondents.

TYLER, P. J. Action on a promissory note given for the sum of \$5,600. The case was tried without a jury. The findings in effect determined that the defenses interposed were true, and judgment followed in favor of defendants.

At the opening of the trial plaintiff moved for judgment on the pleadings. The motion was denied. Appellant here claims, first, that the lower court erred in its denial of the motion, for the reason that all the allegations of plaintiff's complaint were admitted, and the affirmative defenses relied upon in the answer were legally insufficient to base any judgment in favor of defendants. Appellant's next and main contention is that the evidence is insufficient to support the findings. We will discuss the objections in the order stated. The complaint alleges, in substance, that defendants executed and delivered their promissory note for the sum of \$5,600, with interest at the rate of 7 per cent. per annum. The note itself is not set forth in the pleadings. It then recites that no part of said note has been paid except the sum of \$3,950.01, and that there is now due, owing, and unpaid, with interest, the sum of \$1,812.30 for which sum judgment is prayed. The answer is by way of confession and avoidance. The due execution of the instrument is admitted, but under two affirmative defenses it is prayed that plaintiff take nothing by its action. Under the first defense the claim is made that the makers were mere guarantors and were exonerated by the acts of the plaintiff. Under the second, it is asserted that the instrument sued on was without any consideration whatsoever. The allegations of the answer in support of the first affirmative defense set forth, in substance, that the note was given to guarantee the payment of three other separate promissory notes made by certain principal debtors named Bidart, Wittman, and Castro, and executed by said persons to plaintiff; that the Bidart and Wittman notes were paid by defendants, and demand was made by them in August, 1922, for the surrender of the Castro note, together with an offer by them to pay the same in full, but plaintiff informed defendants that the note was lost; that in truth and in fact it was not lost, but had been extended by the execution of a new note, which prolonged the time of payment thereof for a period of two years, contrary to the consent of defendants and without their knowledge. It is then alleged that, at the time the new note was executed and received by plaintiff, the original note was due and

payable and could have been collected. Further allegations are to the effect that the new note was not due and payable at the time of the commencement of this action, that recourse against defendants was not reserved by plaintiff, and that no attempt had been made by it to collect the indebtedness from Castro. The second affirmative defense merely recited that the note sued upon was given without any consideration whatsoever.

[1, 2] It was the contention of plaintiff, in support of its motion for judgment on the pleadings, that the first plea of defendants was an attempt to plead matters which could not be proved without a violation of the so-called parol evidence rule, and that, under the second affirmative defense, the form of denial constituted nothing more than the conclusion of the pleader. We do not consider there is any merit in these contentions. Aside from any question of the doctrines of aid or cure of pleadings by verdict, findings, or judgment, or cure by the right of amendment to conform to proof, whether such right be exercised or not, we are of the opinion that the allegations were sufficient to raise the pleas of exoneration and lack of consideration. The instrument was not set forth in any of the pleadings. The guaranty could have been an intrinsic part of the note. The pleadings did not indicate whether intrinsic or extrinsic evidence would be required as proof. As a matter of fact, as hereafter appears, the guaranty was intrinsic. Nor is there any merit in the further objection to the plea that it fails to allege that the guarantors were not indemnified by the principal for the guaranty. It is true that under section 2819 of the Civil Code, if defendants were indemnified by the principal debtor, the exoneration would be inoperative to the extent of the indemnity. Defendants, however, were only required to plead the facts raising the question of exoneration, which they did; they were not required to anticipate a defense of this character and negative or avoid it. *Moore v. Copp*, 119 Cal. 429, 433, 51 P. 630.

[3] Equally without merit is the claim that the plea of want of consideration, as set forth in the second affirmative defense, is defective. Defendants alleged that the note was given "without any consideration whatsoever." In some jurisdictions a plea in this form is held to be a mere conclusion of the pleader. This is not the rule, however, in this state. It has here been expressly held that, where an answer states in so many words that the note sued on was executed without any consideration whatever, it states a good defense. *Rivera v. Cappa*, 29 Cal. App. 496, 156 P. 1016, 1017. In denying a transfer in this case, our Supreme Court reviewed the former decisions upon the subject and held the allegation to be good. It is difficult to imagine why such a plea should

be more specific. An allegation that there was no consideration expresses the fact with such clearness and certainty there remains no doubt upon that subject. By the words employed, plaintiff was fully advised of the nature of the plea. We conclude, therefore, that the motion for judgment on the pleadings were properly denied.

[4] This brings us to the next and main contention of appellant, that the evidence is insufficient to support the findings. It appears therefrom that in September or October, 1920, a company known as the Stockholders' Auxiliary Corporation purchased the First National Bank in King City by acquiring all of its outstanding stock. The negotiations on the part of the buyer were conducted by one Giannini and defendants herein, Wetzel and Ulrey, represented the sellers. Giannini was president of the Stockholders' Auxiliary Corporation, and defendant Wetzel was a small stockholder of the selling bank, owning 25 shares therein. He was its cashier, and Ulrey was its president. During the negotiations leading up to the sale, Giannini was assured by Wetzel that the notes held by the bank were all good. Giannini had the notes examined by one Blauer, who made objection to three of them. The notes objected to were separate ones given by persons named Bidart, Wittman, and Castro, and referred to in defendants' answer. Wetzel informed Blauer that he was willing to guarantee them if it was important. After his audit was completed, Blauer made his report to Giannini, and the sale of the bank was thereupon completed. At this time nothing was said by the parties relating to any guaranty, and none was given. During the negotiations, Giannini had remarked to Wetzel that, if he made good, there was plenty of room at the top. After its sale, the First National Bank continued to operate as such for about a year, and Wetzel continued as its cashier. In May, 1921, he was transferred to Oakland to become manager of the College Avenue branch of the Bank of Italy. The Bidart, Wittman, and Castro notes in the meantime remained unpaid, and in January, 1922, and while Wetzel was still manager of the College Avenue Bank one Snyder, an officer of the Bank of Italy, requested Wetzel to guarantee them. In keeping with his oral promise made about a year before, Wetzel executed his guaranty of the three notes involved in the principal sums of \$1,506.04, \$3,167.90 and \$931.93, respectively, covering the amounts of the Castro, Bidart, and Wittman obligations. These notes respectively carry the written memoranda "Re Castro guarantee," "Re Bidart guarantee," and "Re Wittman Bros. guarantee," all of which were written on the face of the respective notes before they were signed. They were made in favor of the Stockholders' Auxiliary Corporation, and matured in July, 1922. In the

month of August of the same year, the three guaranty notes were renewed by the consolidation into one note for the sum of \$5,600 in favor of the Bank of Italy. This renewal note bore on the back thereof the memoranda, "covering guarantee of Bidart, Wittman, and Castro notes," which was written thereon before the note was signed. Nothing was received by either of the defendants from any one for the guaranty notes, nor did either of the defendants receive any of the money loaned to Castro, Bidart, or Wittman. At the time of the consolidation of the notes, Wetzel was no longer connected with the Bank of Italy. In November, 1922, demand was made for payment of the consolidated note. Defendant Wetzel thereupon paid the amount covering the Bidart and Wittman notes, but plaintiff was unable to produce the Castro note; it being claimed by it that it was lost. In December following, Wetzel was informed that the same had been found, and he visited plaintiff bank for the purpose of paying the same. Wetzel discovered that the note was not the one he had guaranteed. The new note was executed in December, 1922, and antedated July 1, 1922, and was payable two years thereafter. The amount was for the principal sum of \$1,506.04, the increase over the amount of the original note representing the sum of \$128.61 accrued interest.

The findings of fact upon which the judgment for defendants is based include those that there was no consideration whatsoever for the \$5,600 note or the other three notes for which said note was substituted by way of renewal, and the finding that plaintiff extended the time of the Castro obligation by accepting in lieu thereof a renewal note in a sum covering the original principal sums, plus interest, and upon different terms as to time of payment, thereby exonerating defendants. It is appellant's contention that the evidence is insufficient to support these findings, as it shows a consideration moving to Wetzel and also a prejudice suffered by Stockholders' Auxiliary Corporation; and, further, that the note was not a guaranty, and in addition thereto that the Castro obligation was not renewed, but at best merely physically replaced. In this connection it is claimed that it clearly appears from the evidence that defendants, who were, respectively, president and cashier of the selling bank, were interested in having the transaction consummated, and in furtherance of this object voluntarily gave assurance that the notes were good and would be guaranteed by them; that it further discloses they were stockholders in the selling institution and profited as a result of the sale; that it was understood between Wetzel and the purchasing corporation that, if such sale was consummated, subsequently another bank would become owner of the purchased corporation, and Wetzel

would be employed by it in the same capacity he held in the selling bank at an increased salary, and that his promotion would follow; that, in pursuance of such negotiations, the sale was consummated, the shares of stock were sold and employment and promotion followed. The weakness of this argument lies in the fact that there is no evidence that these considerations in any manner controlled the transaction or that they were ever considered by the parties as part of the consideration for the sale. The guaranties were executed about a year after the sale of the bank had been consummated. Giannini, representing the purchasing corporation, had never even mentioned, much less requested, at the time of the sale, that the guaranties be given as part consideration for the transfer, and none were in fact demanded or given at such time. No obligation was incurred by Giannini to employ Wetzel, nor did Wetzel incur any obligation to guarantee the notes. It is true that Wetzel owned some 25 shares of stock in the selling corporation, which had cost him \$100 per share, and which he sold by reason of the transaction for \$115 per share, but it was never claimed or even intimated at the time of the transaction, nor is there any evidence to show that this fact was an inducing cause of the sale, or that it formed any part of the consideration for the transfer or the assumption by defendants of the obligation by them of the payments of the notes. It must be remembered that the original obligations of Castro, Bidart, and Wittman were incurred in the year 1920, and the original guaranties were entered into in 1922, the latter forming no part of the consideration of the former.

[5, 6] Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation. Civ. Code, § 2792. The guaranties, therefore, required a consideration distinct from that moving to Castro, Wittman, and Bidart. The trial court found that none existed, and the evidence fully supports this finding. The further argument is advanced by appellant that, even conceding this to be true, the payment by defendants of the amounts represented by two of the notes operates as a conclusive recognition of consideration. We do not think so. Plaintiff was in no manner prejudiced, but rather benefited by the payments. No implied promise to pay the amount of the remaining note could possibly arise by such conduct. An implied promise under such circumstances is itself, without consideration, a mere nudum pactum, and unenforceable. Moreover, there never was in fact a part payment of an entire obligation. The

note sued upon and upon which payments had been made and applied is really severable. It was a guaranty of three renewal notes. The amount paid was an exact discharge of the Bidart and Wittman items, and upon payment these notes were delivered to defendants, and the receipt given to them bears the indorsement, "Bal. due 1649.99 % Castro."

Counsel for respondent presents, in support of the judgment, the additional argument that any oral guaranty given or made when the sale took place was made to Stockholders' Auxiliary Corporation, the buyer; that it was a special guaranty which would not inure to the benefit of plaintiff bank; that no one but the particular person addressed may act upon a proposal of special guaranty, and the fact that the purchasing corporation may have been either the agent or principal of the Bank of Italy would not alter the situation; that a new party cannot be thus imported into a contract and imposed upon guarantors without their consent, any more than a change can be made in other pre-existing conditions, as one has a right to choose those with whom he may contract—citing *Garfield v. Ford*, 191 Cal. 69, 214 P. 963. The conclusion that we have reached that the findings of the trial court of lack of consideration of the obligations being fully supported by the evidence, a discussion of the distinction between a general and special guaranty would accomplish no useful purpose. While we are of the further opinion that the evidence supports the finding that defendants were exonerated (even assuming a liability to have existed) by the act of plaintiff in renewing the note, this question, too, becomes unimportant in face of the finding of lack of consideration.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

82 Cal. App. 116

WEAVER v. FICKETT et al. (Civ. 3120.)★

District Court of Appeal, Third District, California. March 30, 1927. Hearing Denied by Supreme Court May 26, 1927.

1. Contracts §229(2)—Where limit was set to cost of building, excess to be deducted from commission, builders were required to pay claims with or return moneys advanced on incurring greatly excessive cost.

Where contract, allowing builder 10 per cent. upon actual cost of building, provided building was not to exceed specified cost, and that, in case of greater cost, overcharge was to be deducted from commission, builders were required to pay claims with or return all moneys advanced, where total cost of building was greatly in excess of specified amount allowed.

2. Indemnity §13(1)—Owner could recover against contractors amounts he was required to pay on claims for which he had advanced contractors money.

Where contractors were under legal obligation to pay claims for labor and materials from moneys advanced by owner, owner could recover amount of claims he was compelled to pay by reason of legal liability, though payments were made without express request from contractors.

3. Indemnity §13(1)—Contractors, turning over to owner unpaid bills, impliedly requested him to make payment.

Delivery by contractors to owner of unpaid bill held implied request to owner to make payment, in action by owner for moneys advanced for contractors' use.

4. Indemnity §13(1)—Payment under legal liability of money which another must pay implies promise to repay.

Where one is legally compelled to pay money which another is under legal obligation to pay, law implies request and promise to repay; it not being necessary that payment should have been coerced, as existence of legal liability is sufficient.

5. Pleading §328—That bill of particulars set forth greater sum than plaintiff was entitled to recover held immaterial variance.

That bill of particulars, in action for money advanced for defendants' use and benefit, set forth claim for greater sum than plaintiff was actually entitled to recover, held not to create material variance.

6. Indemnity §15(7)—Evidence as to moneys owner owed contractors on other work held immaterial in action by owner for moneys advanced, where no affirmative claim was asserted.

In action against contractors for moneys advanced for their use, testimony as to moneys owed defendants by plaintiff on another job held immaterial, where such indebtedness was not pleaded by counterclaim or cross-complaint or otherwise.

7. Indemnity §15(7)—Contractors, sued for money advanced, could not show expenditures on other work for plaintiff without proving terms of other contract.

In action against contractors for moneys advanced for their use and benefit, evidence of expenditures made by contractors on other work for plaintiff held properly rejected, in absence of showing of terms of other contract to determine question of materiality.

8. Appeal and error §1071(1)—Contractors, sued for money advanced, could not object to findings that they paid excessive amounts for labor and materials, where no deduction was made therefor.

Contractors, sued for moneys advanced for their benefit, could not complain of findings that they paid more than reasonable value for certain labor and materials, where no deductions were made on that account from amounts paid by them.

9. Trial Ⓒ388(4)—**Finding that defendants were copartners held unnecessary, where allegation of partnership in complaint was not denied.**

Where complaint alleged defendants were copartners, and allegation was not denied by answer, finding thereon was unnecessary.

10. Indemnity Ⓒ13(1)—**Where contractors were obliged under contract to pay labor and material claims, law implied request and promise to repay owner for claims he was required to pay.**

Where owner paid claims of laborers and materialmen which contractors were under legal obligation to pay, law implied request on part of contractors and promise to repay owner to extent of owner's money remaining in their hands, in action by owner for moneys paid.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by R. D. Weaver against George E. Fickett and V. L. McFadden, copartners doing business under the firm name and style of Fickett & McFadden. Judgment for plaintiff, and defendants appeal. Affirmed.

Davis & Thorne, of Los Angeles, for appellants.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for respondent.

FINCH, P. J. The complaint alleges:

That the "plaintiff advanced to and for the use and benefit of said defendants * * * \$4,779.35, which said amount defendants agreed to repay to said plaintiff, * * * but said defendants failed and refused to repay the said sum or any part thereof."

The prayer is for judgment in the amount alleged. The answer consists of denials of allegations of the complaint. Judgment was entered in favor of the plaintiff for \$1,743.91 and costs of suits, and the defendants have appealed.

The defendants demanded a bill of particulars, and, in response thereto, plaintiff served on them and filed a list of payments made by the plaintiff to various persons and firms, aggregating \$4,779.35, at the end of which appears the following:

"The above and foregoing amounts are moneys advanced by plaintiff to and for the use and benefit of the defendants Fickett & McFadden for labor and materials furnished and used on building contracted to be erected and constructed by Fickett & McFadden for plaintiff, * * * some of which above-named amounts were secured by mechanics' liens filed by creditors in actions to foreclose same."

The court, on stipulation of the parties, appointed a referee "to take and state an account of all dealings and transactions between plaintiff and the defendants, with relation to the matters involved in said cause." The parties appeared before the referee, and

produced evidence. The referee, among other things, found that the plaintiff delivered to the defendants the sum of \$10,000 to be used in the construction of the building mentioned in the bill of particulars, and referred to in the briefs as the Victoria avenue job, and that the defendants "paid out for and on account of labor performed and materials furnished for said building the sum of \$8,256.09." It is undisputed that the plaintiff delivered the sum of \$10,000 to the defendants, as found by the referee. The evidence showing the amount paid out by the defendants in the construction of the building, which consists of numerous items, is too long to set out, and it is deemed sufficient to say that it clearly justifies the finding of the referee in relation thereto. The contract between the parties provides:

"For and in consideration of 10 per cent. of the total cost of said work, and including both labor and materials, to be by said owners paid to said builders, said builders will build, superintend, and oversee the building in constructing of said work in accordance with said plans, subject to such changes as may be agreed upon, to use diligence and care in said construction; builders' charge of 10 per cent. to be paid only on the actual cost of building, said cost to be based upon estimate furnished before building is started, said building to not exceed total cost of \$10,125, including said 10 per cent. commission. If the total cost is less than \$10,125, 1½ per cent. of saving to be paid to Fickett & McFadden in addition to 10 per cent. If building exceeds \$10,125, overcharge to be deducted from said 10 per cent. commission, to the extent of the commission only."

[1] The evidence shows without dispute that in addition to the \$10,000 advanced to defendants, the plaintiff paid out the sum of \$4,779.35 in discharging claims for labor and material contracted for and used by defendants in the construction of the building. Unpaid bills for the greater part of this sum were turned over by defendants to the plaintiff to be paid by the latter. Defendant Fickett testified that the reasonable cost of the building was \$14,000. Other witnesses for defendant testified that the reasonable cost of the building was \$14,000 or more. Some changes were made in the original plans, at plaintiff's request, which caused an additional expense of a few hundred dollars. If the additional amount so expended be deducted from the total cost of the building, the remainder greatly exceeds the sum of \$10,125, and it follows that the defendants, under the terms of the contract, were not entitled to any compensation for superintending and overseeing the construction of the building. It was the duty of the defendants, therefore, to pay claims with or return to the plaintiff the unexpended part of the \$10,000 advanced by the plaintiff.

[2-4] Appellants contend that the payments made by the plaintiff in satisfaction of claims for labor and materials were not made for defendants' benefit or at their request, but that they were mere voluntary payments for which no recovery can be had. The delivery by the defendants to the plaintiff of unpaid bills, under the circumstances stated, implied a request that the plaintiff pay them. Without consideration of that fact, however, the plaintiff was under legal obligation, as between him and the claimants, to pay the amounts due them. It was the legal duty of the defendants to pay such claims to the extent of the moneys remaining in their hands which had been advanced by the plaintiff. An action may be maintained—

"by a person who is legally compelled to pay money which another is under legal obligation to pay, or who, to relieve himself from liability or to save himself from damage, pays money, not officiously, which another person ought to have paid; for in such cases the law implies a request on the part of such other person, and a promise to repay." 17 Cal. Jur. 587.

"One who is compelled, by reason of a legal liability therefor, to pay an obligation for which another in equity and good conscience should pay, may recover from that other the money so paid. It is not necessary that the payment should have been coerced by actual legal proceedings; the mere existence of the legal liability is sufficient." 41 C. J. 13.

[5] It is contended that there is a material variance between the "allegations of the complaint and bill of particulars" and the evidence. If it be conceded that the bill of particulars should have set forth the respective amounts advanced to and paid out by the defendants and the balance remaining in their hands, rather than the amounts paid by the plaintiff in satisfaction of unpaid claims, it does not appear that the defendants were in any manner prejudiced by the course pursued. But it cannot be held that there is a material variance. The plaintiff was legally compelled to pay the claims in question which the defendants should have paid to the extent of plaintiff's money which remained in their hands. The fact that the bill of particulars set forth a greater sum than plaintiff was entitled to recover is immaterial.

[6, 7] Appellants contend that the defendants "should have been permitted to testify as to moneys owing defendants by plaintiff on another job," referred to as the Glendale job. The defendants did not plead such indebtedness by counterclaim or cross-complaint or otherwise, and therefore evidence relating thereto would have been immate-

rial. It is also contended that it was error to exclude evidence of expenditures made by the defendants on the Glendale job. It appears that the Glendale building was commenced during the progress of the work on the Victoria avenue building. In appellants' opening brief it is said:

"It appears by the evidence that \$10,000 was paid to defendants by the plaintiff R. D. Weaver on the Victoria avenue job, and \$2,000 on the so-called Glendale job."

The plaintiff so testified. Appellants have called attention to no evidence showing the terms of the contract under which the Glendale building was being constructed. In the absence of such showing, it cannot be determined whether or not evidence of the amount expended in such construction was material, and, under such state of the evidence, the ruling complained of was not erroneous.

[8] The referee received evidence and made findings to the effect that for certain labor and materials the defendants paid more than the reasonable value thereof. It does not appear, however, that any deductions were made on account thereof from the total amount paid out by the defendants, and therefore the defendants were not prejudiced by such evidence and findings.

[9, 10] Appellants contend that the findings are insufficient, because it is not found that the defendants are copartners. The complaint alleges that the defendants are copartners, and the answer does not deny the allegation; hence no finding thereon is necessary. It is also contended that—

"There should have been a finding to the effect that plaintiff had paid out the money recovered in said judgment by plaintiff for the benefit of defendants, and under agreement with defendants, or under authority of defendants."

There was no dispute as to the fact that the plaintiff paid the money for labor and materials used in the construction of the building. The referee found the respective amounts advanced to and paid out by the defendants. The contract between the parties shows that the plaintiff was under legal obligation to laborers and materialmen to pay the sums due them, and, having done so, the law implies a request on the part of the defendants and a promise to repay the plaintiff to the extent of plaintiff's money remaining in their hands.

The judgment is affirmed.

We concur: PLUMMER, J.; SHIELDS, Justice pro tem.

82 Cal. App. 137

MARPLE et al. v. AMERICAN AUTOMOBILE INS. CO. (Civ. 5789.)

District Court of Appeal, First District, Division 2, California. April 1, 1927.

1. Insurance ☞435—Liability of insured, imposed by law on signing minor son's application for operator's license, held not "others' liability assumed under contract," exempting insurer under liability policy (Motor Vehicle Law, § 24, as amended by St. 1919, p. 223, § 14).

Liability of insured for negligence of minor son in driving automobile, imposed under Motor Vehicle Law, § 24, as amended by St. 1919, p. 223, § 14, in force at time insured signed son's application to obtain operator's license, held not "liability of others assumed by the assured under any contract or agreement," exempting insurer under liability insurance policy from payment of judgment recovered against insured for injuries inflicted by minor son.

2. Insurance ☞591½—Under provision that injured person obtaining judgment could sue insurer, proof of insured's insolvency was not required (St. 1919, p. 776).

Recovery could be had against liability insurance company under judgment recovered in action against insured without proof of insured's insolvency, under policy containing provision required by St. 1919, p. 776, that insolvency shall not relieve insurer and that action may be brought against it directly by person injured in case judgment is secured.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Robert J. Marple and another against the Automobile Insurance Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Sloss & Ackerman, of San Francisco, for appellant.

Marcel E. Cerf and M. P. Bruton, both of San Francisco, for respondents.

KOFORD, P. J. Respondents first recovered judgment against Jay H. Merrill for the death of their son, Robert, Jr., caused by the negligent operation of an automobile in which he was riding while driven by the son of said Merrill. An execution on said judgment having been returned unsatisfied, respondents next commenced this action against appellant, the insurance carrier for said Merrill. Judgment was for respondents against the appellant insurance company.

Appellant claims first that the record in the first suit against Merrill shows that the judgment against him was not given upon the theory of respondeat superior, but because of a liability assumed by Merrill by contract in and by his signing the application of his minor son to obtain an operator's license to drive the automobile. We shall treat the

point as though the judgment was not based upon the doctrine of respondeat superior.

The policy of insurance insured said Merrill (section II) "against direct loss and expense arising or resulting from claims upon the assured for damages by reason of the ownership, maintenance, manipulation, or use of (the automobile in question), * * * if such claims are made on account of [clause A] bodily injuries or death accidentally suffered by any person or persons * * * as the result of an accident occurring while this policy is in force. * * *

[1] One of the limitations (No. 20) of this policy provided that such insurance " * * * does not cover against claims arising under any workmen's compensation agreement plan or law; * * * nor for the liability of others assumed by the assured under any contract or agreement." Jay H. Merrill signed the application of his son for an operator's license as required by section 24, c. 147, Statutes 1919, at page 223, then in force. The statute does not prescribe any particular form for the applicant for a license to sign. It does not prescribe any contract nor formula of words for the parent of a minor to sign. But it is declared unlawful for a parent to knowingly permit his child to drive a motor vehicle without having obtained a license. It is provided that no license shall be granted to a minor unless the parent shall have joined in the application by signing the same, and, finally, that the negligence of the minor shall be imputed to the one so joining, who is declared to be jointly and severally liable with the minor for the latter's negligence.

Since this appeal was perfected the case of Lackey v. Olds & Stoller Interexchange (Cal. App.) 252 P. 672, has been decided. There the precise point was determined adversely to appellant's contention here. It was there held that the liability of an uncle for the negligent driving of an automobile by his nephew was created by law, and that the uncle in signing his minor nephew's application for a chauffeur's license did not breach the condition of the policy against assuming a liability. In Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42, the Supreme Court fully considered and upheld the constitutionality of the act which imputes the negligence of the minor to the person who shall have signed his application for a license. If the liability was created by contract instead of by statute there would have been no constitutional question to consider. In Idemoto v. Scheidecker, 193 Cal. 653, 658, 226 P. 922, the fact of a license having been issued to a minor upon the application of his father under this statute was said to have had the effect of charging the father (in the language of the statute) with joint and several liability, citing Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42.

We therefore hold that the appellant is lia-

ble under the terms of its policy even though the policy contained the provision that it should not cover liability assumed by the assured under any contract or agreement.

[2] Appellant also claims the complaint in this action is insufficient for failure to allege the insolvency of the insured. It claims the right of the injured person to sue the insurance company directly is limited to a case where he can allege and prove the insolvency of the insured. This question requires an interpretation of the rider to the policy attached in compliance with chapter 367, Statutes of 1919, p. 776, which requires such an insurance policy to contain "a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person," etc. The policy rider followed substantially the same wording as the part of the statute quoted.

We are unable to agree with appellant. The statute and the rider state two independent propositions connected by a conjunction (which we have italicized above), both of which are required. The statute requiring the policy to contain "a provision that insolvency * * * shall not release, * * * and stating that in case judgment shall be secured * * * then an action may be brought, * * *" would not be satisfied by a rider stating "that an action may be commenced in case a judgment shall be secured but only in case the insured is insolvent." The rider does not attempt to do so. It is as broad as the statute.

Appellant refers to some language used in *Lackey v. Olds & Stoller Interexchange*, supra, which implies that the action by an injured party against the insurance company directly is limited to cases of insolvency of the insured. As indicated by the opinion itself, we find upon examination that clause H of the policy there was quite different from the clause here under consideration. It stated, "Except, that the insolvency or bankruptcy of the subscriber (insured) shall not relieve the Exchange from the payment of indemnity provided by the policy, but shall entitle the claimant to maintain an action against the Exchange. * * *" The court does not hold this language to be a compliance with the statute, but was merely explaining how the action came to be brought directly against the insurance carrier. The clause there stated that insolvency shall entitle the injured one to maintain a direct ac-

tion, while here the clause states, "and in case judgment shall be secured * * * then an action may be brought."

It is ordered that the judgment appealed from be and the same is hereby affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

82 Cal. App. 98

PEOPLE v. MCGILL. (Cr. 1455.)

District Court of Appeal, Second District, Division One, California. March 30, 1927.

1. Burglary $\S$ 45—Larceny $\S$ 68(1)—Evidence held sufficient for jury on identity of stolen garments, in prosecution for grand larceny and burglary.

In prosecution for burglary and grand larceny, testimony of night watchman, who recovered garments stolen, and of employes of store from which garments were stolen, was sufficient to identify stolen garments for consideration by jury with other evidence.

2. Larceny $\S$ 23—Computation of value of goods stolen by wholesale or retail price held immaterial, where either value exceeded \$200 and supported charge of grand larceny.

Where value of goods stolen was over \$200, whether wholesale or retail price was used in computation, it was immaterial, since in either case value was sufficient to support charge of grand larceny.

3. Criminal law $\S$ 371(2,6)—Other acts of larceny and burglary, committed under same plan, time, and place, held admissible to show intent in grand larceny and burglary prosecution.

Evidence showing six different acts of larceny and burglary committed by same defendant and codefendant under same plan, at same place, and about same time, in pursuance of scheme to steal goods from stores and dispose of same, was admissible to show intent.

4. Criminal law $\S$ 365(1), 371(1)—Other crimes are admissible to show intent or plan embracing several related crimes, when they connect defendant with crime charged or are part of *res gestae*.

Evidence of other crimes is admissible when it tends to establish intent, guilty knowledge, motive, common scheme or plan embracing commission of two or more crimes, so related to each other that proof of one tends to establish the other, when it tends to connect defendant with crime charged, or when other crimes are part of *res gestae*.

5. Criminal law $\S$ 371(12)—Crimes of same character are admissible to show motive and that particular crime was part of common scheme.

Where several crimes of same general character are committed as part of one plan, they are admissible to show motive leading up to particular crime for which defendant is being tried,

to show that crime in question was part of common scheme.

6. Criminal law §427(1) — **Larceny** §43 — Evidence of conspiracy between codefendants to steal from stores and dispose of loot was admissible in prosecution for burglary and grand larceny.

In prosecution for burglary and grand larceny, evidence of conspiracy between defendant and codefendant to steal from department stores and dispose of loot for small sum of money was admissible.

7. Criminal law §636(7)—**Instruction** In response to request of jury, given in presence of defendant but in absence of defendant's counsel, without ordering exception thereto, held not error (Pen. Code, § 1176).

Instruction in response to request by jury, in absence of defendant's counsel, but while defendant was present, defining degrees of burglary and leaving determination of degree to jury, was not error, though no exception was ordered by court to be entered to instruction, since exception was preserved by Pen. Code, § 1176.

8. Criminal law §763, 764(8) — **Instruction** stating there was no testimony of assault in entering building, if defendant entered it, held not erroneous as commenting on facts (Const. art. 6, § 19).

Instruction defining degrees of burglary and authorizing jury to fix degree if they believed beyond reasonable doubt that defendant committed crime, and that there was no testimony that defendant made an assault in entering building, if he did enter it, held not erroneous, under Const. art. 6, § 19, as commenting on facts.

9. Burglary §45—**Court** must instruct jury as matter of law not to return verdict of first degree burglary, where evidence would not support it (Pen. Code, § 1118).

Under Pen. Code, § 1118, trial court is under duty to instruct jury as matter of law not to return verdict of burglary in first degree where evidence would not support such verdict.

10. Criminal law §763, 764(9)—**Instruction** that jury should fix degrees of burglary, and stating there was no evidence justifying first degree burglary, was not erroneous as inferring jury should return verdict in second degree.

Instruction defining degrees of burglary, authorizing jury to fix degree if it believed beyond reasonable doubt that defendant committed crime, and stating that there was no testimony justifying verdict of burglary in first degree, was not erroneous as inferring jury should return verdict of burglary in second degree.

11. Criminal law §1119(1)—**Consultation** between counsel and court, not in record, cannot be considered on appeal.

In prosecution for burglary and grand larceny, consultation between defendant's counsel and court, relative to defendant's being wounded in war, not appearing in record, cannot be considered on appeal.

12. Criminal law §338(7)—**Testimony** of military service of defendant prosecuted for burglary and grand larceny held immaterial.

In prosecution for burglary and grand larceny, testimony as to defendant's military service, was immaterial.

13. Criminal law §385—**Offer** to show that defendant was wounded in war held insufficient as offer to show present physical condition.

In prosecution for burglary and grand larceny, offer to show that defendant was wounded several times during World War, and that his physical condition was affected thereby, was insufficient as offer to show defendant's present physical condition.

Appeal from Superior Court, Los Angeles County; Spencer M. Marsh, Judge.

James J. McGill was convicted of second degree burglary and grand larceny, and he appeals. Affirmed.

Light & Lane, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

McLUCAS, Justice pro tem. In this case the information charges the defendant McGill and one Frank McGettigan in count 1 with the crime of burglary and in count 2 with the crime of grand larceny.

Defendant McGettigan entered a plea of guilty. Defendant McGill stood trial and was found guilty of the crime of second degree burglary and of the crime of grand larceny. He appeals from the judgment pronouncing sentence and from the order denying his motion for a new trial.

Defendants were employed as window washers of the outside windows on the first floor of Blackstone's store in Los Angeles. On June 30, 1926, they left their apartments about midnight, drove downtown, and parked outside the store of the Blackstone Company. Defendant McGettigan testified that both defendants entered the store building on the third floor by way of the fire escape, went to the fourth floor and there filled some window buckets with silk dresses and lingerie, that he was leaving the building by the fire escape when he was shot by the night watchman, and that his codefendant, the appellant, McGill, escaped. The night watchman testified that he saw McGettigan and another man enter the building and go into the third floor, that he shot McGettigan, but that the other man escaped before he could identify him. Officer Bain testified that defendant McGill admitted that he had some garments under his arm which he could not get away with, and dropped them on the roof near the rear fire escape. The appellant denies entering the store, and denies taking any property. He admits his presence outside the store on the same night the crime was com-

mitted, but claims he left before the store was entered.

[1] Appellant's first point is that there was not sufficient identification of the garments admitted in evidence as being the same garments taken from Blackstone's store on the morning of July 1, 1926. The night watchman identified one of the buckets containing the garments by a mark which he had placed thereon, and stated that the buckets were similar to those taken by him from defendant McGettigan at the time of the burglary. The night watchman also identified a mark which he had placed on one of the garments admitted in evidence. The witness Bals, who was the building superintendent, testified that he found 28 silk garments near the rear fire escape. While he could not say that the garments admitted in evidence were the identical garments found by him, yet he stated they were "similar" garments and "looked like" those taken from the store. The assistant buyer for the Blackstone Company testified that she assisted in buying this merchandise and had handled it every day; that she had examined these garments, first at the police station, afterwards at the preliminary hearing, and that the merchandise which she examined on these occasions was the same as that introduced at the trial.

We believe the testimony of these witnesses was sufficient identification of the stolen garments to be taken into consideration by the jury along with the other evidence in the case, including the testimony of appellant's codefendant that both defendants committed the burglary.

[2] Appellant contends that the trial court erred in overruling defendant's objection to the measure of value of the goods in question. The buyer was the only witness who testified as to value, and she stated the retail price under objections of counsel for the defendant. On cross-examination the witness testified that the wholesale price was less 40 per cent. discount from the retail price. The total value of the goods was in excess of \$200, whether the wholesale or retail price be used in the computation. It thus becomes immaterial which figure is used in determining the value; in either case the value was sufficient to support the charge of grand larceny.

[3] Appellant urges that the trial court should have sustained his objection to the introduction of testimony as to other offenses than the one under which he was placed on trial. It was stated by the trial court that this testimony was admitted to show intent. It consisted of testimony by the codefendant that the defendants had six times previously entered the Blackstone store and taken goods therefrom. It further consisted of defendant's own admissions of three such entries which he made to the police officers prior to the trial. In support of his position, the defendant argues that, where defendant de-

nies the commission of the crime charged, then the question of intent becomes immaterial. However, upon examination of the record, we find that some of this testimony was given without objection and that no motion to strike such testimony was made by the defendant. Appellant's codefendant testified that the defendants had entered Blackstone's store six times previously and taken merchandise therefrom. No objection was made until the district attorney inquired how many pieces of merchandise were taken. Officer Bain testified, over objection, that the appellant admitted that the defendants entered Blackstone's store on three other occasions and took 30 or 40 pieces of merchandise on each occasion, having already made arrangements to dispose of these garments at \$1 apiece. Counsel for defendant on voir dire elicited from the witness Bain the testimony that appellant said he could produce dresses in excess of the value of \$10,000.

[4-6] The general rule against the admission of evidence of other crimes is well settled, but certain exceptions to the rule are also well recognized. Generally speaking, such evidence is admissible when it tends to establish intent, or guilty knowledge, motive, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, when it tends to connect the defendant with the crime charged, or when the other crimes are a part of the *res gestæ*. In the present case the evidence shows that six different acts of larceny and burglary were committed by the same defendants, under the same plan, at the same place and at about the same time, all in pursuance of a plan, system, or scheme to steal from the Blackstone Company and other stores and dispose of the goods at \$1 per garment. Where several crimes are committed as part of one scheme or plan, all of the same general character and tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, and thus directly tend to show logically that the crime in question was a part of such common scheme. 8 Cal. Jur. 69. Evidence of a general scheme or plan to steal horses was held properly admitted in *People v. Dixon*, 94 Cal. 255, 259, 29 P. 504. In *People v. Winthrop*, 118 Cal. 85, 50 P. 390, evidence of a plan to commit robbery was held admissible for the reason that such evidence had a direct tendency to connect the defendant with the robbery as charged, although such evidence had a tendency to show an attempt to commit another offense. In the present case the evidence clearly shows that a plan or conspiracy was formed between the defendants to steal from department stores and dispose of the loot for a small sum of money. Evidence of such conspiracy was clearly ad-

missible. In *People v. Ruef*, 14 Cal. App. 576, the court said (page 601 [114 P. 48, 54]):

"The rule is that where several crimes are connected as part of one scheme or plan, all of the same general character, and tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, and thus directly tending to show logically that the crime in question was a part of such common scheme. If the several crimes are part of a chain of cause and consequence so linked as to be necessarily connected with the system or general plan, they are admissible. In a case cited by Lord Ellenborough in *Rex v. Whitley*, 2 Lea, 985, 1 New Rep. 92, where a man had committed three burglaries in one night, and stole a shirt at one place and left it at another, they were all so connected that the court heard testimony of all three burglaries, Lord Ellenborough remarked: 'If crimes did so intermix, the court must go through the detail.'"

In *People v. Tomalty*, 14 Cal. App. 224, 111 P. 513, defendant was charged with falsification of public records, and evidence of other falsifications were held admissible as part of a scheme to conceal shortages in the treasury. *People v. Ferdinand*, 194 Cal. 555, 229 P. 341, was a case in which it was held, in a prosecution for homicide committed in carrying out a conspiracy to commit robbery, that proof of the robbery after the killing was admissible in evidence as a part of the general conspiracy to commit robbery. The court said (page 562 [229 P. 343]):

"The fact that in carrying out the conspiracy to commit robbery a crime of greater magnitude was also committed does not affect the principle that acts of each of the conspirators which are performed during the life of the conspiracy, and which acts are within the scope and in furtherance of the conspiracy, are admissible in evidence. If no murder had been committed and the defendants had been tried on a charge of robbery affecting the victims of any one of the several robberies on the night in question, it could not be doubted that evidence as to the commission of either or both the other robberies would have been admissible."

In *People v. Jo Fong*, 59 Cal. App. 259, 210 P. 548, evidence was held properly received showing that almost simultaneously with the shooting of the deceased another member of the tong of which deceased was a member was shot at and wounded, as tending to show a preconceived and prearranged design on the part of defendants to act in concert in the destruction of the life of the deceased. In *People v. Wilson* (Cal. App.) 245 P. 781, it was held that, where the offense of which defendant stands accused was perpetrated in furtherance of a general conspiracy to commit crime, the character and purpose of the conspiracy may have a tendency to shed light upon the particular offense charged. Examination of cases in oth-

er jurisdictions discloses a similar rule as to admitting evidence of other crimes. In *State v. Morgan*, 129 La. 154, 55 So. 747, it was held that evidence of other burglaries committed at about the same time as the one under investigation was admissible, for the reason that such evidence bore directly upon the crime charged, by showing the same method and system were employed by defendants under similar conditions only a few days before as were employed in connection with the crime under investigation. In *State v. Othick* (Mo.) 184 S. W. 107, it was held that evidence of other thefts by the defendants was admissible as part of the common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tended to establish the other. In *Mason v. State*, 42 Ala. 532, proof was admitted of a series of other burglaries committed by the defendant under similar conditions during the same week and in the same region. In *Ford v. State*, 34 Ark. 649, where the charge was murder committed during the robbery of one person, proof was received of a general plan to rob the store of the same and other persons. In *Commonwealth v. Scott*, 123 Mass. 225, 25 Am. Rep. 81, proof was received of various criminal doings showing a plan to rob banks, and particularly the one in question. In the present case the evidence was clear that the defendants had formed a conspiracy to burglarize stores and dispose of the merchandise thus obtained. We therefore conclude that evidence of offenses other than that charged against the defendant was properly admitted under the facts as shown in this case.

Appellant assigns as error the giving of an additional instruction in the absence of defendant's counsel, but while defendant was present. During the deliberations of the jury the following proceedings occurred. We quote from the transcript, pages 122, 123, and 124:

"The Court: In the case of *People v. James J. McGill* the defendant is present. The people are represented here by counsel, but the attorney for the defendant cannot be found about the building anywhere. We have waited some little time now for him, and we are unable to find him. As I understand it, the jury wish some further instructions in regard to the matter. If the foreman will state—

"The Foreman: If your honor please, in regard to the first and second degree of the charge of burglary, we don't seem to come to any agreement on that, whether we can bring in on second degree or not.

"The Court: Does the district attorney wish to make any concession in the matter?

"Mr. Scheinman: I don't know exactly how to state that—I will stipulate, if the court please, if there is a question of degree on the charge of burglary, that it is second degree burglary. In other words, if the jury believe from the evidence beyond a reasonable doubt that the defendant is guilty of the crime of burglary, the district attorney will stipulate that it is bur-

glary of the second degree, if that is satisfactory to your honor.

"The Court: In other words, you are willing to stipulate that there is no testimony here which would sustain a verdict of burglary in the first degree?"

"Mr. Scheinman: Yes.

"The Court: I might give the instruction on that subject as bearing upon the question of the degree of burglary of which the defendant is guilty, if any. I will give the instruction, as I did before, that you are instructed that every burglary of an inhabited dwelling house or building, committed in the nighttime, and every burglary, whether in the daytime or nighttime, committed by a person armed with a deadly weapon, or who, while in the commission of said burglary, assaults any person, is burglary in the first degree. All other kinds of burglary are of the second degree. The phrase 'nighttime,' as herein used, means the period between sunset and sunrise. If you believe from the evidence beyond a reasonable doubt that the defendant did commit the crime of burglary as charged in the information, it shall be your duty, ladies and gentlemen of the jury, to determine the degree of the offense in this case, and to indicate the same in your verdict. I might say that I think there is no proof here whatever that this building which is alleged to have been entered—I think there is no testimony to the effect that it was an inhabited dwelling house. I think there is no testimony here that the defendant was armed with a deadly weapon. I think there is no testimony here that he made any assault upon any person in entering this building, if he did enter it. So I may add, in my judgment, that there is no testimony here which would justify a verdict of burglary in the first degree."

In *People v. Mayes*, 113 Cal. 618, 627, 45 P. 860, 863, the court said:

"No error was committed by recalling the jury, and giving an additional instruction in the absence of the defendant's counsel. The defendant was himself present, and the court directed that an exception be entered in his behalf to the instruction thus given. It is stated in the bill of exceptions that before giving the instruction the court caused his attorneys to be called and searched for in the courthouse, and also sent officers to look for them, but that they were not found."

[7] In the present case no exception was ordered by the court to be entered, but such entry was unnecessary, since the exception was preserved under the provisions of section 1176 of the Penal Code. It therefore appears that no error was committed by the trial court in the giving of this instruction during the absence of counsel.

[8-10] Appellant complains that in giving the above instruction the trial court erred in charging the jury as to matters of fact in violation of the provisions of article 6, § 19, of the Constitution of the state of California. No authorities are cited by appellant in support of his contention that this instruction

violated the constitutional inhibition against commenting on the facts. We find no error in this instruction. It was the duty of the trial court to instruct the jury as a matter of law not to return a verdict of burglary in the first degree where the evidence would not support such verdict. Penal Code, § 1118; *People v. Welch*, 49 Cal. 174; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95. On the other hand, the court in no way indicated its opinion as to whether the jury should return a verdict of second degree burglary. The court defined burglary in the first degree, and stated that all other kinds of burglary were burglary of the second degree. The jury was instructed that, "if you believe from the evidence beyond a reasonable doubt that the defendant did commit the crime of burglary," then it will be your duty to fix the degree. The jury was told that the building was "alleged to have been entered"; that there was no testimony that defendant made an assault "in entering the building, if he did enter it." There was nothing in this instruction to indicate any opinion of the court on the facts of the case, or to infer that the jury should return a verdict of burglary in the second degree.

[11-13] Finally, appellant contends that the trial court erred in refusing the defendant's offer to prove his military service. The defendant's counsel alleges that, on consultation with the court at the bench, he stated to the court that the defendant was wounded seven times during the World War and was rated by the United States Veteran Bureau as being 43 per cent. disabled. This consultation does not appear in the record, and for that reason could not be considered on appeal. No offer of proof followed the consultation with the court. It does, however, appear in the record that counsel for the defendant wished to show that defendant was wounded several times and that his physical condition was affected thereby. Defendant argues that this testimony was admissible because defendant offered evidence of an alibi showing defendant was at home within a few minutes of the time the shooting occurred, and that therefore it was a physical impossibility for him to have come from the scene of the crime to his home within this short space of time. The testimony as to military service was immaterial. There was no other offer made to show defendant's physical condition. The fact that he had been wounded would not aid the jury unless defendant's present physical condition was shown. A 43 per cent. physical disability means nothing unless the nature of the disability is shown.

It is ordered that the judgment and order denying motion for a new trial be affirmed.

We concur: CONREY, P. J.; HOUSER, J.

82 Cal. App. 233

**NUNEMACHER v. WESTERN MOTOR
TRANSPORT CO. (Civ. 3185.)**

District Court of Appeal, Third District, California. April 7, 1927.

1. Fraud §64(1)—What amounts to mere expression of opinion is question for trial court.

What amounts to expression of opinion, as compared with positive statement of facts, depends on all circumstances of case, and is question for trial court.

2. Fraud §23—Stock seller's statement of opinion, based on facts in buyer's possession, that corporation's business was profitable, held not actionable.

Where seller of corporation stock told purchaser, "We are making money as you can see from this statement," referring to report of receipts and expenses until certain date, and truthfully said that volume of business was steadily increasing, but that no statement of condition had been prepared since such report, his statement of opinion that business was profitable was insufficient basis for charge of fraudulent misrepresentation.

3. Fraud §13(2)—Fraud will not be imputed to one making false representation in reasonable belief that it is true; "actual fraud" (Civ. Code, § 1572, subd. 2).

While positive assertion of that which is not true in manner not warranted by information of person making it constitutes "actual fraud," under Civ. Code, § 1572, subd. 2, though he believes it to be true, fraud will not be imputed to one making representation in reasonable belief that it is true because afterward shown to be untrue.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

4. Fraud §58(2)—Evidence held to support finding false representations in selling stock were made in belief that they were true.

In action for damages by false representations inducing plaintiff to purchase stock in corporation, evidence held to support court's finding that such representations were made in belief, justified by existing facts and circumstances known to defendant, that they were true.

5. Fraud §58(1)—Finding and testimony held to preclude recovery for fraud, as showing no difference between value of stock and sum paid therefor.

In action for damages by false representations inducing purchase of 100 shares of stock at \$100 a share, court's finding that "it is not true that * * * said stock * * * was not worth * * * \$10,000, or any sum in excess of * * * \$2,500," as alleged in complaint, and testimony of defendant's witness that stock was worth at least \$100 a share, precluded recovery under complaint alleging damages to be difference between value of stock and sum paid therefor.

6. Fraud §25—Detriment by fraud is essential to cause of action.

Plaintiff has no cause of action for fraud or deceit of whatever nature, unless detriment has been occasioned thereby.

7. Evidence §113(4)—That stock purchased at par in reliance on alleged fraudulent representations was worth less than par when sold by purchaser held not to show such fact when purchased.

That stock was worth less than par when sold by plaintiff held not to show that it was worth less than par nearly a year before, when purchased by him at par, so as to warrant recovery of damages for fraudulent representations inducing purchase.

8. Appeal and error §1011(1)—Judgment on finding, on conflicting evidence, cannot be disturbed.

Judgment on finding, supported by evidence, though conflicting, cannot be disturbed.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by A. H. Nunemacher against the Western Motor Transport Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John L. McNab and Byron Coleman, both of San Francisco, for appellant.

De Lancey C. Smith, C. J. Goodell, and Sanborn & Roehl, all of San Francisco, for respondent.

FINCH, P. J. Two causes of action are stated in the complaint. In the first it is alleged that the plaintiff was induced by false and fraudulent representations made by defendant to purchase 100 shares of its treasury stock at \$100 a share, to the plaintiff's damage in the sum of \$5,629. In the second it is alleged that the defendant is indebted to the plaintiff for services performed in the sum of \$527.50. The court entered judgment in favor of the defendant on the first cause of action and in favor of the plaintiff on the second. The defendant has appealed from the part of the judgment which is against it, but has presented no argument in support of its appeal. It is deemed, therefore, that such appeal has been abandoned. The plaintiff has appealed from the judgment in favor of defendant on the first cause of action. It is conceded that there is a substantial conflict in the evidence bearing upon some of the alleged false representations, but the plaintiff contends that the evidence shows without dispute that the stock salesman of the defendant falsely "represented to the plaintiff that the business of the defendant was a good and profitable business and * * * was making a profit at the time" the representations were made.

The defendant operated certain passenger

stage lines from about December 1, 1919, to November, 1921. During that period it acquired other stage lines, which it operated until the latter date. Its property was then taken over by the California Transit Company. In the month of June, 1920, a certified public accountant, employed by a person who thereafter purchased a large number of shares of the defendant's capital stock, audited the books of the corporation and made a written report thereof, dated June 20, 1920. The report covers the period from December 1, 1919, to May 31, 1920. It appears therefrom that up to the latter date the defendant had issued 1,201 shares of stock and that the net worth of the corporation was \$121,899.95; that for the six months covered by the report the respective monthly receipts, almost entirely from the sale of tickets, were \$2,336.75, \$2,235.90, \$2,662.28, \$5,246.74, \$5,525.70, and \$10,272.47; and that the corresponding monthly expenses were \$3,148.77, \$2,890.17, \$3,207.22, \$5,095.74, \$5,321.26, and \$6,776.76. From these figures it appears that the business was conducted at a loss during the first half of the period and at a profit during the succeeding three months. The evidence shows and the court found that the report correctly sets forth the business of the defendant up to May 31, 1920. The defendant employed the same accountant to audit its books for the remaining seven months of the year 1920. Neither party questions the accuracy of the report of that audit, dated January 31, 1921. It appears therefrom that up to December 31, 1920, the corporation had issued a total of 1,935 shares of stock and that the net worth of the corporation was then \$170,287.53. The monthly receipts and expenses are not stated, but the total amount received from the sale of tickets during the seven months was \$112,363.17, and the amount of the expenses was \$135,621.66. The accountant included in the expenses a charge of \$15,666.52 for depreciation of automobiles, equipment, furniture, and fixtures. During the year 1920 A. J. Hanford was president of the corporation and Oscar H. Klatt was secretary. John M. Jackson was its stock sales agent.

During the months of October, November, and December, 1920, Jackson and the plaintiff frequently discussed the defendant's business prospects and the value of its stock. They carefully went over the report of June 20, 1920. Plaintiff testified:

"He (Jackson) said, 'You can see from the beginning of the year where we operated at a loss, and how we crept up. * * * You see in the month of May we made a profit of \$3,495.71.' And I asked him whether the same proportionate profit had been made for the balance of the year, and he said: 'Yes; it has increased in proportion.' He told me that the last half of the year, from June to December, had shown an increased proportionate profit as shown on this statement. * * *

"Q. Didn't you learn, Mr. Nunemacher, just about the time when you were negotiating for this stock that this company was taking over the Bay Shore line at a valuation of approximately \$40,000? A. I think * * * it had been taken over. * * *

"Q. You said a minute ago Mr. Jackson told you that the company was taking over new lines from which they were expecting increased profits, didn't you? A. Increased in proportion to what the statement shows. * * * He told me that the new acquisitions would increase the profits in proportion—not as far as the statement shows. * * * He says, 'The existing business is showing this profit, * * * and without anything further you can see what the business is making.' * * * He said that with respect to the holdings at the time the statement was made out. * * *

"Q. Didn't you say just now that Mr. Jackson told you that the company was acquiring these new lines, and from them they expected the profits would increase proportionately, as they had increased in the May statement? A. I think so. * * * In going up to Mr. Jackson's office he would look at the statement, and I would go over the statement with him, showing the percentage of profits made at that time of the year, which was in around October, and * * * he told me about acquiring the lines, and he says: 'We are making money as you can see from this statement, and our proportionate profits are going right ahead up until now; we are increasing our profits every month.' Now, whether everything else was taken into consideration, I don't know, but he understood the business, and he understood that statement, and the increased profits were going ahead all the time, is the way I took it. * * * I asked Mr. Jackson whether there had been any statement made out. He said no; they were about making out a statement.

"Q. So they were going to make out a statement at the end of the year? A. Yes.

"Q. You bought this stock on the 31st of December, 1920? A. I did.

"Q. You did not wait until the annual statement was made out? A. No. * * *

"Q. In the month of December you did ask Mr. Jackson for a statement showing you the amount and character of the business prior to December? A. Yes, sir. * * * He said they were working on the statement. * * *

"Q. When did you first find out what the business had been in money for the seven months from May until December, 1920? * * * A. In January. * * * It may have been around about the middle part. * * *

"Q. You made no demand (at that time) * * * for the return of your money, did you? A. No.

"Q. You went on from month to month taking money from them as a salary, didn't you? A. I did.

"Q. And then along toward the middle of the year, you demanded an increase in salary, didn't you? A. According to the agreement that I had, yes. * * * I have owned a garage for a year and a half; had charge of a fleet of automobile trucks * * * for approximately a year; been buying machines and selling the same."

Plaintiff further testified that one of the conditions of his purchase of the stock was

that he was to be given employment by the defendant at \$150 a month for the first six months, \$200 a month for the next six months, and \$250 a month thereafter.

Jackson testified:

"I went into this statement with Mr. Nunemacher in a rather thoroughgoing way from the angle of profit and loss, and I endeavored to show him, as I believed, that this business was a good profitable business in general, and in particular that certain lines that the company was operating were very good lines. * * * The company was operating stage lines between Oakland and Vallejo, at the time, and Oakland and Sacramento, and there were also other lines that were in their inception, and I endeavored to show Mr. Nunemacher that those lines, * * * and probably other lines, represented the foundation of a good business in my judgment. * * * I endeavored to convince Mr. Nunemacher inferentially that this was a profitable business as it operated following this report and the information that I had gathered by word of mouth from Mr. Klatt and Mr. Hanford. * * * I gained from this statement and from what I had observed of the business as it was being conducted and from what Mr. Klatt and Mr. Hanford had told me I reasoned with Mr. Nunemacher that it was a good profitable business and one that Mr. Nunemacher would be justified in putting his money in. I tried to sell him the stock. * * *

"Q. Did you at any time state to Mr. Nunemacher substantially that the profits of this company had increased proportionately to the profits shown on that statement of May 31, 1920? A. I used no such language to Mr. Nunemacher. * * * I stated things exactly in that first statement, that the volume of business had increased, as I understood it, steadily from the beginning and as represented in this exhibit here, and after that period represented in here.

"Q. You did not use the word 'profit'? A. No; but that the business was profitable.

"Q. You told him that? A. Yes, sir.

"Q. You believed that to be a fact? A. Yes; I did."

[1, 2] Excepting statements clearly shown to be true, the only representation proved without substantial conflict is Jackson's statement that "the business was profitable." Plaintiff's testimony shows that he was qualified by experience to make a reasonable estimate of the value of the defendant's business and property, and he had three months in which to investigate its affairs. He knew that the only statement of defendant's receipts and expenses was that of June 20th and that a later statement, covering the period from June 1 to December 31, 1920, was being prepared. When, according to the plaintiff's testimony, Jackson said, "We are making money as you can see from this statement," referring to the report of June 20th, and truthfully said that the volume of business was steadily increasing, but that no statement of the condition of the business had been prepared since the date of that report, it is a fair inference that

the plaintiff understood the further statement that the business was profitable to be a mere estimate or opinion, based on the facts stated to him by Jackson.

"What amounts to an expression of opinion as compared with a positive statement of fact depends upon all the circumstances of the case, and is a question for the trial court." French v. Freeman, 191 Cal. 579, 585, 217 P. 515, 517.

Since plaintiff was put in possession of the facts upon which Jackson "endeavored to convince Mr. Nunemacher inferentially that this was a profitable business" and upon which Jackson based the opinion that the business was profitable, the statement of such opinion "is not a sufficient basis to support a charge of fraudulent misrepresentation." Rheingans v. Smith, 161 Cal. 362, 365, 119 P. 494, 496 (Ann. Cas. 1913B, 1140).

[3, 4] It does not appear that the representation that the business was profitable was made in bad faith, but rather that Jackson and the defendant's officers did not know that it was being conducted at a loss until the completion of the audit made in January, 1921. It is improbable that the books of any large business concern at all times immediately reflect, without an audit thereof, its current profits or losses, but such matters are ascertained by occasional or regular comprehensive audits into which factors other than mere receipts and expenditures enter. During a particular time or season there may be unusually large receipts or expenses which must be distributed over a longer period in order to determine whether or not a profit has been made. A statement that a particular business is profitable, even though untrue, is not necessarily fraudulent. It is true that "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true," constitutes actual fraud. Civ. Code, § 1572, subd. 2. But in this case it reasonably appears that the representation in question was warranted by the information contained in the report of June 20th and the fact that the volume of business was steadily increasing.

"Where a man makes a representation in the reasonable belief that it is true, fraud will not be imputed to him if it afterward be shown to be untrue, but there must be reasonable grounds for his belief." Maxson v. Llewelyn, 122 Cal. 195, 198, 54 P. 732, 734; Otis v. Zeiss, 175 Cal. 192, 194, 165 P. 524; Nash v. Rosesteel, 7 Cal. App. 504, 509, 94 P. 850; Hodgkins v. Dunham, 10 Cal. App. 690, 706, 103 P. 351; Meeker v. Cross, 59 Cal. App. 512, 516, 211 P. 229.

The court found that—

"Any and all representations or statements made by defendant to plaintiff at said time were made in the belief by defendant that same were true in each and every particular, and said belief that same were true in each and every particular was fully justified by the facts and cir-

cumstances as they existed and were known to defendant at the time such representations or statements were made."

This finding is fully supported by the evidence.

[5-7] The first cause of action is for damages in the difference between the amount which plaintiff paid for the stock and its value at the time of the purchase thereof. The complaint alleges that at that time the stock "was not worth the sum of \$10,000, or any sum in excess of \$2,500." The answer denies this allegation. The court found that—

"It is not true that at the time of purchase by the plaintiff of said stock that same was not worth the sum of \$10,000 or any sum in excess of \$2,500."

If it is not true that the stock was not worth \$10,000, then it is true that it was worth \$10,000. A witness for defendant testified that the stock was worth "not less than \$100 a share" December 31, 1920. Since the amount of plaintiff's damages is alleged to be the difference between the value of the stock and the sum paid therefor, it follows that if there is no such difference there is no right of recovery.

"It is fundamental, of course, that no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action." *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 571, 126 P. 351, 355 (42 L. R. A. [N. S.] 125).

The court found that the plaintiff sold the stock December 12, 1921, for \$4,371, "which was the highest price obtainable at that time." The fact that the stock was worth less than par at that time does not show, under the circumstances of this case, that it was worth less than par nearly a year prior thereto. *Wegerer v. Jordan*, 10 Cal. App. 362, 365, 101 P. 1066.

[8] While the evidence is conflicting in many respects, it is clearly sufficient to support the findings, and therefore the judgment cannot be disturbed.

The judgment is affirmed in its entirety.

We concur: PLUMMER, J.; SHIELDS, Justice pro tem.

82 Cal. App. 180

GAMBLE v. FIERMAN et al. (Civ. 3123.)★

District Court of Appeal, Third District, California. April 4, 1927.

Hearing Denied by Supreme Court June 2, 1927.

1. Covenants ⇨69(2), 79(3)—There is no privity between lot owners deraining title from common grantor, but right to enforce restriction is in nature of equitable easement.

As between adjoining lot owners deraining title by separate chain from a common grantor,

there is no privity either of contract or estate, and claimed right of one to enforce a building restriction is in the nature of an equitable easement.

2. Covenants ⇨69(2)—Basis of equitable easement to enforce building restriction must be found in common grantor's deed, construed in light of surrounding circumstances.

As between lot owners deraining title from common grantor, basis of equitable easement of one owner to enforce building restriction must be found in deed from common grantor, which must be construed in light of circumstance at time of making thereof.

3. Evidence ⇨460(9)—Reference in deed to map of subdivided tract held to authorize admission of evidence that tract was subdivided under general building scheme.

In suit by lot owner to enforce building restrictions, reference to map of subdivided tract in deed to defendant's grantor held to authorize admission of extrinsic evidence that defendant's lot was part of property, subdivided for building purposes under general scheme of building improvement.

4. Covenants ⇨79(3)—Covenant that building restrictions should run with land and be enforceable by any other lot owner held not personal to grantor, but for benefit of balance of tract.

Covenant in deed to lot in subdivision referring to grantor as seller, and providing that building restrictions should be covenants running with the land to operate for benefit of and enforceable by any other lot owner, held to indicate covenant was not personal to grantor, but for benefit of balance of property in subdivision.

5. Covenants ⇨69(2)—Defendant lot owners held chargeable with notice of building restrictions, though deed from their immediate grantor did not contain them.

Where original deed to defendant's grantors from owner of subdivision containing building restrictions was recorded, and about 1,500 other lots were sold by common grantor with same restrictions, and residence erected on subdivision conformed thereto, defendants held chargeable with notice of right of adjoining lot owner to enforce restriction, though deed from defendants' immediate grantor did not contain them.

6. Injunction ⇨62(3)—Lot owner in subdivision held entitled to injunction, where defendants lot owners were constructing building in violation of restriction after notice.

Where lot owner in subdivision had notice of building restriction and against protest of adjoining lot owner was constructing building in violation thereof, adjoining lot owner was entitled to injunctive relief.

Appeal from Superior Court, Los Angeles County; E. P. Shortall, Judge.

Action by Ida B. Gamble against Richard Fierman and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Smith & Lucas, of San Pedro, for appellants.

Clement L. Shinn, of Los Angeles, for respondent.

BUCK, Justice pro tem. [1] This is an appeal by defendants from a judgment enjoining defendants from violating a building restriction in a residence district. Plaintiff and defendants are the owners, respectively, of adjoining lots, each deraining title by a separate chain of title from a common grantor. Consequently, as between plaintiff and defendants, there is no privity either of contract or estate, and the right claimed by plaintiff is in the nature of an equitable easement, as defined and exemplified in the cases of *Werner v. Graham*, 181 Cal. 174, 183 P. 945, *McBride v. Freeman*, 191 Cal. 152, 215 P. 678, *Martin v. Holm*, 197 Cal. 733, 242 P. 718, and *Alderson v. Cutting*, 163 Cal. 504, 126 P. 157, Ann. Cas. 1914A, 1.

[2] Under the foregoing authorities, the basis of plaintiff's equitable easement as against the defendants must be found in the deed from the common grantor to the defendants' grantor. Furthermore, the language of this deed must be construed in the light of the surrounding circumstances existing at the time of the making of the deed. In other words, from this deed, and this deed alone, as so construed, must appear the intent of the parties to create mutual or reciprocal rights of restriction between the grantees of the original grantor. In the case at bar, at the time of the deed to defendants' grantor in January, 1923, the *Averill-Weymouth Company, Inc.*, was the owner of a tract of land known as *Vista Del Oro*. This tract had been subdivided into residence lots and blocks, and the map thereof recorded in the office of the county recorder of the county. In each deed the lot sold was referred to as lot in "*Vista Del Oro*, as per map recorded in Book 37, page 96 of Maps, in the office of the county recorder of said county." Following the foregoing form of description each deed, including the deed to defendants' grantor, and the later deed to plaintiff, contained the following stipulations:

"*Said land* shall be used for residence purposes only, and any residence thereon shall cost and be fairly worth not less than \$2,500, and every part and appurtenance thereof, except eaves and steps, shall be at least 20 feet from the front line, and, in case of corner lots, at least 20 feet from the side lot line on the side adjacent to a street, except if said land is located in *that part of block 4, 5, or 6*, facing *Meyler street*, it may be used for business purposes and any building thereon shall cost and be fairly worth not less than \$1,000, and any building thereon and every part and appurtenance thereof shall, in case of corner lots, be at least 20 feet from a side lot line adjacent to a street, and the foregoing restrictions shall terminate on January 1, 1940. Said land shall never be rented to any person of African or

Oriental descent, and no intoxicating liquors shall be manufactured or sold thereon. The restrictions and conditions contained in this deed shall be covenants *running with the land*, and shall operate for the *benefit of* and may be enforced by the *seller or the owner of any lot in said tract 'Vista Del Oro.'*"

As already noted, the first question to be considered is whether or not the foregoing language in the deed to defendants' grantor, construed in the light of the surrounding circumstances, contains expressions from which may be inferred any intent on the part of the parties thereto to create the equitable easement sought to be invoked in this action.

In the *Werner* and *McBride* Cases cited above, and in the case of *Berryman v. Hotel Savoy*, 160 Cal. 559, 117 P. 677, 37 L. R. A. (N. S.) 5, and in *Bresee v. Dunn*, 178 Cal. 96, 172 P. 387, the deed relied upon contained no language, express or implied, referring to any general plan or scheme of building improvement, and contained no language showing that it was the intent of the parties to the deed that the restrictions in the deed should be for the benefit of the subsequent owners or holders of all the lots in a defined or designated tract of land subdivided into residence lots.

For instance, it will be noted in the *Werner* Case—strongly affirmed and upheld in the *McBride* Case as fully stating the rule and its proper application—that the deed relied upon contains no language showing that the lot conveyed is a part of a residence tract or subdivision of land of which the grantor is the seller, nor is there any language in the deed from which it can be inferred that the owners or holders of the balance of the tract shall be the beneficiaries of the restrictions imposed upon the covenantor by the deed in question. See pages 177 and 178 of the *Werner* Case (183 P. 946).

Also, in the *McBride* Case, though the complaint alleges that "in accordance with a general plan or scheme for the improvement of said tract, the said owner inserted in each and every deed conveying said lots" certain restrictions, and further alleges that these restrictions "were imposed and said general plan or scheme adopted for the general benefit of all lots in said tract," it fails to appear that the pleader has, as in the case at bar, set out the language of the deed from which, by proper construction, any such intent as alleged can be inferred, or that the intent, even as alleged, was the intent of both parties to the deed.

Likewise, in the case of *Bresee v. Dunn*, as appears from page 99 of the opinion (172 P. 388), the deed fails to contain any language from which, in the light of attending circumstances, the requisite intent can be inferred.

See, also, the *Berryman* Case, at page 562 of the opinion (117 P. 677).

But the *Berryman* Case does lay down the rule of construction later adopted in the *Mc-*

Bride Case, at page 156 (215 P. 680), as follows:

"The intention of the parties should be 'determined by a fair interpretation of the grant or reserve creating the easement' [citing cases]. 'It seems to us that in all these cases it is better to get at the intention of the grantor from the language of the deed, interpreted in the light of the attending circumstances, than to conjecture the intent from the circumstances and then to make the language of the deed bend to that.'"

The court in the McBride Case then continues as follows:

"*Alderson v. Cutting*, 163 Cal. 503 (126 P. 157, Ann. Cas. 1914A, 1), involved a case of uniform building restrictions wherein 'each of said deeds declared that the conditions stated should, as to each owner of any other lot in the tract, his heirs, successors or assigns, operate as covenants running with the land for the benefit of said other lots or their owners.' These restrictions were held to create an equitable easement so as to be enforceable by one grantee as against another."

In other words, the court fully recognized the rule that by the light of surrounding circumstances we may explain what was doubtful, but may not contradict what is plain, or supply what is absent. In the McBride Case the court emphasized by its own italics the language in the Alderson Case as above italicized.

Also, in the case of *Currie v. Title Insurance & Trust Co.*, 60 Cal. App. 192 at page 196, 212 P. 409, 411, the court emphasizes the distinction made in *Werner v. Graham* between the language in the Alderson Case and in the Werner Case, in the following language, where it was clearly indicated that, in the opinion of the court, the language in the Alderson Case was sufficient to express the mutual intent of the parties to create the equitable servitude relied upon, the following being the language used in the opinion:

"These matters may all have been in the mind of the grantor and yet be of no avail to impose a servitude on the lots conveyed unless the grantee also joined in the plan and gave his consent to the interchange of servitudes involved. This very point is the one which was controlling in the determination of *Werner v. Graham*. What was there said was not obiter dicta. The Supreme Court stamped it as 'the crux of the present case.' In distinguishing *Alderson v. Cutting*, 163 Cal. 504, 126 P. 157, Ann. Cas. 1914A, 1, from the one then under consideration, it said, 'The difference between such a case and the one at bar is that here there is no language in the instruments between the parties, that is, the deeds, which refers to a common plan of restrictions or which expresses or in any way indicates any agreement between grantor and grantee that the lot conveyed is taken subject to any such plan.'"

[3] Therefore, comparing the language of the deed in the case at bar with the language of the deed in the Alderson Case, it would

seem that the deed in the case at bar, by virtue of its reference to the map of the subdivided tract, would and did permit it to be shown by extrinsic evidence that the lot of the defendants was part and parcel of a piece of property so subdivided as to be used for a common building purpose. And, furthermore, it will be noted that the deed contained language referring not only to the land conveyed, but also went on to provide as follows:

"And in case of corner lots, at least 20 feet from the side lot line on the side adjacent to a street, except if said land is located in that part of block 4, 5, or 6, facing Meyler street," etc.

The foregoing language would enable the court to avail itself of extrinsic evidence to show that there was a general scheme of building improvement in the tract.

[4] Also, the following language would indicate that the covenant was not a mere personal covenant so far as the grantor, as grantor, was concerned, for the grantor is referred to by the broader term of "seller" with reference to the tract as a whole, by fair construction. And, also, the following language would indicate that the covenant is imposed not simply for the personal benefit of the grantor, but for the benefit of the balance of the property in the tract, the language in question being as follows:

"The restrictions and conditions contained in this deed shall be covenants *running with the land*, and shall operate *for the benefit of*, and may be enforced by the seller or the owner of any lot in said tract 'Vista Del Oro.'"

Therefore, treating the construction placed by the courts upon the Alderson Case as a definitely approved rule of property in this state, it would appear that the language in the case at bar, construed in the light of the existing and surrounding circumstances, is just as potent for the expression of a mutual and reciprocal intent to bind defendants' property by an equitable easement as was the language in the Alderson Case.

[5] Defendants contend that the evidence is insufficient to sustain the finding that defendants took with notice of plaintiff's equity for the reason that the deed by which defendants took title from their immediate grantor did not contain any of the restrictions in question. But it does appear that the original deed containing all these restrictions and provisions, by which defendants' grantor took from the common grantor of plaintiff and defendants, was duly recorded at the time in the office of the county recorder, and it also appears, as already noted, that about 1,500 other lots were sold by the common grantor containing the restrictions in question, and that the residences erected upon the property so sold conformed to the restrictions set forth in the deeds.

The defendants were therefore affected with constructive notice of plaintiff's equities

as they appeared from the terms of the common grantor's deed, construed, as aforesaid, in the light of the surrounding circumstances and the law as applied in the case of *Alderson v. Cutting*, supra.

Since defendants took with notice of plaintiff's equitable easement, they took subject thereto. *Miles v. Clark*, 44 Cal. App. 539, 548, 187 P. 167; *Pomeroy's Eq. Jur.* (4th Ed.) § 1704, and cases cited; *Quatman v. McCray*, 128 Cal. 285, 60 P. 855; *Allen v. Mass. Bonding & Ins. Co.*, 248 Mass. 378, 143 N. E. 499, 33 A. L. R. 669; *Johnson v. Mt. Baker Presbyterian Church*, 113 Wash. 458, 194 P. 536.

[6] It further appeared from the evidence and findings, that the defendants, in violation of the restrictions of which they had notice and against the protests of the plaintiff, were constructing a portion of their residence within 20 feet of the front line of their lot. The plaintiff was therefore entitled to injunctive relief. *Pomeroy's Eq. Jur.* (4th Ed.) §§ 1693 and 1705; *Taft v. Washington*, 29 Cal. App. 197, 154 P. 1073; *Attorney General v. Algonquin Club*, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500.

Judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

82 Cal. App. 165

**DONNER v. SUPERIOR COURT WITHIN
AND FOR LOS ANGELES COUNTY
et al. (Civ. 5534.)**

District Court of Appeal, Second District, Division 2. California. April 1, 1927.

1. Justices of the peace § 166(2)—Superior court had no jurisdiction except to dismiss appeal from justice brought to trial after expiration of year, notwithstanding stipulation for extension entered into after year expired (Code Civ. Proc. § 981a).

Superior court had no jurisdiction on appeal from justice's court except to dismiss appeal, where more than one year had elapsed from time of filing appeal, under Code Civ. Proc. § 981a, notwithstanding parties, after expiration of year's period had stipulated for extension of time; statute being mandatory and analogous to sections 581a, 581b, and distinguishable from section 583.

2. Courts § 23—Jurisdiction which has been lost cannot be restored by stipulation.

Where jurisdiction has been lost, authority of court cannot be restored by stipulation of parties.

3. Courts § 1—"Jurisdiction" is right to adjudicate subject-matter of case.

"Jurisdiction" constitutes right to adjudicate concerning subject-matter of given litigation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (Of Courts).]

4. Courts § 30—Statute withdrawing power to act after fixed period deprives court of jurisdiction.

Where statute expressly withdraws power to do an act after fixed period, such statute is mandatory, depriving court of jurisdiction to act against statutory inhibition.

Application by J. H. Donner for writ of mandate to be directed to the Superior Court in and for the county of Los Angeles, Hugh J. Crawford, Judge, to compel vacation of an order of the court dismissing appeals from justice's court in two cases wherein petitioner was defendant. Writ denied.

Jennings & Belcher, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and Homer I. Mitchell, Deputy County Counsel, both of Los Angeles, and J. R. Pollock, and A. D. Mitchell, both of Ontario, for respondents.

CRAIG, J. [1] Two cases, entitled Upland Realty & Insurance Company v. J. H. Donner, and Montrose McCann and E. O. Bowden v. J. H. Donner, were appealed from the justice's court to the superior court of Los Angeles county, but were not brought to trial within the year following the date upon which the appeals were filed. For 13 days after the one year expired no steps were taken to have the appeals dismissed, and no attempt was made by the parties to comply with the requirements of section 981a of the Code of Civil Procedure with regard to preserving the jurisdiction of the superior court to hear them. At the end of that time, however, the parties to both actions entered into and filed stipulations which provided:

"That the time of trial on appeal in the superior court of the above-entitled actions, and each of them, may be, and the same is hereby, extended so that the trial of said actions, and each of them, may take place after the period of one year has elapsed from the time of taking the appeals in said actions, and that said actions, nor either of them, shall not be dismissed for failure to bring same to trial within the period of one year after the taking of said appeals."

Thereafter the respondent court dismissed both appeals upon the ground that it had lost jurisdiction to try them, and that jurisdiction could not be conferred by the stipulations. It is sought by this proceeding to have the dismissals set aside. The superior court merely performed its plain duty in dismissing these appeals, for it was without discretion.

Section 981a provides:

"No action * * * appealed from the justice court * * * shall be further prosecuted, and no further proceedings shall be had therein, and all such actions * * * must be dismissed by the court to which the same shall have

been appealed, on its own motion, or on motion of any party interested therein, * * * where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal * * * unless such time be otherwise extended by a written stipulation by the parties to the action. * * *

[2] Construing this provision, we recently held in *Napolitano v. Superior Court* (Cal. App.) 254 P. 647, that the prohibition against further prosecution contained in the above section deprives the court of authority to take any other action except to dismiss the appeal, that the direction requiring a dismissal is mandatory, and that, where the appeal is not brought to trial within one year from the date of its filing, the jurisdiction of the superior court is lost in so far as taking any action other than dismissing the appeal is concerned. We also concluded that the jurisdiction of the superior court to try the case could be preserved only by a written stipulation on the parties, extending the time for trial; that, although the appeal therein considered was actually tried, the superior court's action in dismissing it before rendering judgment was proper, since, with the expiration of the period of one year from the date of the filing of the appeal, all authority to do any act except to direct a dismissal had been lost, and the steps which the court had taken were void. A jurisdiction which has been lost cannot be restored by stipulation. *Sauer v. Superior Court* (Cal. App.) 241 P. 570.

[3, 4] The question is undoubtedly one of jurisdiction. In the instant case the authority of the superior court to try these appeals entirely passed away. Its jurisdiction died, and remained dead for 13 days before the parties attempted to bring it to life through the futile gesture of then stipulating that the court might do that which the law prohibited. The language which the Legislature has employed in section 981a is mandatory; its meaning is unmistakable. It not only directs the dismissal, but it expressly prohibits any other steps to be taken. Jurisdiction is a right to adjudicate concerning the subject-matter of a given case. *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15. Section 981a prohibits the court from making such adjudication after the statutory period has elapsed, unless the parties have stipulated in writing to extend the time for trial of the appeal. When, as in said section, the statute expressly withdraws the power to do an act after a fixed period, it is mandatory, and the court is without jurisdiction to act against this inhibition. *Cake v. City of Los Angeles*, 164 Cal. 705, 130 P. 723. That the jurisdiction of the court is terminated with the expiration of the period after which further action is prohibited has been decided in a number of California cases interpreting sections of the Code worded

practically the same as 981a. Section 581a provides:

"No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. * * *

In *Sauer v. Superior Court*, supra, referring to the contention of the respondent that the stipulation signed by the petitioner waiving the latter's right to ask for a dismissal, it is said:

"To adopt this view of the matter would be, in effect, to deny that, at the time when said stipulation was made, the court had lost jurisdiction of the case, or to hold that, by stipulation of the parties, a jurisdiction which has been lost can be resumed. Neither of these alternatives can be accepted."

Language similar in all material respects to that contained in sections 581a and 981a of the Code of Civil Procedure is also to be found in section 581b. This provision was held to be mandatory in its requirement that no further proceedings shall be had in an action transferred as provided therein from one county to another where certain fees and costs have not been paid by the plaintiff for one year "after the time when such pleadings or papers shall have arrived in the custody of such clerk or justice." It was there said that the superior court should have dismissed the action because of the plaintiff's failure to pay the costs as required, and that the court "had no power to do anything else." The same principle is announced and made the basis of decision in *Davis v. Superior Court*, 184 Cal. 691, 195 P. 390; *Beal v. Superior Court* (Cal. App.) 247 P. 922; *Swortfiger v. White*, 141 Cal. 576, 75 P. 172; *Siskiyou County Bank v. Hoyt*, 132 Cal. 81, 64 P. 118; *Modoc Land & Livestock Co. v. Superior Court*, 128 Cal. 255, 60 P. 848; *White v. Superior Court*, 126 Cal. 245, 58 P. 450; and *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 P. 470.

The foregoing decisions all recognize the mandatory character of the section now before us or others almost identically worded. These authorities govern and determine the present proceeding, for they establish the principle beyond dispute that, when the year allowed by section 981a has expired, and no written stipulation is before the court extending the time, jurisdiction to take any other step except to dismiss the appeal is lost, and it is elementary that such juris-

diction, when once lost, cannot be conferred or revived by stipulation.

Petitioner relies upon *Rio Vista Mining Co. v. Superior Court*, 187 Cal. 1, 200 P. 616, in which it was determined that the written stipulation made after the expiration of the five-year period limited in section 583 of the Code of Civil Procedure had the effect of tolling the operation of the statute. We think the provision of that section is plainly distinguishable from that contained in section 981a. Section 583 contains no inhibition against steps being taken other than the ordering of a dismissal, as does section 981a. The decision itself clearly recognizes this distinction. Referring to section 583, it is said:

"There is, moreover, nothing in the wording of the statute in question to deprive the court of jurisdiction upon the mere lapse of five years. It is only after due notice to plaintiff that it may be dismissed on motion of the defendant, and until the actual dismissal, there appears no reason why the matter of going to trial should not remain subject to the stipulation of the parties. Unlike the preceding sections, 581a and 581b, directing dismissals upon failure to issue and return summons within a specified period, or upon failure to pay fees on transfer of actions, section 583 does not require that such actions shall not be 'further prosecuted and no further proceedings shall be had therein,' after the limited time has expired. The provision of section 583 for an extension of time for trial by stipulation of the parties, and directing notice, before dismissal on motion of the plaintiff, would suggest that even a dismissal on the court's own motion would contemplate some previous determination as to whether or not such stipulation between the parties existed. Under sections 581a and 581b the writ of prohibition has been upheld to prevent further exercise of jurisdiction in actions coming under those provisions (*Modoc Land Co. v. Superior Court*, 123 Cal. 255, 60 P. 848; *White v. Superior Court*, 126 Cal. 265 [245], 58 P. 450), and such dismissal can be had without notice to either of the parties (*Ransome-Crummey Co. v. Wood*, 40 Cal. App. 355, 180 P. 951). The only relief granted under section 583 by our decisions has been to require, on proper showing, that an order of dismissal be entered, upon the apparent assumption that until such dismissal is made or demanded the parties are at liberty to treat the action as pending and within the jurisdiction of the court."

It is true that in another part of the opinion it is said that, if the parties had actually tried the case, it would not be disputed that a judgment following such trial would be valid; and further that, if the parties could waive the right to object, under such circumstances they could confer jurisdiction by stipulation. Of course this statement must be considered in connection with the interpretation of section 583, above quoted. It cannot be said that the opinion goes further and holds that under a statutory prohibition against the prosecution of an ac-

tion, such as those contained in sections 581a, 581b, and 981a, the parties may by stipulation set at naught the mandate of the law. It should be observed also that none of the cases cited in *Rio Vista Mining Co. v. Superior Court*, supra, to the effect that, "where a cause of action is within the general jurisdiction of a court, the voluntary appearance of the parties and submission of the cause on its merits confers jurisdiction to try the issues presented," in any way touch upon the question of the right to confer jurisdiction by stipulation where the statute declares that it shall not exist. For example, *Allen v. Allen*, 159 Cal. 197, 113 P. 160, held that, since the superior court has general jurisdiction to determine title to real property, that matter might be litigated in a divorce proceeding where the parties have submitted that issue, although as a general rule the superior court in such a proceeding has no jurisdiction to pass upon the question of the separate property of the spouses. This proposition is easily differentiated from the one here under consideration. There the superior court had general jurisdiction to determine title to real property. Were the law, organic and statutory, to be so altered as to provide that after a certain time no further steps should be taken in any action involving title to real property, the situation would be rendered similar to that presented under section 981a in the instant case. Under this section, after the year has expired within which the appeal may be heard by the superior court, it has no jurisdiction, general or otherwise, to pass upon any issue presented therein.

The writ of mandate must therefore be denied, and it is so ordered.

I concur: THOMPSON, J.

WORKS, P. J. I concur in the judgment and in everything that it said in the foregoing opinion, with the exception that I am not in accord with the comments upon *Rio Vista Mining Co. v. Superior Court*, 187 Cal. 1, 200 P. 616. I think the opinion in that case is out of harmony with other decisions of the Supreme Court upon kindred subjects. The only material differences between section 583 of the Code of Civil Procedure, which is dealt with in the case cited, and section 981a, are two. First, section 583 provides for notice of the motion for dismissal to be made by a party, while section 981a does not; but this difference in the letter seems not to effect a difference in the spirit of the sections.

"It is, of course, beyond question that where a motion is required to be made for an order in a cause whereby the right of an adverse litigant may be affected, it must be upon notice to such party." *Bohn v. Bohn*, 164 Cal. 532, 129 P. 981.

If it be said that a motion is not "required," within the meaning of this language of the Supreme Court, under either section 583 or 981a, because a dismissal may occur of the court's own motion, there seems to arise another and totally different reason for seeing no actual inharmony between the two sections in respect of the matter of notice. Beyond a doubt the court could of its own motion order a dismissal under section 583 after notice of motion given by a party and before the arrival of the day upon which, according to the notice, the motion of the party was to be made. This would appear to render nugatory the provision for notice in section 583 and place that section in the same condition with section 981a, for it was directly decided in *Rio Vista Mining Co. v. Superior Court* that the requirement of section 583 is mandatory where no stipulation has been made. It would appear, indeed, that the only office that a motion under either section can perform is to apprise the court of a situation under which it must act. There is therefore no legal difference between the sections as to the matter of notice. The second apparent difference between sections 583 and 981a lies in this: The latter section provides that, after the expiration of the year following the perfecting of an appeal, no action "shall be further prosecuted, and no further proceedings shall be had therein." Section 583 contains no such language, but, as the express requirement of the enactment is mandatory, it would seem that the legislative intent was that no further proceedings should be had in actions coming within its inhibition. Its mandate operates directly upon the court, and would seem to impose as insuperable a bar to the exercise of jurisdiction as the language in section 981a to the effect that no action "shall be further prosecuted, and no further proceedings shall be had therein," unless a stipulation be entered into between the parties "extending" the time which would otherwise end with the passage of a year following the perfecting of an appeal.

82 Cal. App. 202

**WHEELER et al. v. SUPERIOR COURT IN
AND FOR CITY AND COUNTY OF
SAN FRANCISCO. (Civ. 5844.)**

District Court of Appeal, First District, Division 1, California. April 6, 1927.

1. Injunction ⇨164—Equity courts may modify or suspend their injunctions, at least where right is reserved in injunction order.

Courts of equity have right and power to retain control over their own injunctions so that they may modify or suspend them as equity requires, at least where such right is reserved in order granting injunction.

2. Mandamus ⇨48—Petitioners claiming danger of total loss of valuable crops held entitled to peremptory mandamus to compel determination of motion to dissolve injunction against selling them.

Petitioners claiming that their crops, worth \$10,000, are in great danger of total loss through moulding, if not disposed of promptly, held entitled to peremptory writ of mandamus to compel hearing and determination of their motion to vacate preliminary injunction against sale thereof, where injunction order contained reservation that it was made without prejudice to defendants' right to move to vacate injunction.

3. Injunction ⇨157—Injunction held based on written order granting it without prejudice to right to move to vacate it, not on minute entry of oral announcement that it would be granted.

Written order granting temporary injunction against sale of crops without prejudice to right to move to vacate injunction, not clerk's minute entry of court's oral announcement that it would grant injunction, held order on which injunction was based.

4. Judgment ⇨278—Judgments in many actions, especially equitable, as for injunctions, must be formulated by judge, and cannot rest on clerk's minutes.

While orders, in some instances, may rest on clerk's minutes, as where mere clerical or ministerial duties are involved, form of judgment and character of relief are subjects for exercise of judicial power in many actions, especially of equitable nature, such as suits for injunctions.

5. Injunction ⇨157—Injunction should contain sufficient information on face to apprise party served of what he cannot do.

Injunction should contain sufficient information on its face to apprise party on whom it is served of what he is restrained from doing.

6. Judgment ⇨282—Decrees in equity should be signed by judge.

In ordinary actions at law, judge's signature is not necessary to validity of judgment, but decrees in equity should be so signed.

Original petition by Harold Wheeler and another, individually and as partners doing business under the firm name and style of Sycamore Ranch, and another, for an alternative writ of mandamus to the Superior Court of the State of California in and for the City and County of San Francisco, Hon. G. H. Cabaniss, Judge, to hear and determine a motion to vacate a preliminary injunction. Alternative writ made peremptory.

Walter E. Hettman, of San Francisco (Harold Wheeler, of San Francisco, of counsel), for petitioners.

Sapiro & Hayes, of San Francisco, for respondent.

TYLER, P. J. Petition for alternative writ of mandamus. It is alleged therein, in sub-

stance, that on the 21st day of September, 1926, the California Prune & Apricot Growers' Association, a corporation, as plaintiff, filed in the superior court of Tehama county a verified bill in equity against petitioners wherein said plaintiff claimed that, under and by virtue of a certain written agreement dated April 28, 1921, said plaintiff was entitled to have and receive from said defendants, petitioners herein, all of the crops of dried prunes which defendants should harvest and dry on their property, known as the Sycamore Ranch, in Tehama county, during the years 1922 to 1928, inclusive; the complaint further alleges that said defendants had failed and refused to deliver to plaintiff their dried prunes of the crops of 1924 and 1925, and had sold the same to persons other than plaintiff, in violation of said written agreement, and that, unless restrained by order of said superior court, defendants would sell their crops of 1926, 1927, and 1928 to persons other than plaintiff; that such sales would cause the plaintiff great and irreparable injury unless the superior court should grant to plaintiff the specific performance of the written agreement, together with an injunction to prevent the sale of the prunes, for the years stated, to any person other than plaintiff. In the complaint, judgment was prayed for, requiring and ordering defendants to perform and carry out their agreement.

That upon the filing of the complaint the plaintiff in said cause obtained from the superior court an order to show cause and temporary restraining order dated September 21, 1926, requiring the defendants to show cause, on the 28th day of September, why a preliminary injunction should not be issued against defendants as prayed for, and meanwhile enjoining and restraining them from selling the crops. This order was never served on either of the defendants, nor were they served with summons in the action until after the time fixed in the order to show cause. That at the time fixed, on September 28, 1926, the matter came on regularly for hearing, and it was continued until October 11, 1926. No further proceedings upon said order of September 21, 1926, and no hearing thereon was ever thereafter had or taken in said cause. Subsequently, on October 2, 1926, upon an ex parte application made by said plaintiff, the superior court made and issued a second order of the same character, which second order was addressed to petitioners as defendants in said suit, and was based solely upon the complaint hereinabove referred to. That said suit was thereafter duly transferred to the superior court of the city and county of San Francisco, and it is still pending in that court. No answer has as yet been filed by the defendants, petitioners herein. The second order to show cause came on regularly for hearing on November 6, 1926,

the plaintiff and defendants being represented by their respective attorneys. The matter was thereupon heard by the court and submitted for determination. The court then orally announced from the bench that, as it saw no reason why the suit could not be brought to issue and tried on its merits within the following two or three weeks, it would pro forma grant a preliminary injunction against the defendants and would later on, after the trial of the cause upon its merits, consider the various points and authorities that had been submitted at the hearing in support of or against the granting of such preliminary injunction. Thereafter, on November 16, 1926, pursuant to said oral announcement of November 6, 1926, the court signed a written order of preliminary injunction in the matter, said order having been prepared by the attorneys for plaintiff. This order was duly filed and served upon the defendants therein. The order of preliminary injunction carried with it the reservation that:

"This order is made without prejudice to the right of the defendants, at any time hereafter, to move to vacate the injunction hereby granted whenever so advised."

This reservation, so it is alleged, had been inserted in the order upon the express direction of the trial court, and was made with the intention and for the purpose of expressly reserving to said court the rights to vacate the injunction, if it should thereafter be shown that its continuation would be inequitable or improper. Thereafter petitioners herein, as defendants in said suit, duly served and filed a notice of motion to dissolve and vacate the preliminary injunction. The matter came on regularly for hearing, whereupon, and before said motion could be heard, counsel for plaintiff objected to any hearing of the motion on the ground that the court had no jurisdiction to hear the motion or to vacate or dissolve the preliminary injunction theretofore issued. The objection of plaintiff's counsel was argued and submitted to the court for determination, and the judge thereof delivered his oral opinion, in which he sustained the objection of plaintiff's counsel and declared that he would refuse to hear or consider the motion to vacate, solely for the reason that said superior court had no power of jurisdiction so to do. That the facts and grounds upon which petitioners, as defendants in said suit, moved the court to vacate the preliminary injunction are fully set forth in an affidavit of Harold Wheeler, one of the defendants, from which it clearly appears, so it is alleged, that if the motion should be heard and considered, there are good and sufficient reasons, in equity and good faith, why said motion should be granted and the injunction dissolved; that the refusal of said court to hear and consider the motion was an abuse of discretion which con-

stituted error at law, and that unless said motion is heard petitioners will be irreparably injured, and will have no speedy or adequate equitable remedy. It is accordingly contended that the court erred in holding that it was without power to hear or consider defendants' motion to vacate the preliminary injunction. It is further contended that the superior court of Tehama county likewise had no jurisdiction or power to issue the second order to show cause, having exhausted its power and jurisdiction in this regard by its issuance of the first order, and that inasmuch as the preliminary injunction of November 16, 1926, rested wholly upon said second order to show cause, said preliminary injunction was, therefore, not within the power or jurisdiction of the court and should therefore be vacated and set aside.

Petitioners, in support of their application for the writ, claim that the superior court's ruling was based essentially on the decisions of our Supreme Court in the case of *United Railroads v. Superior Court*, 170 Cal. 755, 151 P. 129, Ann. Cas. 1916E, 199, and subsequent cases to the effect that when a provisional injunction has been granted on notice, and opportunity to be heard, it may not be subsequently vacated or modified, pending trial on the merits, as the decision having been once made the power of the court is exhausted and the sole remedy is by appeal. See, also, *Eisenberg v. Superior Court*, 193 Cal. 575, 226 P. 617, *Ots v. Superior Court*, 10 Cal. App. 168, 101 P. 431, and *Humphrey v. Buena Vista Water Co.*, 2 Cal. App. 540, 84 P. 296. In no one of the cases, however, did the injunctive order of the lower court contain any clause by which the court reserved to itself, as here, the right to vacate or modify the order. It is, accordingly, contended by petitioner that the authorities cited and relied on by respondent is as far as the decisions can go without giving to section 527 et seq. of the Code of Civil Procedure a meaning that would make that section unconstitutional as divesting the court by an act of the Legislature of the equity jurisdiction conferred on it by the state Constitution. Respondents herein contend that the granting of the provisional injunction, with the reservation that "the order is made without prejudice to the right of the defendants, at any time hereafter to move to vacate the injunction whenever so advised," did not constitute a reservation in the court of a power to vacate, modify, or otherwise disturb the temporary injunction theretofore granted upon notice, and the provision inserted did not waive any effect of the statutory provisions denying such a right to the petitioners. They also contend that the temporary injunction having been granted upon notice, the court was without any authority whatsoever or jurisdiction to entertain a motion to vacate, modify, or disturb the same, and could not

under our practice make any reservation in its order so as to grant the right to make such a motion. Counsel for respondents further urge the contention that, assuming for the purpose of argument that the clause did constitute an attempted reservation of a right to modify the injunction, such attempted reservation was void, as the court had no authority to modify the order granting the temporary injunction as evidenced by a minute order made by the court room clerk under date of November 6, 1926, after the court had orally announced that it would grant an injunction. In support of the first two contentions that, under the law in California, the court had no power to include the "without prejudice" clause in the order as the statute does not confer any right upon them to move to dissolve, for the reason that it was granted upon notice, and that the clause, therefore, has no operative effect even though it be assumed that there was an attempted reservation, we are cited to *United Railroads v. Superior Court*, 170 Cal. 755, 151 P. 129, Ann. Cas. 1916E, 199, and the other cases hereinabove referred to as supporting this rule. As above indicated, in none of these cases was there any attempted reservation. An exhaustive discussion of the inherent powers of the English chancery courts to suspend or stay injunctions is contained in *Tulare Irr. Dist. v. Superior Court*, 197 Cal. 649, 242 P. 725. It is unnecessary, however, for us to advert to such powers. Mr. Justice Shenk, the author of that opinion, in discussing the effect of *United Railroads v. Superior Court*, distinctly points out that there is a strong intimation contained therein that, if the order of preliminary injunction there granted had contained a provision reserving to the court the rights to revoke or modify the preliminary injunction which it was then ordering, such power could have been reserved. While refusing to pass upon the exact question here presented, the learned author states that the intimation fortifies the conclusion that the only theory upon which that case was decided was that in view of our statutory provisions regulating and providing a full and complete system of law and procedure as to the granting, refusing, modifying, and dissolving temporary injunctions, without reserving to itself the right to revoke or modify such an injunction, the court's power in the premises had spent its force and been exhausted, but that this result does not follow when the right of modification is reserved. The same intimation is contained in *American Trading Co. v. Superior Court*, 192 Cal. 770, 222 P. 142. Text-writers on this subject make the same distinction that was made in the cases above cited between injunctions that reserve the right to vacate the same and those that contain no such reservation. 14 Cal. Jur. 282.

[1, 2] We are of the opinion that as an es-

sential part of their equity jurisdiction courts of equity have the right and power to retain control over their own injunctions, so that they may modify or suspend them as equity should require, at least where the right is reserved in the order granting the same. Without such power, it is clearly evident that great injustice might result. The granting and keeping in effect an injunction might cause as great an injury to a defendant as its denial might cause to the plaintiff. Here it is claimed that the crops belonging to petitioners, and amounting in value to the sum of \$10,000, are in great danger of becoming a total loss through moulding, if not disposed of promptly. Nor do we consider that there is any merit in the remaining contention of respondent.

[3] Counsel attempts to avoid the effect of the reservation clause of the court's order of November 16, 1926, by claiming that such order was not the order for the injunction, but that the order upon which it was based was the minute entry made by the clerk under date of November 6th, when the court orally announced from the bench that it would grant injunction. This minute entry, it is true, makes no reservation of a right to the defendant to move later for the dissolution of the injunction, but it is plainly manifest that the provisional injunction was not based upon the minute entry. The order as entered by the clerk reads as follows:

"Ordered, application for temporary injunction granted. Bond fixed in the sum of \$10,000."

This entry by the clerk was but a memorandum of the court's intention to sign a written order for an injunction when the same was properly prepared and presented. The minute entry lacked the essential elements of an order since it left the terms and extent to be determined later by a written order. A written order was, in fact, prepared and presented, whereupon the court amended it by inserting the provision in question. The written order as signed was clear and definite as to its terms. The minute order was incomplete, and it would have been impossible to have procured a writ of injunction pendente lite thereon in the terms prayed for or by the order to show cause. Then, again, there was no attempted service of the minute order, and none was made until after the written order was prepared and signed. When so prepared and signed, the order enjoined the defendants, naming them,

from selling the prunes, and then followed the "without prejudice clause," after which it read "Let an injunction issue." It is clearly apparent that the written order was the order upon which the injunction was based, and was so considered by all the parties.

[4-6] It is true that in some instances orders may rest upon the clerk's minutes, but it is also true that others require some formulation by the judge. This is particularly so in the case of injunctions. An injunction should contain sufficient information on its face to apprise the party upon whom it is served of what he is restrained from doing. In ordinary actions at law, it is the rule that the signature of the judge is not necessary to the validity of the judgment, but it has been the almost invariable rule in this state for decrees in equity to be so signed. *Tulare Irr. Dist. v. Superior Court*, supra. There are many judgments whose entry involves nothing more than clerical or ministerial duties, such as a judgment for the recovery of specific real or personal property, or a fixed amount of damages, or one which is rendered generally that the plaintiff is not entitled to recover from the defendant. In such cases, the mere order for judgment is all that is needed for the clerk, but in many other actions, and especially those of an equitable nature, the form of the judgment and the character of relief that is to be granted are as much a subject for the exercise of judicial power as is the determination of the party in whose favor judgment is to be rendered. *Broder v. Conklin*, 98 Cal. 360, 33 P. 211. The distinction between oral orders that are full and sufficient in themselves and those that have to be followed up by fuller written orders to dispose completely of the matter is discussed in *Barbee v. Young* (Cal. App.) 249 P. 15; and *Brown v. Superior Court*, 70 Cal. App. 732, 234 P. 409.

Upon this subject we are of the opinion that the written order is the order upon which the injunction was based. That order containing a reservation of modification, the lower court has full power and it is its duty to entertain the motion in question. It is therefore ordered that the alternative writ heretofore issued be made peremptory, requiring respondent to hear and determine defendant's motion to dissolve the attachment.

We concur: KNIGHT, J.; CASHIN, J.

82 Cal. App. 226

SENEY v. PICKWICK STAGES NORTHERN DIVISION, Inc., et al. (Civ. 4664.)★

District Court of Appeal, Second District, Division 1, California. April 7, 1927.

Hearing Denied by Supreme Court June 6, 1927.

1. Carriers ⇨316(1)—*Res ipsa loquitur* doctrine is applicable, where vehicle operated by common carrier overturns, unless allegations of negligence are specific only, and proof is insufficient.

Overturning of vehicle operated by common carrier raises inference of negligence under doctrine of *res ipsa loquitur*, even though there be specific as well as general allegations of negligence in complaint, but, where such allegations are specific only, and proof is insufficient, doctrine does not apply.

2. Carriers ⇨316(1)—In death action, allegation of defendant's careless and negligent operation of automobile stage and testimony as to how overturning occurred held not to make *res ipsa loquitur* doctrine inapplicable.

In death action against automobile stage company, plaintiff's allegations that defendant operated stage in such careless, reckless, wanton, and negligent manner that it was overturned, followed by some testimony as to how overturning occurred, held not to deprive plaintiff of benefit of doctrine of *res ipsa loquitur*, where precise cause of overturning was not shown.

3. Carriers ⇨316(1)—*Res ipsa loquitur* doctrine does not shift burden of proof from plaintiff in death action against carrier.

Burden of proof, which is on plaintiff in death action against automobile stage company, is not shifted by doctrine of *res ipsa loquitur*, invoked by overturning of stage, since such doctrine merely establishes *prima facie* case of negligence, which defendant is bound to meet.

4. Carriers ⇨318(4)—Evidence held to establish defendant's negligence in action for death caused by overturning of automobile stage, driver of which had not slept within 36 hours.

Evidence held sufficient to establish defendant's negligence in action for death of passenger, caused by overturning of automobile stage, either with or without application of doctrine of *res ipsa loquitur*, where stage was driven on gravel road by one who had not slept for 36 hours.

5. Carriers ⇨295(1)—Overturning of automobile stage held not unavoidable accident or ordinary risk of road assumed by passenger.

Overturning of automobile stage, which was driven on gravel road by one who had not slept for 36 hours, held not unavoidable accident or ordinary risk of road assumed by passenger, where stage would not have left road except for driver's negligence.

6. Death ⇨99(1)—\$15,000 held not excessive for death.

\$15,000 held not excessive for death of passenger on automobile stage, which overturned due to driver's negligence.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Hattie L. Seney against Pickwick Stages Northern Division, Inc., and others. Judgment for plaintiff, and the defendant named appeals. Affirmed.

Warren E. Libby and B. P. Gibbs, both of Los Angeles, for appellant.

Edwin S. Earhart and Seth B. Smith, both of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Defendant Pickwick Stages Northern Division, Inc., appeals from a judgment in favor of plaintiff, as sole heir of Leslie W. Seney, in the sum of \$15,000 for the death of said Leslie W. Seney, alleged to have been caused by the negligence of defendant in operating one of its auto stages upon which the deceased was a passenger, in such a manner that the stage was overturned and resulted in said death. The case was tried by the court without a jury.

The complaint alleges that the defendant is a common carrier of passengers for hire, and operates auto stages over and along the public roads and highways in the state of California; that on June 24, 1922, plaintiff and her husband were passengers on one of said stages running from Portland, Or., to San Francisco, Cal.; that defendant "operated the auto stage on which said Leslie W. Seney was a passenger in such a careless, reckless, wanton, and negligent manner that the said auto stage was overturned, and said Leslie W. Seney was instantly killed."

[1, 2] Appellant contends that the doctrine of *res ipsa loquitur* does not apply in this case, for the reason that the foregoing is a specific allegation of what constituted the negligence of the defendant. In support of its contention, appellant quotes the following testimony from the record. The plaintiff testified as follows:

"Q. By Mr. Earhart: What was the first thing you knew of the happening of that accident, if any happened? A. Well, as we would say, as we were coming up grade on the right-hand side we skidded against the bank, and the car jumped and skidded clear across the road, and turned upside down. That is as far as I can remember."

The witness Bohme, being the only other witness for plaintiff, testified as follows:

"Q. By Mr. Earhart: Now Mr. Bohme, at the time of the accident, at the time and place mentioned, what was your first knowledge of anything the matter with the car or its operation? A. Why, the car turned to the right to let a vehicle pass, and there was a scraping against the rocks, and then something—I don't know—it turned across the road for some reason or other, and the next thing that we knew was that it turned over. It hit some rocks or some obstacle in the road. The car started bouncing, and it seemingly got unmanageable, and turned over."

Appellant urges that the foregoing testimony could have been adduced for no other purpose than proving an allegation of negligence concerning which the plaintiff's counsel considered the burden was upon him to prove. Appellant further urges that no negligence is shown by the testimony above quoted, and that, since there was no attempt to rely upon any presumption of negligence, the motion for nonsuit should have been granted. The general rule is well settled that the overturning of a vehicle operated by a common carrier raises an inference of negligence under the doctrine of *res ipsa loquitur*. 4 Cal. Jur. § 119, p. 980; *Dowd v. Atlas T. & A. Service Co.*, 187 Cal. 523, 202 P. 870; *Lawrence v. Pickwick Stages*, 68 Cal. App. 494, 229 P. 885; *Lawrence v. Green*, 70 Cal. 417, 11 P. 750, 59 Am. Rep. 428; *Boyce v. California Stage Co.*, 25 Cal. 468. This doctrine still applies, even though there be specific, as well as general, allegations of negligence in the complaint. *Roberts v. Sierra Ry. Co.*, 14 Cal. App. 180, 111 P. 519, 527. The allegation and proof of specific acts of negligence would not deprive plaintiff of the benefit of the doctrine of *res ipsa loquitur* so far as those specific acts of negligence were concerned. *Atkinson v. United Railroads of San Francisco*, 71 Cal. App. 82, 89, 90, 234 P. 863. Where the allegations of negligence are specific only, but not general, and the proof is insufficient, then the doctrine does not apply. *Marovich v. Central Cal. T. Co.*, 191 Cal. 295, 216 P. 595; *McKeon v. Lissner*, 193 Cal. 309, 223 P. 965. In *Zerbe v. United Railroads of San Francisco*, 56 Cal. App. 583, 205 P. 887, where the allegations in the complaint were very similar to those in the complaint in the instant case, it was held that the doctrine of *res ipsa loquitur* applied. We confess that we find some difficulty in following appellant's argument that the complaint contains a specific allegation of negligence when it states that "defendant operated the auto stage * * * in such a careless, reckless, wanton, and negligent manner that the said auto stage was overturned." True, the allegation is not wholly general; it is equivalent to a statement that the defendant negligently overturned the auto stage. We have already seen that the doctrine of *res ipsa loquitur* applies in all such cases. The pleading does not state how or in what manner the stage was overturned. There is no dispute in the evidence as to the fact of overturning; but there is a conflict as to what happened at the time of the accident. The mere fact that plaintiff went further than required in proving her *prima facie* case in offering some testimony as to the manner in which the overturning occurred does not deprive her of the benefit of the doctrine of *res ipsa loquitur*. Such proof was a part of the *res gestae*. There is nothing in the record which should take from plaintiff her right to have the

court infer negligence from the happening of the accident under the circumstances in evidence. We have examined the cases cited by defendant holding that, where the proof discloses the cause of the accident, inferences are to be excluded. In *Stangy v. Boston Elevated Ry. Co.*, 220 Mass. 414, 107 N. E. 933, a case cited by defendant, the court said:

"The case at bar is not an instance of an unsuccessful attempt to prove the precise cause, which would not bar the plaintiff from relying upon appropriate presumptions, but it is a case where inferences are excluded because the cause is disclosed to be a definite fact."

In the present case the evidence offered by plaintiff does not disclose the cause of the overturning as a definite fact. Plaintiff testified that the car skidded against the bank and skidded clear across the road and turned upside down. The witness Bohme testified that the car scraped against the rocks, and then turned across the road and turned over; that it hit some rocks or some obstacle in the road, and started bouncing and turned over. The witness further stated that he did not see any obstruction in the road. Under such testimony the precise cause of the overturning of the stage remains unknown, and the plaintiff is entitled to the inferences arising from the doctrine of *res ipsa loquitur*. Accordingly, we hold that the doctrine of *res ipsa loquitur* applies to this case, and that the trial court did not err in denying defendant's motion for a nonsuit.

[3, 4] Appellant next urges that, even if the doctrine of *res ipsa loquitur* did apply, then the plaintiff did not prove negligence on the part of defendant by a preponderance of the evidence. The rule is well recognized that the burden of proof at all times remains upon the plaintiff. The doctrine of *res ipsa loquitur* does not shift this burden, but merely establishes a *prima facie* case of negligence which the defendant is bound to meet. All that is required of defendant is to produce evidence sufficient to offset the effect of the plaintiff's showing, and it is not required to offset it by a preponderance of the evidence. *Scarborough v. Urgo*, 191 Cal. 347, 216 P. 584. We cannot agree with appellant's contention that the plaintiff failed to establish her cause by a preponderance of the evidence. The evidence shows that the deceased was a passenger on one of defendant's stages running from Portland, Or., to San Francisco; that the driver of the stage worked during all of the night preceding the accident trying to repair a bearing in one of the cylinders of the automobile, and at the time of the accident had been without sleep for over 36 hours; that there was a good firm road at the scene of the accident, which had been recently covered with buckshot gravel; and that the stage had been running over such graveled road for a mile and a half

before the accident; that, while ascending a 3 per cent. grade the stage left the road, overturned, and plaintiff's husband was killed as a result of the accident. Plaintiff's evidence shows that the stage skidded against the bank while passing another car, skidded across the road, and turned upside down. The speed of the car was between 12 and 15 miles per hour. The stage driver testified for the defendant that he was driving around a right-hand curve where he could not see the road more than 15 feet ahead, at a speed of 12 to 15 miles per hour, when he saw a two-by-four stick in the road about 12 feet ahead, projecting $2\frac{1}{2}$ or 3 feet into the road, which was 20 feet in width; that he drove around the stick with the front wheels of the car, but, on account of the curve in the road the hind wheels struck the two-by-four, and skidded off the road, and that the car overturned about 75 or 80 feet distant from the point where the stick lay in the road. The driver further testified that by the application of the brakes he could have stopped the car within 20 feet at the time he saw the stick. On rebuttal the witness Bohme testified that the view of the road was unobstructed for a distance of 60 feet before the point was reached where the driver testified he saw the stick in the road. The witness Hassler testified on rebuttal that the car could have been stopped within 6 or 7 feet. Taking the driver's own testimony, if the stick was 12 feet ahead of him at the time the driver first saw it, then the rear wheels must have been nearly 20 feet distant from the stick at that time, and the driver could have brought his car nearly to a standstill before the rear wheels hit the stick. If this had been done, the car could not have run a distance of 75 or 80 feet upgrade beyond the stick before overturning. It is evident that the driver made no effort to apply the brakes when he first saw the obstruction, but that he attempted to drive around it without reducing his speed; that he succeeded in passing the stick with the front wheels; but that the rear wheels failed to pass. It is a significant fact that the marks on the roadway caused by the application of the brakes were after the driver had turned to avoid the obstacle. At this time it may be remarked that the trial court may have disbelieved the testimony of the driver that there was an obstruction in the road, as it had a perfect right to do, if not satisfied with the proof. No other witness testified to seeing such obstruction.

[5, 6] Appellant asserts that this was an unavoidable accident beyond the power of human care and foresight to prevent, and resulted from a cause over which the defendant had no control. We have already indicated that defendant has not shown that the accident was unavoidable. Neither did the accident result from an ordinary risk of the

road assumed by the plaintiff. This was not a case where the driver suddenly found himself driving over a skiddy surface, and thereby lost control of his car. No one knew the condition of the road better than the driver himself, as he had been driving over the gravelled surface for some time. If the road was dangerous, he should have driven his car with greater care so as to prevent skidding. Under the facts involved in this case the stage would not have left the road and overturned, except for the negligence of the defendant, and such negligence is not a risk assumed by the plaintiff.

Finally, the judgment, in our opinion, is not excessive.

We believe the evidence in this case absolutely establishes the negligence of the defendants, with or without the application of the doctrine of *res ipsa loquitur*.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

82 Cal. App. 210

LOS ANGELES COUNTY v. PAYNE, County Auditor et al. (Civ. 5500.)

District Court of Appeal, Second District, Division 2, California. April 6, 1927.

1. Statutes $\S$ 179—Statute whose language is clear must be substantially complied with, though statute itself directs liberal construction.

Where legislative language is clear and unambiguous, it must be substantially complied with, notwithstanding provision of statute that it should be liberally construed to effect purposes stated.

2. Waters and water courses $\S$ 183 $\frac{1}{2}$ —Publication of notice for 2 consecutive weeks held jurisdictional in proceedings for formation of waterworks district (County Waterworks District Act, $\S$ 3).

Provision of County Waterworks District Act (Deering's Gen. Laws 1923, Act 9123), $\S$ 3, requiring publication of notice of hearing once a week for 2 consecutive weeks for formation of waterworks district, held necessary jurisdictional step in proceedings.

3. Waters and water courses $\S$ 183 $\frac{1}{2}$ —Requirement for publication of notice of forming waterworks district held to require weekly publication over 14-day period (County Waterworks District Act, $\S$ 3).

County Waterworks District Act (Deering's Gen. Laws 1923, Act 9123), $\S$ 3, requiring publication of notice of hearing for formation of waterworks district at least once a week for 2 consecutive weeks, held to require publication over period of 14 days in order to give jurisdiction, as requirement relates not to manner, but to period of time for publication.

4. Waters and water courses ☞183½—10-day period before hearing petition for waterworks district did not commence to run until publication of notice was complete (County Waterworks District Act, § 3; Code Civ. Proc. § 416).

Provision of County Waterworks District Act (Deering's Gen. Laws 1923, Act 9123), § 3, that notice must be published 10 days before date set for hearing on petition for forming waterworks district, gave 10-day period, which did not commence to run until jurisdiction was acquired by completion of publication under Code Civ. Proc. § 416.

5. Waters and water courses ☞183½—Supervisors held without jurisdiction to create waterworks district at hearing held 20 days after date of first publication of notice (County Waterworks District Act, § 3).

Board of supervisors had no jurisdiction to create waterworks district at hearing fixed only 20 days after time of first publication of notice under County Waterworks District Act (Deering's Gen. Laws 1923, Act 9123), § 3, requiring publication at least once a week for 2 consecutive weeks, and further required notice must be published at least 10 days before date set for hearing.

6. Waters and water courses ☞183½—Supervisors had no jurisdiction to create waterworks district on petition failing to recite separately estimated incidental expenses of improvement (County Waterworks District Act).

Board of supervisors had no jurisdiction to form waterworks district on basis of petition which failed to state estimated incidental expenses, though specified figure was given as gross amount of cost, under County Waterworks District Act (Deering's Gen. Laws 1923, Act 9123), requiring that petition contain "estimate of the cost of the proposed improvement and of the incidental expenses in connection therewith"; gross estimate being insufficient.

Application by the County of Los Angeles for mandamus to be directed to H. A. Payne, County Auditor, to which the respondent and Charles T. Alleman demurred. Writ denied.

Everett W. Mattoon, County Counsel, Pierce Works, Deputy County Counsel, and Robert C. Wygant, Deputy County Counsel, all of Los Angeles, for petitioner.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent Payne.

Leonard S. Barnes, of Los Angeles, for respondent Alleman.

THOMPSON, J. The petitioner seeks a writ of mandate directing the county auditor of Los Angeles county, H. A. Payne, to countersign the bonds of the Los Angeles county waterworks District No. 9. The respondent Payne and the respondent Alleman, a taxpayer of the district, have appeared by demurrer, so that for the purposes hereof we may refer to the petition for the facts. It appears therefrom that on January 11, 1926, a

petition for the formation of the waterworks district, signed by the requisite number of freeholders, was presented to the board of supervisors, together with the map and bond as required; that the board fixed February 8, 1926, as the time for the hearing of the petition and protests, if any; that notice thereof was given by the clerk by posting in three public places, and also by publication in the Compton News-Tribune on January 19, 1926, and January 26, 1926. The County Waterworks District Act (Deering's Gen. Laws of 1923, p. 3784) requires that:

"The said clerk shall also cause a notice, * * * to be published at least once a week for two consecutive weeks in a newspaper of general circulation printed and published in the county in which the proposed district is located, and designated by said board for that purpose. Said notice must be posted and published, as above provided, at least ten days before the date set for the hearing of said petition." Section 3.

The respondents assert that the publication recited was insufficient, and was not in compliance with the provisions quoted. It also appears from the pleadings here that, in the petition presented to the board, the estimate of the cost of the proposed improvement and of the incidental expenses in connection therewith was set forth as follows:

"The estimated cost of the improvement together with the incidental expenses in connection therewith is seventy thousand dollars (\$70,000.00)."

The respondents take the position that this is not sufficient to meet the requirements of the act that the petition shall contain "an estimate of the cost of the proposed improvement and of the incidental expenses in connection therewith."

[1-5] We proceed to the inquiry with the mandate of the statute in mind that it shall be liberally construed to effect the purposes thereof. As was said by us in a recent decision, "We cannot, however, apply a rule of construction where there exists no room for construction." In re Flesher (Cal. App.) 252 P. 1057. Where the legislative language is clear and unambiguous, there must be a substantial compliance therewith. We find no room for doubt or uncertainty in the requirement that the notice shall be "published at least once a week for two consecutive weeks," and that "said notice must be * * * published as above provided, at least ten days before the date set for the hearing of said petition." (Italics ours.) The notice herein provided for is unquestionably the method provided by law for acquiring jurisdiction, and is a necessary jurisdictional step in the proceedings. Williams v. Board of Supervisors, 58 Cal. 237; Bliss v. Hamilton, 171 Cal. 123, 152 P. 303. Petitioner's claim that the requirement for publication for 2 consecutive

weeks relates to the manner of the publication, and not to the period of time, cannot be sustained. Its argument finds some apparent support, it is true, from the direction in the act to the board to set the petition for hearing on a day not less than 21, nor more than 30, days from its filing. It has been held, however, that this is directory and not mandatory. *Bliss v. Hamilton*, supra. Aside from this, however, is the equal certainty of the jurisdictional requirement that notice be published at least once a week for two consecutive weeks. We cannot by judicial construction shorten the period of 2 weeks, or 14 days, to 8 days. Nor can we say that jurisdiction is acquired by any publication short of the requirement. Jurisdiction is not acquired until the publication is complete, and, inasmuch as it could not be published for 2 consecutive weeks, unless it was published once every 7 days for the period of 2 weeks, it was not complete. *Williams v. Board of Supervisors*, supra; *Secombe v. Roe*, 22 Cal. App. 139, 133 P. 507; and *Foster v. Vehmeyer*, 133 Cal. 459, 65 P. 974. The 10-day period must be likened to the time to appear and plead or answer in response to the ordinary processes of court, which does not commence to run until jurisdiction is acquired, and in such instances jurisdiction is acquired when the publication is complete. Code Civ. Proc. § 416. Hence the requirement that the said notice shall be published at least 10 days before the date of the hearing means that, after the publication is complete, the residents shall have 10 days within which to prepare and file their protests to the formation of the district. The time being insufficient, therefore jurisdiction was not acquired.

[6] Another objection raised by respondents is that the petition did not give an estimate of the expenses incident to the acquisition and construction of a waterworks system. It will be observed that, in the facts heretofore recited, the incidental expenses were contained in the estimate of the cost of the proposed improvement, which estimate the petitioner asserts is a substantial compliance with the act. It was held in *Biggart v. Lewis*, 183 Cal. 660, 192 P. 437, that these incidental expenses are those which "naturally and necessarily appertain to and follow the estimate of the whole cost of the proposed improvements." And from this it is

argued that no useful purpose is served by segregating what amounts to the total cost. However, we may easily conceive of situations where the incidental expenses might be out of all proportion to the actual, as distinguished from the inclusive, cost of the improvement—and such disproportion might be sufficient to cause, not only the inquiring taxpayer, but also the board of supervisors, to find unfavorably on the petition. It has frequently been held that, where there is a requirement that something other than a gross estimate be given, a gross figure is insufficient. *Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161; *City of Peoria v. Ohl*, 209 Ill. 52, 70 N. E. 632; *City of Chicago v. Illinois Malleable Iron Co.*, 293 Ill. 109, 127 N. E. 349; *City of Harvard v. Roach*, 314 Ill. 424, 145 N. E. 618; *City of Erie v. Brady*, 150 Pa. 462, 24 A. 641; and *Friedenwald v. Shipley*, 74 Md. 220, 21 A. 790, 24 A. 156.

It is no answer to say that, since the notice of time set for hearing does not of necessity include an estimate of the incidental expenses other than by reference to the petition, the provision was not intended for the protection of the taxpayer. Had the Legislature intended that the gross cost should be sufficient, why did it not say so in the natural way, to wit, an estimate of the cost of the proposed improvement, including the incidental expenses in connection therewith? The very fact that the conjunction "and" is used indicates to our mind that both are required instead of one estimate covering both. It seems to us that the recital in the petition of an estimate of the incidental expenses was necessary to the acquisition by the board of jurisdiction.

Other irregularities are pointed to by the respondents, but they are all irregularities arising out of typographical errors or a failure to properly compare the proof of the published notice with the petition, and would not arise on a resubmission of the petition to the voters, and therefore there is no occasion for us to pass upon their sufficiency or insufficiency.

Writ denied.

I concur: CRAIG, J.

Presiding Justice WORKS, deeming himself disqualified, did not participate in the decision.

MARTIN v. PACIFIC GAS & ELECTRIC CO. (Civ. 3164.)★

District Court of Appeal, Third District, California. March 31, 1927.

Rehearing Denied April 27, 1927. Hearing Granted by Supreme Court May 26, 1927.

- 1. Electricity** ⇨19(2)—Evidence of previous negligence in maintaining wires held inadmissible, under complaint alleging specific negligence admitted (Code Civ. Proc. § 1868).

Where complaint alleged and defendant admitted that plaintiff was injured solely because of defendant's negligence in allowing fallen wire to remain charged across sidewalk and defendant elected to go to jury solely on issue of damages, testimony as to defendant's previous negligence in maintaining line between tree branches, etc., was inadmissible, under Code Civ. Proc. § 1868.

- 2. Evidence** ⇨99—Evidence not corresponding with allegations and confined to issue is irrelevant (Code Civ. Proc. § 1868).

Under Code Civ. Proc. § 1868, evidence not corresponding with allegations and confined to point at issue is irrelevant.

- 3. Negligence** ⇨119(4)—Proof is limited to negligent act specifically alleged.

Plaintiff is not limited in first instance to alleging specific acts of negligence, but, if he specifically bases grounds of complaint on particular act, proof is limited to such act.

- 4. Negligence** ⇨125—Negligence cannot be proved by similar instances, where notice is not involved.

Where notice is not involved, negligence or absence thereof cannot be proved by similar instances.

- 5. Damages** ⇨158(2)—Testimony as to endocarditis, chorea, and possibility of cancer, not alleged in complaint detailing injuries sustained, held inadmissible (Civ. Code, § 3283).

Where complaint detailed injuries sustained because of defendant's negligence, without alleging general bodily injuries, testimony as to plaintiff suffering from endocarditis and chorea and possibility of cancer, which were not pleaded, was inadmissible, under Civ. Code, § 3283, in absence of allegation or testimony that they necessarily follow injuries alleged.

- 6. Damages** ⇨24—Testimony as to what might possibly result from injury sustained is inadmissible under any pleadings (Civ. Code, § 3283).

Under Civ. Code, § 3283, testimony as to what might possibly occur as result of injury sustained is inadmissible under any state of pleadings.

- 7. Damages** ⇨20—Only natural results of injuries can be considered in awarding damages.

Only natural results of injuries sustained can be considered in awarding damages.

- 8. Damages** ⇨143—Natural and probable, but not necessary, results of injuries must be specifically pleaded.

Necessary results of injury sustained need not be pleaded, but merely natural and probable results must be specifically pleaded.

- 9. Damages** ⇨142—Damages necessarily resulting from wrongful act can be recovered under general allegation of amount, but must be specially alleged where merely natural consequences in connection with special circumstances.

Damages which are necessary consequences of wrongful act can be recovered under general allegation of amount of damage inflicted, but if damages ensue because of particular circumstances, though natural consequences of wrongful act in connection with special circumstances, facts must be specially alleged.

- 10. Appeal and error** ⇨1060(1)—Argument respecting prior negligence in maintaining power line held prejudicial error, in view of allegation and admission that allowing charged wire to remain on sidewalk solely caused injury.

Where complaint alleged and defendant admitted that plaintiff's injuries were wholly due to defendant's negligence in allowing fallen wire to remain charged across sidewalk, vigorous and able argument of plaintiff's counsel, detailing and emphasizing prior acts of negligence in construction and maintenance of power line, was prejudicial error as tending to obliterate distinction between punitive and compensatory damages; testimony as to such acts being irrelevant.

- 11. Appeal and error** ⇨1066—Instructions as to previous acts of negligence held prejudicially erroneous, in view of admission that injury was caused solely by negligence alleged.

Where complaint alleged and defendant admitted that plaintiff's injuries were caused solely by defendant's negligence in allowing fallen wire to remain charged across sidewalk and elected to go to jury solely on issue of damages, instructions based on inadmissible testimony as to previous acts of negligence in construction and maintenance of power line were prejudicially erroneous as conveying impression that jury was to decide other issues than extent of damages.

- 12. Trial** ⇨250—Jurors should be instructed only on questions to be decided, and instruction without bearing on issues or unsupported by evidence is erroneous.

Jurors should be instructed only on questions they are to decide, and it is error to give instruction without bearing on issues or unsupported by evidence, though correct as abstract statement of legal proposition.

- 13. Trial** ⇨252(3)—Instructions as to previous negligence, evidence of which was inadmissible, held erroneous as tending to confuse jury.

Instructions as to previous acts of negligence, evidence of which was inadmissible because of defendant's admission that negligence alleged was sole cause of injury, held erroneous as tending to confuse jury as to issue for decision in rendering general verdict, if effect, as

impressing on their minds conclusion that something besides compensatory damages should be considered, was cured by subsequent instructions correctly stating measure of damages.

14. Damages ⚡132(13)—\$25,000 for severe electric shock, pain, and loss of thumb and two fingers of schoolboy held excessive by \$10,000.

Award of \$25,000 for severe electric shock and pain suffered by schoolboy and disfigurement of his right hand for life by amputation of thumb and two fingers held excessive by \$10,000, in view of problematical permanency of other alleged consequences and failure to plead endocarditis, chorea, and probability or possibility of cancer as result of such injuries.

15. Damages ⚡127—Allowance must be made for dollar's diminished purchasing power, in fixing damages for injuries since 1915.

In fixing amount of damages for injuries sustained since 1915, due allowance must be made for diminished purchasing power of the dollar.

16. Appeal and error ⚡1140(2)—Appellate court may order that judgment stand affirmed on remittitur of excessive damages awarded because of evidence of negligence prior to that alleged and admitted (Code Civ. Proc. § 53).

Where amount of damages was only proper issue for jury and evidence of defendant's previous negligence was admitted notwithstanding admission that injury was caused solely by negligence alleged, appellate court, under Code Civ. Proc. § 53, may order that judgment stand affirmed on filing of remittitur of excessive damages awarded because of such evidence.

17. Costs ⚡241—Where it is ordered that judgment for plaintiff stand affirmed on filing of remittitur below, parties will be ordered to pay their own costs on appeal (Code Civ. Proc. § 1027).

Under Code Civ. Proc. § 1027, parties to case, in which it is ordered that judgment for plaintiff stand affirmed on filing below of remittitur of excessive damages awarded, will be ordered to pay their own costs on appeal.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Henry Alan Martin, a minor, through his guardian ad litem, P. R. Merrill, against the Pacific Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed on condition of remittitur.

Carr & Kennedy, of Redding, and T. J. Straub, of San Francisco, for appellants.

Jesse W. Carter, of Redding, for respondent.

PLUMMER, J. Plaintiff had judgment in the sum of \$25,000 in an action for personal injuries, and the defendant appeals.

As grounds for reversal herein, the appellant sets forth 8 specific reasons, which, for convenience, we will reclassify, as a number of them appear to be divisions of subjects which may be considered as one. We will consider them in the following order:

(1) The alleged error of the trial court in admitting evidence regarding the construction and condition of the defendant's power line preceding the event of plaintiff's injury. (2) That the court erred in admitting testimony outside of the issues tendered by the pleadings. (3) That the court erred in its instructions to the jury. (4) That the verdict of the jury was and is excessive. All the other errors assigned may properly be considered in connection with the main subjects just enumerated.

The plaintiff was injured on the morning of December 24, 1922, at Cottonwood, in Shasta county, by coming in contact with a power line charged with electricity belonging to and maintained and operated by the defendant in serving a pumping plant near by with electrical energy. The wire of the power line with which the plaintiff came in contact had broken and fallen across the sidewalk area of a certain street in said town known as Chestnut street. This wire remained on the ground unguarded and charged with electricity for several hours, to wit, from some time early in the morning of said day until after the injury of the plaintiff, which occurred at about 10 o'clock on the morning of said 24th of December. Preceding the fall of the wire there had been a heavy snowfall. The circumstances preceding the injury of the plaintiff and the specific act of negligence upon which this action is founded can be best explained by here setting forth the allegations of the plaintiff's amended complaint involved in the questions to be considered, to wit:

"V. That on or about the 24th day of December, 1922, and for several months prior thereto, the said defendant carelessly and negligently had constructed, kept, maintained, and operated the said electric wire power line through the limbs and branches of a tree, situated on the sidewalk on said Chestnut street, near the southeast corner of the yard fence of the 'Ogburn residence,' in said town of Cottonwood; that said electric wire power line was so constructed, kept, maintained, and operated through the limbs and branches of said tree that the wires thereof came in contact with the limbs, branches, and leaves of said tree and caused the same to arc, burn, rub, and cut said limbs, branches, and leaves; that for approximately three weeks continuously prior to the said 24th day of December, 1922, some of the limbs and branches of said tree had broken and fallen over said wires, causing the same to droop, sag, and break and thus greatly endangering the life and limb of persons passing under said tree and said electric wire power line on said sidewalk; that as a result of said wires coming in contact with the limbs and branches of said tree and the limbs and branches thereof falling and bearing upon said wires, and said wires arcing, burning, rubbing, and cutting said limbs and branches, one of said wires broke and fell to the ground, and remained thereon at or near said sidewalk from about 6 o'clock a. m., until 12 o'clock m., on the

said 24th day of December, 1922; that said wire remained connected on one end with the said electric wire power line and was, during all of said time, heavily charged with electricity, which said charged wire was so exposed and unguarded as to permit pedestrians to come in contact with it, all of which the said defendant well knew; that said broken wire lying on the ground near said sidewalk, as aforesaid, was at all of said times owned by and under the control of said defendant.

"VI. That on the said 24th day of December, 1922, and at about the hour of 10 o'clock a. m. of said day, while the said minor, Henry Alan Martin, was walking along the sidewalk on said Chestnut street, at or near the corner of the yard fence of said 'Ogburn residence,' while walking within the limits of said Chestnut street, and on and along the pathway generally traveled by pedestrians, he, the said minor, came in contact with said live wire so lying on the ground, as aforesaid, and thereupon and thereby the full charge of electricity then carried by said wire passed through the person of said minor, and said minor was thereby knocked down and very severely burned at various points on and about his body, his head, his hips, and arms; that his right arm, hand, and fingers were so badly burned that it became necessary to amputate the index and middle finger and thumb of his right hand, and the same were amputated; that the right hand and arm of said minor were so badly burned that the same are now shrinking and shriveling and are less than their normal size, and said minor has lost the strength and full use of said right hand and arm.

"VII. That by reason of said injury and said burns, said minor was made ill and was confined to his bed for several weeks, and during all said time suffered and still suffers great and excruciating pain, and by reason of said burns plaintiff has been maimed and disfigured and permanently deprived of the full use and strength of his right arm and hand, and plaintiff is informed and believes that his injuries are permanent, and that he will continue to suffer great and unusual pain and mental anguish for a long time to come.

"VIII. That said plaintiff, Henry Alan Martin, suffered and received said injuries hereinabove mentioned wholly by reason of the carelessness and negligence of said defendant in permitting said electric power wire to remain upon the ground at the time and in the manner aforesaid."

[1] Immediately upon the impanelment of the jury to try this case defendant in open court made and entered the following admission:

"The Pacific Gas & Electric Company desire to admit that on the morning of December 24, 1922, one of its wires fell, and that the defendant thereafter negligently permitted the wire to remain on the ground until the time alleged in the complaint, and that Henry Alan Martin, the plaintiff in this action, was injured as a result of such negligence.

"We have made this admission in the interest of shortening the trial of the case, believing that the circumstances justify it; and we will then go to the jury with the sole issue as to the nature and extent of the injuries, and the amount of just compensation to which the plaintiff is entitled."

Notwithstanding the allegations contained in paragraph VIII of the plaintiff's amended complaint and the admissions of the defendant, the trial court permitted the plaintiff to introduce testimony that for a considerable period of time, ranging over something like three years, the defendant had maintained its line in such a place and course that the wires thereof ran between the limbs of a certain eucalyptus tree; that the wires running between the branches of said tree rubbed against the same, causing the electricity with which the wires were charged to arc, thereby emitting flashes of light; that about the 9th day of December, 1922, there was a snowfall of about four inches in the vicinity of the town of Cottonwood; that the weight of the snow caused some of the limbs of the said eucalyptus tree to bend and break and drop over on the wires of the power line maintained through said trees by the defendant to such an extent that one of the wires broke and fell to the ground; that this broken wire was repaired by an employee of the defendant; that nothing, however, was done toward the removal of the limbs or branches of the tree, or to safeguard the wires running between said branches, and that this condition continued from the 9th to the 24th days of December, 1922. Some seven different witnesses were called by the plaintiff, who testified as to the condition of the power line, as it had been maintained for a long period of time preceding the 24th day of December, 1922. The several witnesses all repeating in detail the substance of which we have stated generally, relating to the previous erection and maintenance and condition of the power line, or lines belonging to the defendant. All of the testimony relating to the condition of the wires belonging to the defendant, the manner of its maintenance, etc., was objected to by the defendant on the ground that it did not tend to prove any of the issues involved in the action; that the specified act of negligence which led to the plaintiff's injury being particularly set forth in such manner as to exclude any general acts of negligence, and being admitted by the defendant, all other questions were irrelevant, immaterial, and incompetent. The plaintiff, having alleged in paragraph VIII that the injury of the plaintiff was caused "wholly by reason of the carelessness and negligence of said defendant in permitting said electric power wire to remain upon the ground at the time and in the manner aforesaid," and the defendant having admitted such act of negligence, and that the plaintiff was injured by reason of the defendant having negligently allowed the power wire charged with electricity to remain in its fallen condition across the sidewalk in the town of Cottonwood, there was nothing for the jury to determine or pass upon save and except the amount of damages that should be awarded, and that testimony as to any previ-

ous condition of the wire, its having fallen at a previous time, or any negligence in its maintenance could only have one effect, to wit, arouse resentment or passion on the part of the jury.

The effect upon the jury of the admission of such testimony may be inferred by considering the following excerpt taken from the argument of counsel in urging upon the trial court the admissibility of such testimony:

"We claim that the defendant is guilty of negligence. Now, the facts which would impute knowledge of the conditions to the defendant would be necessary in order to prove negligence. Now, if the condition has existed here for a period of over three years, even if that condition had not been brought home to them, knowledge of that condition is to be imputed to them—to the defendant—and we desire to show that they knew all about it for over three years and never raised a hand to correct, and the question of knowledge is relevant in all those cases. In a case of this kind we have the right to show that this defendant knew of this condition and, having knowledge, they were negligent in not correcting it. We are not trying to show any previous damage done to any one, but are showing that this was a condition they knew of, and it would have been the part of prudence for them to have repaired it and they did not do it. The same question was involved in the case of *Smith v. San Joaquin Light & Power Co.*, 59 Cal. App. 647, 211 P. 843—they knew it, but didn't repair it. It seems to me that over the entire period it was a series of negligence, and that we have right to show it, whether it was a day, week, a month or a year, or three years, as was the fact in this case."

It is apparent that counsel was placing before the jury a series of negligent acts, irrespective of paragraph VIII, which specifically confined plaintiff's injury wholly to one cause, and that cause being admitted, former acts of the defendant, or prior condition of the wires belonging to defendant, were entirely outside of the issues tendered by the complaint. Knowledge of the fact of there being a fallen wire could, of course, be imputed to the defendant by proving the length of time that it remained upon the ground, but, in this case, it was first proved and not denied by the defendant that some hours before the injury to the plaintiff occurred the employees of the defendant at the station where the power could be turned off of the wire had been informed that the charged wire was lying across a sidewalk in the town of Cottonwood, and that such employees had neglected to turn off the power. This was established, and not denied. The allegations of the complaint and the admissions of the defendant were to the effect that the plaintiff was injured by the fallen wire, and that his injuries were wholly due to the negligence of the defendant in allowing the wire to remain charged across the sidewalk, and, therefore, whatever had occurred prior to the falling of the wire and whatever acts of negligence the

defendant may have been guilty of prior to the negligence, allowing the wire to remain across the sidewalk, and thereby causing the plaintiff's injuries, were not involved in any issue to be tendered to the jury. The defendant, prior to the filing of defendant's answer to the plaintiff's complaint, moved to strike out as surplusage all that portion of the amended complaint relating to previous acts of negligence and the manner of its maintenance of its wires other than that portion of the complaint specifically alleged to be wholly the cause of plaintiff's injuries. This motion was denied and is also set forth as one of the grounds of error, which is properly considered by what is hereafter said and governed by the authorities cited.

Section 1868 of the Code of Civil Procedure provides as follows:

"Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

From what has been said it will be perceived there was no collateral fact pertinent to a decision of the issue before the court under which inquiry as to previous occurrences might properly be had, nor was anything that had occurred in the past connected with the question in dispute, to wit, the amount of damages that the plaintiff was entitled to recover. Nor was there anything that called for the admission of such testimony affecting the credibility of witnesses. The injuries suffered by the plaintiff could neither be augmented nor lessened by the testimony concerning previous acts of negligence on the part of the defendant. The cause of the injuries suffered by the plaintiff, having been limited and circumscribed to a specific act, eliminated all matters of previous general negligence, even though the plaintiff, in the discretion of the court, be allowed to make proof of the specified act, rather than rely upon the defendant's admission.

[2] As stated in the *Estate of Boyes*, 151 Cal. 143, on page 147, 90 P. 454, 456:

"One of the elemental rules of the law of evidence is that the evidence must correspond with the allegations and be confined to the point at issue. Code Civ. Proc. § 1868. If not, it is said to be irrelevant. 16 Cyc. pp. 847, 1111; 1 Taylor on Evidence, § 217."

In the case of *Frascona v. L. A. Ry. Corp.*, 48 Cal. App. 135, 191 P. 968, the court held:

"In an action for damages for personal injuries alleged to have been caused by the negligence of the defendant, a common carrier of passengers, while plaintiff was a passenger on one of its street railway cars, where the complaint alleges one distinct and specific act of

negligence, namely, starting the car before plaintiff had alighted, a general finding that defendant operated its car in a careless and negligent manner, thereby injuring plaintiff, is not responsive to the issue as tendered by the complaint; and the failure of the court to find on that issue is prejudicial error requiring a reversal of a judgment in favor of plaintiff."

Thus, in the case at bar, the issue upon which the plaintiff could prevail was the issue tendered in paragraph VIII of the amended complaint and was the only issue upon which a judgment could be based and therefore the only one upon which testimony would be pertinent.

[3] The rule governing the admission of testimony in negligence cases is thus stated in 19 Cal. Jur. p. 687, § 110:

"Under a general allegation of negligence, plaintiff may show the particular act which caused the injury complained of and is entitled to instructions upon every one of the probative elements pertinent to the rights and liabilities of the parties. Likewise, where a general allegation of negligence is followed by an enumeration of specific acts, the pleader is not limited to proof of the specific acts alleged unless his pleading clearly indicates an intention to so limit his proof; and this is true even though the specific acts pleaded precede the general allegation. However, if a pleading is specific, setting forth in detail specific acts in connection with which negligence is claimed, proof is limited to acts so pleaded."

To the same effect is 20 R. C. L. p. 177, § 146. Thus, the plaintiff is not limited in the first instance to alleging specific acts of negligence, but, as stated in Cal. Jur., if, in pleading his cause of action, the plaintiff specifically bases his grounds of complaint upon a particular act, proof is limited to the act so pleaded, to which the plaintiff's injuries are attributed. In *St. Louis & S. F. Ry. Co. v. Simmons* (Okla. Sup.) 250 P. 510, the court thus states the rule on the admission of the testimony we are considering:

"We think the rule recognized by the authorities generally, and by this court, is that, when a general allegation of negligence is followed by an enumeration and averment of specific acts of negligence, plaintiff is confined to the acts of negligence specifically alleged. 21 R. C. L. 501; *McManamee v. Missouri Pacific Ry. Co.*, 135 Mo. 440, 37 S. W. 119; *Haley v. Missouri Pacific Ry. Co.*, 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743; *C. & R. I. & P. Ry. Co. v. Wheeler*, 70 Kan. 755, 79 P. 673."

In *Shipley v. Nelson*, 121 Wash. 39, 207 P. 1046, the Supreme Court of Washington holds:

"Where there is a general allegation of negligence in a complaint which is followed by a specification of the acts of negligence complained of, or where negligence is specifically set out without any general allegation, the evidence must be confined to the specific issue so presented in the pleadings."

The same court, in *Ennis v. Banks*, 88 Wash. 237, 152 P. 1037, stated:

"Plaintiff having charged the appellant with a specific act of negligence cannot, under that charge, introduce evidence of other acts and attempt to show negligence therein, although she is not obligated to plead her evidence or set out in detail specific acts."

These cases point out the reasons for the rule, it being held that, the plaintiff having elected to base the cause of action upon specified acts, the defendant cannot be expected or required to meet other acts of alleged negligence not involved in the determination of the issue before the court. In *Moore & McFerren v. Fletcher*, 145 Tenn. 97, 236 S. W. 924, the Supreme Court of Tennessee thus states the rule:

"Where a pleader undertakes specifically to set forth the acts of negligence which constitute the proximate cause of the injury, he cannot rely on other acts of negligence."

See, also, *Davis v. Texas Co.* (Tex. Civ. App.) 262 S. W. 129, 22 C. J., p. 744.

[4] Notice not being involved, negligence or the absence of it cannot be proved by similar instances. *Steinberger v. Cal. Electric Co.*, 176 Cal. 386, 168 P. 570. To the same effect is *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, where, on page 281, 201 P. 599, 603, it is said:

"Evidence as to the previous conduct and habit of the conductor as to sitting down and talking to passengers was improperly received, not only because of the fact that the matter was not in issue, but also because of the fact that his habit was not competent (*Langford v. San Diego Electric Ry. Co.*, 174 Cal. 729, 732, 733 [164 P. 398]; *Steinberger v. California Elec., etc., Co.*, 176 Cal. 386 [168 P. 570]) to establish the condition at the time of the accident. We need not here consider the effect of the exception to this general rule considered in *Wallis v. Southern Pacific R. R. Co.*, 184 Cal. 662 (15 A. L. R. 117, 195 P. 408), where circumstantial evidence only is relied upon, and there are no eyewitnesses."

See, also, *Manwaring v. Geisler*, 191 Ky. 532, 230 S. W. 918, 18 A. L. R. 192.

The negligence not in issue, and not involved in the specific act alleged to be the cause of the plaintiff's injuries, should not have been presented to the jury, either by way of testimony or argument. In *Taylor v. Spokane P. & S. Ry. Co.*, 72 Wash. 378, 130 P. 506, where the negligence alleged was admitted by the defendant, the Supreme Court of Washington held it was error to permit plaintiff's counsel to discuss the question of negligence in presenting the cause to the jury. The same case was previously before the court and reported in 67 Wash. 96, 120 P. 889. In the first opinion it was held error to permit argument upon admitted facts, but not sufficiently prejudicial to warrant reversal. Upon rehearing a reversal was ordered.

[5-8] In paragraph VI of plaintiff's complaint a detailed statement is made of all and

singular the injuries suffered and sustained by the plaintiff by reason of the negligence of the defendant, without any allegations of general bodily injuries, such as are frequently set forth in actions for negligence, where the plaintiff does not by his pleadings confine himself to any particular injurious results. This difference in pleading is illustrated by the case of *Samuels v. Cal. Street Cable R. Co.*, 124 Cal. 294, 56 P. 1115, where the complaint alleged the injuries suffered and the bodily condition resulting therefrom in such manner as to admit the widest possible range of testimony and put the defendant upon notice and inquiry as to all the injuries that could be traced to the act of negligence alleged. Without any such pleading in this case, the court, over the objection of the defendant, permitted the plaintiff to introduce testimony as to the plaintiff suffering from endocarditis (affection of the heart), chorea (St. Vitus dance), and possibility of cancer. Under no state of the pleadings could testimony as to what might possibly occur be held admissible. Section 3283, Civil Code, reads:

"Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

The rule is well settled that only the natural results can be considered in awarding damages. The necessary results do not have to be pleaded, but the evils which are not necessary results, but are the natural and probable results of an injury, must be specifically pleaded. As set forth in 8 Cal. Jur. p. 889:

"The defendant cannot be presumed to be aware of the damage naturally, though not necessarily, resulting from his act, and, therefore, in order to prevent a surprise on him, this sort of damage must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it" (citing a number of cases).

Likewise, in 8 R. C. L. p. 611, it is said:

"General damages, that is, such as necessarily result from the injury complained of, need not be specially pleaded."

And on page 612 of the same volume the rule is further set forth:

"That special damages, that is, damages which do not necessarily result from the injury complained of, must be specially pleaded, except where they are conclusively presumed from the facts stated,"

—the reason for the rule being set forth. It is further said in the same volume, pages 620, 621, that the plaintiff may allege his injuries in such a manner as not to require specific allegations:

But, "if the complaint specifies the injuries received, then proof cannot be given of any other injuries, unless they necessarily and immediately flow from those named."

Here the complaint specifies all the injuries received, and there is nothing in the record either by way of allegation or testimony showing that endocarditis, chorea, or cancer, either one or all three, necessarily follow in the wake of the injuries alleged.

In 17 C. J. p. 107, the text, supported by a long list of authorities, is as follows upon this subject:

"In actions for personal injuries, where injury is alleged, a recovery may be had for the natural and probable consequences thereof, although such consequences are not set up in detail, while all effects not the natural and necessary result of the injury complained of constitute special damages, and must be specially averred."

[9] As stated in *Gomez v. Reed*, 178 Cal. 759, quoting from page 763, 174 P. 658, 660:

"Damages which are the necessary consequence of the wrongful act can be recovered under the general allegation of the amount of damage inflicted. *Treadwell v. Whittier*, 80 Cal. 579 (13 Am. St. Rep. 175, 5 L. R. A. 498, 22 P. 266). * * * And if damages ensue because of some particular circumstances existing at the time, though the natural consequences of the wrongful act in connection with the special circumstances, the facts must be specially alleged."

In *Sloane v. Southern Cal. Railway Co.*, 111 Cal. 668, 44 P. 320, 32 L. R. A. 193, where the plaintiff sought to recover for special injuries not the necessary consequence of the defendant's acts, it was held that it was necessary to allege the same. In *Morris v. Allen*, 17 Cal. App. 684, 121 P. 690, in dealing with the subject of special damages, the court holds:

"General damages are those which necessarily result from the act complained of, and may be shown in evidence under a general allegation of damages. Special damages are those that are the natural, but not the necessary, result of the act complained of, and not being implied by law, they must be particularly pleaded and proved."

The same rule was followed in the case of *Ryan v. Oakland Gas, etc., Co.*, 21 Cal. App. 14, 130 P. 693, where the distinction is made between mental suffering and mental impairment, holding that in order to admit proof of mental impairment there must have been such an allegation in the complaint. Likewise, in *McCready v. Bullis*, 59 Cal. App. 286, 210 P. 638, it is said:

"When the damages are special—that is, such as do not necessarily arise, or are not implied by law, from the act complained of—the facts out of which the damages arise must be averred in the complaint."

See, also, *Yoakam v. Hogan*, 198 Cal. 16, 243 P. 21; 5 Enc. of Pleading & Practice, p. 719. In *Hall v. Manufacturers' C. & C. Co.*, 260 Mo. 351, 168 S. W. 927, Ann. Cas. 1916C, 375, the rule relating to pleading and evidence relative to general and special damages is clearly set out in the following excerpt:

"General damages are those which necessarily and by implication of law result from the act or default complained of. * * * Special damages as contradistinguished from general damages have been defined as those which are the natural but not the necessary result of the act complained of." 8 Am. & Eng. Enc. of Law (2d. Ed.) 542, 543; *Brown v. Hannibal*, etc., R. Co., 99 Mo. 310, 12 S. W. 655; *Nicholson v. Rogers*, 129 Mo. 136, 31 S. W. 260.

Special damages, which are the natural but not necessary result of the injury complained of, must be specially alleged. Such injuries do not necessarily result from the defendant's wrongful act, but flow from it as a natural and proximate consequence; hence the defendant may have notice thereof and be prepared to meet the same upon the trial. 5 Enc. Pl. & Pr. 719, and numerous cases therein cited; *Brown v. Railroad*, supra; *Nicholson v. Rogers*, supra; *Bliss on Code Pleading* (3d Ed.) par. 297a, 297b; 13 Cyc. 176.

It would serve no useful purpose to review the cases cited by counsel for the respondent holding that distinct acts of negligence may be set forth in a complaint and, also, holding that where knowledge is to be imputed from a condition long existing, then and in that case, and under proper pleadings, evidence of the previous condition of the dangerous instrumentality may be offered in evidence. Thus, in the case of *Rocca v. Tuolumne County Elec. Power & Light Co.* (Cal. App.) 245 P. 468, proof of the dangerous condition preceding the falling of the wire was admitted for the purpose of imputing knowledge to the defendant and, also, proving the act of negligence on the part of the defendant in erecting its wire underneath an overhanging limb of a tree, which constituted a perilous circumstance of which the defendant was bound to take notice. Also, where the cause of death is questioned, as was true in the case of *Robinson v. Western States Gas & Electric Co.*, 184 Cal. 401, 194 P. 39, and as shown in 10 Cal. Jur. pp. 827, 828, such testimony is admitted to bring home knowledge to a defendant. The cases of *Marovich v. Central Cal. T. Co.*, 191 Cal. 295, 216 P. 595, *Connor v. A. & S. F. Railway Co.*, 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462, and *Atkinson v. United Railroads of S. F.*, 71 Cal. App. 82, 234 P. 863, have to do mainly with the application of the doctrine of *res ipsa loquitur*, and not questions of pleading confining the negligence to a specific act from which the injury is alleged to have been suffered.

It may be here stated that a review of the cases cited by counsel for respondent discloses that none of them limit the cause of the injury complained of to a particular proximate cause or single act of negligence. Under such circumstances, the rule applicable to the admission of testimony and the relevancy of the testimony is entirely different. Where the dangerous character of the instru-

ment is disputed, and where knowledge of the dangerous condition of the instrument is to be imputed, and the pleadings are so framed as to involve such issues, and no particular act of negligence is specified as the proximate cause of the injury, and there is no admission of negligence on the part of the defendant, then, under such circumstances, the law supports the contention of the respondent, but such is not the case at bar.

[10] We need not follow the somewhat extended argument of appellant in support of its allegation that counsel for respondent was guilty of misconduct to the extent of preventing a fair trial further than to state that the objectionable conduct related to statements during the taking of testimony and in arguments to the jury, detailing and emphasizing the prior alleged acts of negligence of the defendant in the construction and maintenance of its power line, which acts, as we have shown, are irrelevant to the issues which the jury could only properly be called upon to decide, and therefore the cases which we have cited on the admission of testimony are sufficient to show whatever element of prejudice there was in such testimony conveyed to the jury by the argument of counsel. Had the testimony been admissible, the argument of counsel, we think, would have been entirely unobjectionable, but it is easily perceived that a rather vigorous argument of counsel to a jury of ordinary human beings, presenting a picture of alleged previous acts of negligence covering a long period of time, tended strongly to obliterate the line of demarcation between punitive and compensatory damages. Had the premises for the argument been such as warranted counsel's remarks, there would be nothing objectionable therein, and for this reason we do not think it necessary to incorporate in this opinion the argument of counsel set out in the record, and confine ourselves to the further statement that it was a rather able argument and may be said to be reasonably calculated to induce in the minds of the jurors a conclusion that there should be something added to the award of damages in order to teach the defendant a lesson.

[11-13] At the conclusion of the taking of testimony, the court, in line with its previous rulings, instructed the jury relative to the previous acts of the defendant, construction and maintenance of its power lines, not involved as the alleged cause of the injury to the plaintiff. These instructions abstractly state the law correctly, but are not embraced within the issues tendered for decision. The instructions, in substance, state that, where one places or maintains a wire charged with a highly dangerous electrical current over a public highway, the law requires that he must see the highest and utmost degree of care in the construction, maintenance, and operation of such wire; that he must use the

best materials, adopt the most approved methods of construction to prevent injury, use due care and circumspection to prevent the wires from hanging down and falling to the ground; that the duty is not only to make such wires safe but to keep them safe by vigilance, foresight, and inspection; that a company using wires charged with electricity is bound to know the extent of the danger resulting from them, while the public is not, and is bound to use the highest degree of care practicable to avoid injury; that the operator of an electrical plant is bound to exercise reasonable care in maintaining a system of inspection in order to discover any change in the physical condition of the plant, which would tend to increase the dangers to persons lawfully in pursuit of their business or pleasure; that the care which the law exacts in operating an instrumentality is always in proportion to the degree of injury reasonably to be apprehended from the use of the means employed; and that the master or employer is liable for the wrong or negligence of the servants or employees.

These instructions necessarily conveyed to the jury that it was called upon to decide other issues than that of the extent of the damages suffered by the plaintiff. There is no dissent from the rule that jurors should be instructed only upon the question or questions which the jury is called upon to decide. As said in 24 Cal. Jur. p. 827:

"Accordingly, it is error to give an instruction which, although correct as an abstract statement of a proposition of law, has no bearing upon the issues of the case under consideration, or is unsupported by evidence, though, as in other cases, a reversal is justified only in case a miscarriage of justice results, as where it is probable that the jury was misled. Prejudicial error does not result from an erroneous abstract instruction, which, in view of the undisputed facts, could not possibly have caused injury."

All of these statements of the law, as set forth by the text-writer, would be applicable here, where it is not for the fact of the erroneous admission of testimony and the tendering to the jury for decision questions not involved. But, following the admission of the erroneous testimony and the argument of counsel relative to previous acts of alleged negligence and the alleged negligence in the construction and maintenance of the power line, it could not very well be said to have any other effect than to impress upon the minds of the jury a conclusion that something besides compensatory damages should be taken into consideration by the jury. We think that such would be the case, notwithstanding the fact that the trial court subsequently correctly instructed the jury as to the measure of damages. If the effect which we have mentioned may be said to be cured by the subsequent instruction, then the tendency of the instructions, to which we have referred, was to confuse the jury as to the question or issue they

were called upon to decide in rendering a general verdict, and to that extent constituted error. Taken alone, we would not hold the giving of the instructions mentioned prejudicial error, but, in connection with the inadmissible testimony upon which the instructions were based, we conclude that the jury must have been more or less influenced thereby.

Upon motion for a new trial the defendant set out in an affidavit the alleged misconduct of counsel for the plaintiff, among other things, as a basis upon which its motion should be granted. This affidavit was upon motion of the plaintiff stricken from the record. The action of the court in granting such motion and denial of the defendant's application for a new trial are assigned as grounds for reversal, but are not separately considered herein for the reason that it would involve practically a restatement of what we have heretofore stated. The affidavit added nothing to the record.

[14, 15] As one of the reasons urged upon the trial court as to why a new trial should be granted, and one of the grounds strongly urged upon this court as to why the judgment of the trial court should be reversed, appellant sets forth that the damages are excessive. As stated herein, the jury awarded the plaintiff the sum of \$25,000. The damages suffered by the plaintiff, as shown by two physicians called on the part of the plaintiff, are as follows:

"Testimony of Dr. Thompson.

"The burn destroyed the exterior area of the skull covering about one-half inch in diameter, which had to be removed; the electric current entered the body from the right hand and his two fingers and thumb were badly burned; the bone on the lower or outer edge of the right hand was burned so it had to be removed; the little finger is somewhat pressed in toward the other fingers; the second finger was destroyed to the knuckle joint and had to be removed to that joint; the first finger was destroyed down almost to the joint; the thumb was removed to the last joint; the wire evidently came in contact with the right hand, passed through the head and where the boy's body came in contact with the ground; the next injury was a spot on the left shoulder blade about two inches long, where it went through the skin; there was a burn about four inches long on the left side and some of the tissues underneath were destroyed; we took some skin off the leg and covered that over; you can still see the outline of the scar; at the point where the burn occurred I will say that the muscles extending to the arm where the electric current entered the body, the upper part of the arm is about half an inch smaller than the left arm and in the forearm it is about a quarter of an inch smaller than the left arm; the boy was formerly right-handed; the measurements of the boy's chest disclose that the muscles in the right side seemed to be three or four inches smaller than the muscles on the left side of the chest; the tendency of the muscles on the left side of the chest being drawn toward the spine is to pull the muscles to the

left of the vertebræ and cause a curvature of the spine; this curvature is about an inch at the widest place."

In answer to a juror, the distance was given at about half an inch.

"There was also a spot on the left shoulder blade about two inches in length; the boy was a robust boy of between eight and nine years of age when the injuries were inflicted."

In answer to a juror, the doctor stated that he would not say that the curvature of the spine would weaken the boy permanently. This witness then testified that the boy was suffering from chorea and endocarditis as probable results of the injuries described. The witness also testified that cancerous growth frequently follows a scar or a burn; that such results are probable results. It may be here stated that other witnesses had testified that the boy was unconscious for a few hours, that when the doctor called the plaintiff was unconscious and seemed to be suffering great pain; that cancerous growth is not certain to occur in cases of this kind, but that in a certain number of cases cancerous growths do appear from scars or burns; that in this case chorea was the result of the shock; that the chorea might be permanent.

Dr. White, the second doctor called for the plaintiff, testified substantially as Dr. Thompson, but added that his first observation was of a large scar on the left buttocks and then described the other scars and injuries about the same as Dr. Thompson; that the right arm at the biceps was found one-half inch smaller in circumference than the left, and the lower portion of the right arm about one-quarter inch smaller than the left. This witness also testified as to the presence of chorea, endocarditis, and of the possibility of cancerous growth that might occur any time within a period of 50 years.

Two witnesses called by the defendant testified that there was no evidences of endocarditis or of chorea, and that the boy was simply a nervous child; there was also testimony that the boy had resumed his studies in school, and that he had a very fair grip in his right hand.

It thus appears that, while the boy suffered a severe shock and a great deal of pain, that his right hand is disfigured for life, the permanency of the other alleged injurious consequences induced by the shock are more or less problematical. And this is true if we accept only the testimony of the physicians called by the plaintiff. As heretofore pointed out, the circumstances of endocarditis, chorea, and probability or possibility of cancerous growth were not pleaded as injuries or results of injuries suffered by the plaintiff by reason of the negligence of the defendant, but the testimony in relation thereto is referred to herein as bearing upon the question of the award of damages.

As a final résumé of the grounds set forth for reversal upon this appeal, the respondent calls attention to the fact that, even though it be admitted that the errors occurred in the trial as complained of and that the testimony objected to should not have been admitted, unless the defendant has been prejudiced thereby, the judgment should not be reversed. In other words, unless the damages awarded are in excess of what should have been awarded, the defendant has not been injured. This necessitates a consideration of the award. We will here state that we cite no case decided prior to the year 1916 for the reason that beginning at about the year 1916, and perhaps a little earlier, the value of dollars taken as a standard in estimating damages has very materially changed; that is, the value of a dollar prior to 1916, in purchasing power, was so much greater than the purchasing power since the beginning of the year 1916 and up to the present time has been and is so that due allowance must be made therefor.

Since the preparation and filing of briefs by counsel in this cause, volume 46 of the American Law Reports has been published. This volume contains in its annotations of cases an almost complete treatise on the subject of damages in personal injury cases. The annotations referred to include only cases decided between the beginning of the year 1916 and the end of the year 1926. The annotations to which we refer begin on page 1230 of volume 46 A. L. R., and cover over 193 pages. In these pages are collected and cited all the cases, we think, appearing in the official reports decided during said period of time. It would be a work of supererogation on our part to do anything more than to refer to the annotations appended to the case of *Quinn v. Chicago, M. & St. P. Ry. Co.*, beginning on page 1230 of volume 46 A. L. R. A careful study and review of every one of the cases contained in that elaborate annotation discloses no case where damages awarded in a sum such as was awarded in this case have been allowed to stand, where the injuries were no more serious than those suffered by the plaintiff. The cases collected in the note to the annotation to which we have referred show that, in practically every case where the injuries suffered by the plaintiff may be said to be at all comparable, the award of damages has been limited to from \$10,000 to \$15,000.

In the case of *Williams v. Fleming*, reported in 46 A. L. R. 1220, just preceding the annotations contained in said volume, we find where a jury had brought in a verdict of \$25,000 for injuries to a boy 3½ years old, which required amputation of one leg above the knee and other injuries mentioned thereon, the verdict was reduced to \$15,000. In the case of *Stroup v. N. E. Okl. R. Co.*, 122 Kan. 587, 253 P. 242, in an action for damages where the plaintiff, 24 years of age, had suf-

ferred a fracture and displacement of the vertebrae and other nervous afflictions, a verdict of \$30,000 was reduced to \$20,000. In the case of *Stone v. City of Pleasanton*, 115 Kan. 378, 223 P. 312, a case decided in 1924, a boy of 13 years of age came in contact with a live wire, was severely burned, his arm had to be amputated between the elbow and the wrist, scalp wounds on the head which would not cure, large burns on the shoulder and leg, and 216 square inches of skin grafting required. A verdict of \$19,000 was reduced to \$15,000.

We will not here extend this opinion by referring to the cases cited, but content ourselves with the statement that an examination thereof shows that the award in this case is considerably in excess of that which has been awarded for anything like comparable injuries in other states, and no case has been decided in this state where, for like injuries, so great an award has been permitted. The nearest approach thereto is that of *Smith v. San Joaquin Light & Power Corporation*, 59 Cal. App. 647, 211 P. 843. In that case, the right arm of the plaintiff had to be amputated just below the elbow and other injuries were suffered by him, which the record does not disclose, but which the court in its opinion stated that it had carefully examined, and that there was nothing in that case which tended to improperly influence the jury and thereby increase the award of damages.

[16] Without touching upon the question of passion or prejudice, we think it is reasonably apparent from what has been said herein that the award of the jury was increased to a considerable extent by the testimony improperly admitted, and that to such extent the defendant may be said to have suffered prejudice. In view of the admission of negligence on the part of the defendant and that the amount of damages to be awarded really constituted the only issue that should have been submitted to the jury, and which issue only it was proper for the jury to determine, the ends of justice in this case do not require an absolute reversal of the judgment. Under section 53, Code of Civil Procedure, an appellate court is empowered to affirm, reverse, or modify any judgment appealed from and may direct the proper judgment to be entered, or direct a new trial or that further proceedings be had. In the case of *Simoneau v. Pacific Electric Ry. Co.*, 166 Cal. 264, 277, 137 P.

20, the Supreme Court, in a personal injury case, upon first hearing ordered a new trial for the reason that improper testimony had been admitted. Upon rehearing this order was revoked, and the judgment was remitted in a definite amount and allowed to stand affirmed as remitted. The court, in its opinion, following this course, said:

"As, however, the only ground upon which the judgment and order denying a new trial was reversed was for the erroneous admission of evidence on the subject of damages, the respondent asks that he be permitted to remit the sum of \$3,000, and that upon such remission, the order denying a new trial and a judgment against defendant for seven thousand dollars be affirmed. There can be no question but that this court in a proper case may do this (Code Civ. Proc. § 53; *Tarbell v. Central Pac. Ry. Co.*, 34 Cal. 616; *Kinsey v. Wallace*, 36 Cal. 463; *Davis v. Southern Pacific Co.*, 98 Cal. [19] 18 [35 Am. St. Rep. 133, 32 P. 708]), and we think this is a proper case for doing so."

Eliminating the inadmissible testimony to which we have referred, which may have increased the award of damages, and also eliminating the special injuries complained of, which were not properly pleaded and presented for determination, we think there is still remaining sufficient to show that the plaintiff suffered severe injuries and that a comparison of this case with the long list of cases set out in the annotations in 46 A. L. R., supra, to which we have referred, a judgment awarding the plaintiff compensation for the injuries suffered in the sum of \$15,000 would subserve the ends of justice, avoid the expense and necessity of a new trial and terminate litigation already somewhat protracted.

[17] It is therefore ordered and adjudged that if the respondent shall, within 30 days after the going down of the remittitur herein, file in the court below a written release to the extent of \$10,000, then, and in that case, the judgment in this case stands affirmed in the sum of \$15,000, otherwise to stand reversed; it is further ordered that in view of section 1027, Code of Civil Procedure, covering costs in cases where a judgment is modified, that the respective parties in this case pay their own costs upon appeal and that neither recover from the other such costs.

We concur: FINCH, P. J.; SHIELDS, Justice pro tem.

82 Cal. App. 187

**THILLE v. BOARD OF PUBLIC WORKS OF
CITY OF LOS ANGELES et al.**
(Civ. 4484.)

District Court of Appeal, Second District, Division 1, California. April 5, 1927.

1. Municipal corporations ⚡58—City charter strictly construed (Constitutional Amendment 1914 [article 11, § 6]).

In view of constitutional amendment of 1914 (article 11, § 6), providing that cities might regulate municipal affairs, subject to limitations provided in charters and as to other matters being subject to general laws, city charter *held* to operate as a limitation, and not a grant of power, and hence was to be strictly construed.

2. Municipal corporations ⚡63(1)—Unless ordinance is clearly oppressive, it will be upheld as exercise of police power.

Unless city ordinance, claimed to be in exercise of municipal police power, is clearly harsh and unreasonable and not related to public health, safety, morals, or general welfare, courts will not nullify it.

3. Municipal corporations ⚡595—Police power extends to regulations merely for public convenience.

Police power of city embraces regulations designed to promote public convenience or general welfare, as well as those intended to promote public safety, health, or morals.

4. Municipal corporations ⚡601—Ordinance prohibiting building unless 30 feet from street held sustainable on other than aesthetic grounds (Const. Cal. art. 11, § 11; Const. U. S. Amend. 14).

Under Const. Cal. art. 11, § 11, city ordinance requiring buildings erected in certain district to be 30 feet from street *held* sustainable and not in violation of Const. U. S. Amend. 14, without basing justification on aesthetic considerations only.

5. Constitutional law ⚡319—Ordinance requiring buildings to be 30 feet from street held not confiscatory (Const. Cal. art. 11, § 11; Const. U. S. Amend. 14).

Under Const. Cal. art. 11, § 11, city ordinance prohibiting building unless 30 feet from street *held* regulative only, and not confiscation of private property in violation of Const. U. S. Amend. 14.

6. Municipal corporations ⚡601—City ordinance prohibiting building within 30 feet from street held within police power (Const. Cal. art. 11, § 11; Const. U. S. Amend. 14).

Where reasonableness, as matter of public welfare, of city ordinance prohibiting erection of buildings unless thirty feet from street was debatable, *held* that court could not interfere with such exercise of city's police power, under Const. Cal. art. 11, § 11, and hence refusal to issue permit to plaintiff entitling him to build garage within prohibited limits was within dis-

cretion of city officials, and not in violation of Const. U. S. Amend. 14.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Mandamus proceeding by John M. Thille against the Board of Public Works of the City of Los Angeles and another. From an order issuing a writ of mandate, defendants appeal. Reversed.

Jess E. Stephens, City Atty., Lucius P. Green, Asst. City Atty., and Chas. B. MacCoy, Deputy City Atty., all of Los Angeles, for appellants.

Wm. J. Locke, of San Francisco, J. Leroy Johnson, of Stockton, Archer Bowden, of San Jose, S. J. Higgins, of San Diego, Leon E. Gray, of Oakland, Robert L. Shinn, of Sacramento, John J. O'Toole, of San Francisco, Loren A. Butts, of Fresno, and Earl J. Sinclair, of Berkeley, amici curiæ.

Vernon M. Brydolf, of Pasadena, for respondent.

YORK, J. The merits of this appeal rest upon a certain ordinance adopted by the city council of the city of Los Angeles on the 14th day of July, 1922, designated a "set-back ordinance." In that ordinance the city council "determined that the public peace, health, safety, comfort, convenience, interest, and welfare require and it is hereby ordered that the minimum distance back from the street line for the erection of buildings or structures to be designated as 'set-back lines' on Lake street, between Bellevue avenue and Temple street," for certain distances on either side of said North Lake street should be 30 feet; and enacted that it should be unlawful to construct any buildings, etc., between the lines of the street and said "set-back" lines.

The plaintiff on the 7th of March, 1923, made an application in due form to the board of public works of the city of Los Angeles for a permit to erect a garage at No. 458 North Lake street, in said city, which permit was refused on the ground that the application did not show that the place where it was proposed to erect such garage was not within the said 30 feet between the established "set-back" line and the line of the street. This action is prosecuted by plaintiff against the board of public works, consisting of Charles H. Treat, Hugh J. McGuire, and Edward J. Delorey as members of the board, and J. J. Backus, as chief inspector of buildings of said city, asking for a writ of mandate requiring the issuance of such permit. The superior court held that the ordinance was void, and ordered the issuance of the writ of mandate as prayed. The defendants have appealed from the judgment, which judgment was entered June 25, 1923.

Said "set-back" ordinance was adopted in accordance with another ordinance adopted by said city council on December 13, 1921, No. 42882 (New Series), known as a "set-back" ordinance, which provides for the establishment by the city council of a line along any portion of any street in the city of Los Angeles, and prohibits the construction of any building or structure between such line and the street line. The general ordinance prescribes the method of procedure in the establishing of such lines, provides for a notice of intention to adopt the same and a hearing thereon at a time and place to be designated, and provides that prior to the time such ordinance establishing such line, etc., shall be effective, no building permit shall be issued for the erection of any building between the line proposed to be established and the line of the street. Under this ordinance the council has reserved the power to deny any and all protests, and adopt an ordinance establishing or refusing to establish a "set-back" line.

[1] Appellants contend that the judgment of the trial court was erroneous, and contend that said ordinances were in accordance with the police powers of said city, and the question involved is whether it was shown that such "set-back" ordinances are in accordance with article 11, § 11, of the Constitution of the state of California, which provides that:

"Any county, city, town, or township may make and enforce within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general laws."

Respondent contends also that such ordinances are in violation of the Fourteenth Amendment of the Constitution of the United States. Our attention has not been called to any general law with which either of said ordinances is in conflict. By an amendment of the Constitution of California, adopted in 1914 (article 11, § 6), it is provided that:

"Cities * * * hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities * * * heretofore organized by authority of this Constitution may amend their charters, * * * so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

It has therefore been held that such city charters operate as a limitation and not a grant of power, and hence should be strictly construed. The city charter of the city of Los Angeles comes within this rule.

The tendency to a more liberal construction of the police power, as applied in zoning and other regulatory laws, is shown in such decisions as *Miller v. Board of Public Works*,

195 Cal. 477, 234 P. 381, 38 A. L. R. 1479, and *Zahn v. Board of Public Works*, 195 Cal. 497, 234 P. 388. In the *Miller Case* the Supreme Court said:

"As a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. This is so because: 'What was a reasonable exercise of this power, in the days of our fathers may today seem so utterly unreasonable as to make it difficult for us to comprehend the existence of conditions that would justify same; what would by our fathers have been rejected as unthinkable is to-day accepted as a most proper and reasonable exercise thereof.' *Streich v. Board of Education*, 34 S. D. 169, 147 N. W. 779, L. R. A. 1915A, 632, Ann. Cas. 1917A, 760. * * *

"Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.'"

In providing for the common welfare the statutes of California take into consideration "open space for light," "ventilation," "health," "comfort," and "convenience"; even sentiment has had an influence in extending the limitations of the exercise of police powers. Police power embraces in its most comprehensive sense the whole system of internal regulation, and extends to the protection of all persons within its jurisdiction, and their health, comfort, and quiet. As was said by the Supreme Court in *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 35 S. Ct. 678, 59 L. Ed. 1204:

"And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety."

See, also, *Sligh v. Kirkwood*, 237 U. S. 52, 35 S. Ct. 501, 59 L. Ed. 835. The limitation of police powers has been expanding slowly but surely for several years. The case of *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385, seems to change former decisions defining police powers to such an extent that Chief Justice Fuller wrote a dissenting opinion, which was concurred in by Justice Field and Justice Brewer. But we have found no case where the authority of the majority decision has ever been questioned. That decision was rendered March 5, 1894. In his dissenting opinion, Chief Justice Fuller said:

"The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation."

The question involved was the right to destroy property under a law of New York, which property was being used in violation of a prohibitory law, and which had been summarily destroyed. The property destroyed was valued at \$525. The contention was that, notwithstanding the New York statute, the owners should have had an opportunity to defend their rights in the property in court. Gradually police powers have been extended until we have the decisions of our Supreme Court in the *Miller and Zahn Cases*, supra, which set up an authority and rule far in advance of the cases which the respondent has cited, all of which cases cited were decided long before the *Miller and Zahn Cases*, and of course such cases cited have no controlling force, wherein they are not in accord therewith. As was said in the case of *Zahn v. Board of Public Works*, supra (page 514 [234 P. 395]):

"* * * We are well satisfied that the weight of authority dealing with the subject of zoning may now be regarded as establishing that 'every intendment is to be made in favor of zoning ordinances, and courts will not, except in clear cases, interfere with the exercise of the power thus manifested.'"

Miller v. Board of Public Works, supra, was also quoted in the case of *Zahn v. Board of Public Works*, as follows:

"The courts are loath to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such an enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. Every intendment is to be indulged by the courts in favor of the validity of its exercise and unless the measure is clearly oppressive it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals or general welfare that it will be nullified by the courts."

[2] In other words, the question is not whether the city council acted wisely, but whether it acted so oppressively and irrationally as to justify a court in holding that the city council exceeded its authority and imposed harsh and unreasonable ordinances from motives not intended for the public welfare. As held in *Hebe Co. v. Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255, if the question of public welfare be debatable, the city council is entitled to its own judgment, and that judgment is not to be superseded by the opinion of a court.

[3] Police power is not subject to definite limitations, but is coextensive with the neces-

sities of the case and the safeguards of public interest. It embraces regulations designed to promote public convenience, or the general prosperity, or welfare, as well as those specifically intended to promote the public safety, or the public health. Whether it is a valid exercise of the police power is the question in this case, and that power, as far as it is capable of definition, extends not only to regulations as to morals, and safety, but to those which tend to promote the public convenience.

[4] The case of *Varney & Green v. Williams*, 155 Cal. 318, 100 P. 867, 21 L. R. A. (N. S.) 741, 132 Am. St. Rep. 88, cited by respondent, pertains to a decided prohibition of the use of property for maintaining billboards, except to advertise goods for sale by the owner of the property on which the signs are maintained. The Supreme Court said in that case:

"We find that the one ground upon which the town council may be thought to have acted is that the appearance of billboards is, or may be, offensive to the sight of persons of refined taste."

[5] In other words, holding that an ordinance cannot be sustained which inhibits a use of property or restricts its use solely on aesthetic grounds. The contention that there was no other than aesthetic grounds to sustain the ordinance in question in this case at bar cannot be sustained. The cases cited in the last-named case, wherein they are not in accord with the *Miller and Zahn Cases*, are, of course, not authority in determining the points involved in this case. The case of *Varney & Green v. Williams*, supra, was decided almost 15 years before the *Miller and Zahn Cases*, and the authorities cited in the *Varney & Green v. Williams* case were, of course, much more ancient than that. It is clear that the ordinance in question is regulative, and not confiscatory.

Zoning ordinances are now being held to be for the public welfare, basing the consideration on fire protection, safety, and security of human life, prevention of street accidents—especially to children—by reducing the traffic congestion in residential districts, and danger of collision, with the resultant damages, and even when based on the decrease of noises in residential areas of a character that tend to produce "nervous disorders," may be "debatable," though not void. Changes in living conditions during a comparatively few years have brought corresponding changes in the exercise of police powers, and those advancements are recognized in construing ordinances alleged to be in conflict with them.

[6] In the case under consideration the city council may have concluded, without being arbitrary or intentionally unreasonable, that the public welfare would have been subserved, danger from fires lessened, danger

from street traffic lessened, without injustice to plaintiff. There was a 20-foot alley in the rear of the lots in the district where plaintiff's lot was located. The alley runs in from North Lake street and connects with Bellevue avenue. Before approaching Bellevue avenue the alley widens into a street called Telvada street. Plaintiff's testimony that during the rainy season he could not get up the alley with his automobile does not establish that with grading the alley would not serve the purpose of entry to a garage erected on the rear of plaintiff's lot. It would seem quite improbable that the alley could not be so improved that it would be ample as a driveway to and from the rear of plaintiff's lot. The council could reasonably consider that, as plaintiff's garage was to be constructed at a line within 30 feet from the street line, the approach to the street with an automobile could not be as readily discerned by pedestrians and those passing in the street in vehicles after its erection. Under the circumstances, it was for the city council to decide whether the erection of a garage within the 30-foot limit would be detrimental to the public welfare. It is for this court to decide whether the question is a debatable one only, and the court is not to substitute its judgment for that of the city council if the question of the reasonableness of the ordinance is a debatable one.

We hold that the reasonableness of the ordinance in question here is, to say the least, debatable. It may have been unwise, but it was not necessarily based upon æsthetic considerations only, but had a reasonable basis within the charter of the city of Los Angeles and the Constitution of the state. The latest expression on the subject by the Supreme Court of the United States that we have been able to find is contained in the case of *Euclid v. Ambler Realty Co.*, 47 S. Ct. 114, 71 L. Ed. 171. We will quote from page 175 (47 S. Ct. 118):

"There is no serious difference of opinion in respect to the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which *must be left open*, in order to minimize the danger of fire or collapse, the evils of overcrowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch v. Swasey*, 214 U. S. 91, 29 S. Ct. 567, 53 L. Ed. 923; *Hadacheck v. Sebastian*, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; *Reinman v. Little Rock*, 237 U. S. 171, 35 S. Ct. 511, 59 L. Ed. 900; [Thomas] *Cusack Co. v. City of Chicago*, 242 U. S. 526, 529, 530, 37 S. Ct. 190, 61 L. Ed. 472, [475] L. R. A. 1918A, 136, Ann. Cas. 1917C, 594." [Italics ours.]

We cannot do better than quote further from the case of *Euclid v. Ambler Realty Co.* as follows:

"Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase of concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

"The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. * * * Nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Radice v. New York*, 264 U. S. 292, 294, 44 S. Ct. 325, 68 L. Ed. 690 [694]. * * *

"The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations, and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories. * * *

"If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for

adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.' * * *

"If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

It was said by the Court of Appeals of New York, in the case of *Wulfsohn v. Burden*, Inspector of Buildings of the City of Mount Vernon, 241 N. Y. 288, 150 N. E. 120, 43 A. L. R. 651:

"The open spaces not only tend to minimize the danger of fire to adjoining buildings and thus a spreading conflagration, but they also afford a greater opportunity for access by fire departments to a burning building and thus increase the possibility of successfully stopping a conflagration before it spreads to other buildings. * * * But certainly it seems to us that a requirement of 25 feet of open space between an apartment house such as the one proposed and adjoining property cannot be said to be an unreasonable protection against some of the dangers to which we have referred."

We are not unmindful of the fact that in *Zahn v. Board of Public Works*, supra, at page 502 (234 P. 390), our Supreme Court said:

"It will not be necessary for us to decide at this time the question as whether or not the particular set-back ordinance in question here is valid."

But we observe from a careful examination of both the case of *Miller v. Board of Public Works*, supra, *Zahn v. Board of Public Works*, supra, and *Euclid v. Ambler Realty Co.*, supra, that the reasoning used in each and all of said cases would apply equally to the particular set-back ordinance involved in this appeal. We are not holding that the law laid down in this case, or in any of the cases cited, would affect a case where want of good faith on the part of the legislative body is involved, as there is nothing in this case at bar, or in the three cases cited, raising such a question. We can readily see that circumstances might arise whereby a set-back ordinance of even the distance involved in this case would work an absolute confiscation of an entire lot—but a question of that kind is not involved in this appeal.

We hold that the court erred in granting the writ of mandate. It follows that the judgment of the trial court should be reversed, and it is so ordered.

CONREY, P. J. I concur in the judgment. It is only fair, however, to admit that I have found it difficult to be satisfied with this extension to set-back ordinances of the rule recently declared in the zoning cases. To say that the owner of a lot, in building thereon, shall leave vacant a 30-foot strip in front of his property is different in fact, if not in principle, from a mere regulation governing the kind of structure that he may place upon his land. A set-back ordinance, at least in some instances, goes perilously near to depriving the owner of his property without compensation. To wholly deprive one of the use of property is, in effect, the same as taking the property entirely away from him. On the other hand, of course, it must be conceded that the use is not entirely destroyed, since there remain the rights of light and air and the right of access or passage to and fro across the otherwise unoccupied space. There also remains the right to cultivate the ground and ornament it with grass, trees, and flowers, or, if the owner prefers, with cabbages and turnips, until, perhaps, such right shall be taken away from him for aesthetic reasons. A writer, who apparently is neither a judge nor a legislator, has recently remarked concerning Charles I of England:

"His theory of the divine right of kings is dead—or at least has been transmuted into a theory of the divine right of Legislatures to make police regulations."

Even in very recent decisions in some of the states the courts have refused to concede the right to enforce the establishment of set-back lines by exercise of the police power, and have insisted that such regulations should be enforced under the power of eminent domain, where a right of compensation is recognized. The Supreme Court of Massachusetts, in making such a ruling, declared that the establishment of such a building line is the creation of an incumbrance upon private property in favor of the public; and that such establishment of a building line being a taking of property by eminent domain, the procedure prescribed for such taking must be followed. *Inhabitants of the Town of Watertown v. Dana et al.*, 150 N. E. 860, 44 A. L. R. 1374. If the police power applies to such a case, then the incumbrance always exists in an inchoate state, and is not "created" by the set-back ordinance.

Notwithstanding the foregoing observations, which at least show the difficulty of arriving at a decision in favor of appellants in this case, I concur in the judgment of reversal because I think that such is the inevitable progressive consequence of the decisions rendered in the *Miller Case* and in the *Zahn Case*, which are extensively quoted in the foregoing opinion written by Mr. Justice YORK. It is admitted by every one that

all private property is held subject to the state's exercise of that vast and flexible authority known as the police power. It may be that some of these later applications of that power, in the control of property rights, present themselves to our minds in the aspect of something arbitrary while they are new, but will seem less objectionable when our independent souls become accustomed to the new bonds. As the individual withers and as his frontiersman spirit is tamed, he will more easily recognize that when he lives in Rome and owns property there he must submit to the conditions which the Romans prescribe. Since it is now established to be the law that the city of Los Angeles, in adopting its zoning plans, may provide for strictly private residential districts, from which all kinds of business structures are prohibited, it is perhaps a very short step, and not crossing any boundary lines of principle, to preserve the commonly accepted characteristics of such residential districts by insisting that every house shall have its own "front yard," with an incidental view across the neighbors' front yards. It may be worth while to observe, however, that the application of this rule may have a direct effect in limiting the choice of property owners in selecting building plans for homes, so that instead of rear gardens or interior gar²dens and playgrounds for their children, the trapezes and hobby horses will have to go out into the more exposed and more public front yard.

It may be, however, that while the enactment of set-back ordinances, as such, is a thing within the power of the municipality, yet that some set-back ordinances might be rejected as unreasonable invasions of private right. In the case at bar, where it appears that the property owner is seeking to erect on the street line a garage for trucks used by him in his trucking business, and to do this in a block of residences, all of which are set back from the street line, it does not seem probable that the application of the ordinance in this case is peculiarly unreasonable.

HOUSER, J. I dissent. As it is apparent that no consideration of public health, morals, safety, or welfare is here involved, it follows that, in my judgment, none of the reasons assigned for the exercise of the police power in the premises is sound. I cannot but think that the suggestion that more light, or more air, or more or better fire protection will be afforded in a residence district by reason of the enforcement of a set-back ordinance, which forbids the erection of any building nearer than 30 feet to the front property line, is untenable. It may not be doubted that in a downtown business district in a city like New York, for example, where extremely tall buildings are per-

mitted, such an ordinance might be helpful, if not essential, to the public welfare. But on a fairly wide street, in a residential district, the only consideration which can be reasonably urged for the passage of such an ordinance is that without it the beauty of the street will be marred; in other words, the reason is founded solely on æsthetical considerations. No one contends but that the police power is elastic, but the upholding of the ordinance in question as legal stretches the police power to the breaking point. The ordinance is arbitrary in its nature, and at least morally discriminatory, if not legally so.

In addition to such criticisms on the exercise of the so-called police power as affecting the ordinance here under consideration, it is clear that the effect of such ordinance is nothing less than confiscatory. It is possible that a 30-foot corner lot, which may face on a street intersecting at right angles with the street affected by the ordinance in question, so that the length of the lot will run lengthwise of such street, in effect, will be taken without compensation and without "due process of law." The owner of such a piece of property, as will the owner of every other piece of property fronting on the street affected by the proposed ordinance (to the extent of 30 feet thereof), will be deprived of practically every useful benefit connected therewith, so far as pecuniary considerations are concerned. That one may be the owner and possessor of real property, and yet by ordinance be so restricted as to be prevented from putting it to any beneficial use, presents an anomalous situation. The only remaining privileges to the owner of property so affected are to pay taxes and street assessments levied thereon and keep it cleared of weeds, garbage, and other refuse. In such circumstances, especially as affecting a corner lot fronting on an intersecting street, as hereinbefore suggested, the owner thereof, far from having a property of value, exchangeable for currency or marketable commodity, might even experience difficulty in inducing its acceptance by any person as a gift. To one so situated, if it be possible that the upholding of the ordinance amounts to the safeguarding of his constitutional property rights, by comparison it would seem that the classic myths depict what were stern realities. To my perception, the fact of the matter is that the ordinance is both arbitrary and oppressive and a clear invasion and infringement upon the rights guaranteed by the Constitutions of this state and of the United States. With the recognition of such legislation as lawful, every other constitutional right possessed by each citizen of the state is in danger of being disregarded at the whim or the caprice of any legislative body. As affecting the principle, it was said by Burke:

"The moment you abate anything from the full rights of men each to govern himself, and

suffer any artificial positive limitation upon these rights, from that moment the whole organization of government becomes a consideration of convenience."

both parties, to conform to findings and conclusions.

2. Appeal and error ⚡957(1)—**Judgment** ⚡139—Motion to set aside default is discretionary, and trial court's action disturbed only for abuse.

Motion to vacate default is addressed to sound discretion of trial court, which will not be disturbed in absence of clear showing of abuse.

3. Appeal and error ⚡957(1)—In absence of abuse of discretion, order refusing to vacate default, based on conflicting affidavits, cannot be disturbed.

Where affidavits submitted were conflicting, order of trial court, denying motion to be relieved from default, cannot be disturbed, in absence of abuse of discretion.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig and Hugh J. Crawford, Judges.

Action by Anna M. Gomes against H. H. Bragg. From a judgment entered for plaintiff by default and an order refusing to set aside the default, defendant appeals. Judgment modified, and, as modified, affirmed, with directions, and order appealed from affirmed.

Hugh A. McNary, of Los Angeles, for appellant.

C. H. Johnson and H. J. Brady, both of Los Angeles, for respondent.

PER CURIAM. This is an appeal by the defendant from a judgment entered by the superior court of Los Angeles county and from an order refusing to set aside and vacate the defendant's default. The action was instituted to secure the specific performance of a contract for the exchange of real properties. It is alleged in the complaint that the parties to the action executed, on October 2, 1924, a contract in writing, whereby the plaintiff agreed to convey to the defendant certain real property, particularly described, situate in this state, and the defendant agreed to convey to the plaintiff in exchange therefor certain particularly described real property, situate in the state of Montana. There is also an allegation that the defendant refused and failed to comply with the terms and provisions of said contract. Personal service of summons was had upon the defendant. Thereafter and upon the expiration of the statutory period the defendant's default was duly entered. In its findings of fact and conclusions of law the trial court declared that the defendant had wrongfully breached the written agreement of the parties, and that the plaintiff was entitled to a deed of conveyance covering the Montana property, "upon depositing with the clerk of this court a deed to the property in San Bernardino county, Cal." Judgment

201 Cal. 70

GOMES v. BRAGG. (L. A. 8752.)

Supreme Court of California. April 18, 1927.

1. Appeal and error ⚡1152—Where decree of specific performance of exchange contract failed to require performance by both parties, appellate court may modify decree to conform to findings (Code Civ. Proc. § 53).

Where decree of specific performance of contract for exchange of real properties required execution of deed from one party only, court could, on appeal, under Code Civ. Proc. § 53, modify judgment to require delivery of deeds by

ment was thereupon entered, decreeing that the defendant execute and deliver to the clerk of the court for the plaintiff a deed covering the Montana property. Thereafter, and upon the denial of a motion to vacate and set aside his default, the defendant prosecuted this appeal from the judgment and order. The appeal was placed upon a special calendar of this court upon an order to the respondent to show cause why said judgment and order should not be reversed, or that such order be made as might be met in the premises. At the time of the placing of the cause upon said calendar, and the entry of the order to show cause, it appeared that the appellant's brief had been filed herein but that no brief had been filed on behalf of the respondent, although the time for the filing of such brief under the rules of this court had long since expired. The order to show cause was thereafter submitted upon the calling of said special calendar.

[1] As ground for reversal of the judgment, the appellant urges that said judgment is inconsistent with and unsupported by the complaint and findings of fact, and that it is invalid in that it does not fully adjudicate the mutual rights and liabilities of the parties. This contention is bottomed upon the assertion that the judgment should have decreed, in conformity with the terms of the contract, that each party execute in favor of the other a deed of conveyance covering his or her respective property as described in the contract. In our opinion the failure or silence of the judgment to decree the execution by the respondent to the appellant of a deed to the California property does not necessitate or warrant a reversal of the judgment. The findings of fact and conclusions of law, as above indicated, provide for the mutual execution and delivery by the parties of deeds to their respective described properties. Section 53 of the Code of Civil Procedure provides that on appeal the court may "affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered. * * * The judgment appealed from is therefore modified by adding thereto immediately preceding paragraph 2 thereof the following:

"The delivery of said deed to the plaintiff being conditioned upon her executing in favor of the defendant, H. H. Bragg, as grantee, and depositing with the clerk of this court a deed in and to that real property situate in San Bernardino county, Cal., described as follows, to wit: The east half of lot 507 according to the map showing subdivisions of lands belonging to the Semitropic Land & Water Company, as per plat recorded in Book 11, p. 12, of Maps Records of said county."

[2, 3] This brings us to a consideration of the appeal from the order refusing to va-

cate and set aside the appellant's default. The recent case of *Waybright v. Anderson*, (Cal. Sup.) 253 P. 148, announces the principles of law governing such appeals. It is there held that a motion to set aside a default is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below. There has been no showing herein that the trial court abused its discretion in denying the appellant's motion to be relieved from default. Moreover, it is indicated in *Waybright v. Anderson*, supra, that the decision of the lower court is conclusive on appeal in so far as the affidavits used on said motion are in conflict. An inspection of the record in the instant case discloses a sharp conflict in the affidavits filed. In view of these conflicting affidavits and in the absence of abuse in the exercise of its discretion, the order of the trial court denying the motion to be relieved from default must be affirmed.

The judgment appealed from is affirmed as modified, with directions to the court below to amend the same as herein indicated. The order appealed from is also affirmed.

201 Cal. 57

SMITH et al. v. SOUTHERN PAC. CO., et al.
(S. F. 11453.)

Supreme Court of California. April 15, 1927.

1. Railroads ⚡348(4)—Evidence of operation of train without light or warning held to show negligence.

Evidence of operation without headlight or any warning, of electric train, which struck plaintiff, held to show negligence of defendant railroad company.

2. Evidence ⚡10(3)—Court may take judicial notice that avenue where pedestrian was injured by train was in business district of city.

Court may take judicial notice that avenue where pedestrian was injured while crossing railroad tracks was in business district of city.

3. Appeal and error ⚡866(1)—Where plaintiff was nonsuited because his evidence showed contributory negligence, sole question on appeal is whether he was guilty of contributory negligence as matter of law.

Where plaintiff, suing for being struck by train, was nonsuited on theory that his evidence showed contributory negligence in failing to observe train before stepping on track, sole question on appeal is whether he was guilty of contributory negligence as matter of law.

4. Railroads ⚡301—Pedestrian's right to use street is equal to right of electric railroad.

Pedestrian has right to use of street equal with that of electric railway thereon.

5. Railroads ⚡324(1)—Pedestrian, crossing railway at point other than regular crossing, must exercise greater care than in using established crossing.

Pedestrian, struck by electric car in crossing street at point other than regular crossing while crossing track in diagonal route, was required to exercise greater care than if he had used established crossing.

6. Railroads ⚡330(1)—Pedestrian may assume train will be operated in careful manner.

Pedestrian about to cross electric railway track has right to assume that those in charge thereof will operate it in reasonable and careful manner.

7. Railroads ⚡330(3)—Pedestrian had right to assume motorman would sound warning for crossing.

Pedestrian about to cross electric railway track had right to assume that motorman in charge of electric train would sound warning bell or whistle as he crossed cross street near by.

8. Railroads ⚡330(3)—Pedestrian had right to assume that train without headlight was not coming toward him.

Pedestrian crossing electric railway track had right to assume that train was equipped with proper headlight, and that, if it was approaching where he was about to cross, it would be reflected along track, and, as he saw no light on train, it was not unreasonable to assume that it was not traveling toward him.

9. Railroads ⚡350(28)—Pedestrian crossing in front of train without headlight held not negligent as matter of law.

In action against railway company for personal injuries, evidence of plaintiff's attempt to cross track in front of train without headlight, which he thought was traveling away from him, held to present jury question, and not to show contributory negligence as matter of law.

10. Railroads ⚡350(13)—Pedestrian's knowledge of custom of stopping trains held not to make him guilty of contributory negligence as matter of law.

In action by pedestrian against electric railway company for injuries while crossing track, his knowledge that company stopped trains at cross street near by did not make him guilty of contributory negligence as matter of law, but presented jury question, in view of fact that train which struck him was without headlight, causing him to think it was traveling away from him, which might have caused him to forget place of stoppage of trains temporarily.

11. Negligence ⚡69—Forgetfulness of known danger does not always prevent recovery.

Plaintiff's forgetfulness of known danger does not always prevent recovery therefrom, for it is not negligence, unless it shows want of ordinary care.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Edward Smith and another against the Southern Pacific Company and another. From a judgment granting a motion for a nonsuit, plaintiffs appeal. Reversed.

Philip M. Carey and Chapman, Trefethen & Chapman, all of Oakland, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondents.

CURTIS, J. This action was brought to recover damages sustained by plaintiff Edward Smith for injuries caused by the alleged negligence of the defendants in the operation of an electric car or train belonging to the defendant corporation. The defendant Tom Kelley was the motorman in charge of said car at the time said plaintiff was injured, and the plaintiff, Vernon P. Peck, was the employer of the said Edward Smith at the date of the latter's injury. Hereafter we will refer to Edward Smith as the plaintiff or appellant and the Southern Pacific Company as the defendant or respondent. At the close of plaintiff's evidence the court granted a motion for a nonsuit, and from the judgment, based upon the order granting said motion, the plaintiffs have appealed. The injury of plaintiff, for which he seeks to recover damages in this action, was received while he was crossing Shattuck avenue in the city of Berkeley on the evening of October 20, 1922, at about half past 6 o'clock. The plaintiff was 26 years of age, in good health, and his hearing and eyesight were unimpaired. He was employed at the time in Pex Candy Store as a soda water dispenser, and had been so employed for a period of about 2 months previous thereto. During a part of this time he had lived in San Francisco, and made daily trips to and from that city to Berkeley over the Key Route, getting off the train at Bancroft way. He knew on the date of the injury that both the Key Route and the Southern Pacific trains coming from San Francisco stopped on the south side of Bancroft way, and on the north side of Bancroft way in going to San Francisco. He also knew that the Southern Pacific trains used the third and fourth tracks, but he did not know on just which track the north-bound train stopped, nor on which track the south-bound train stopped. He never rode on those cars. Shattuck avenue runs north and south, and is intersected at right angles by Bancroft way and Kettredge street. Shattuck avenue is practically 160 feet in width. Bancroft way is 61 feet in width. Pex Candy Store is located on the east side of Shattuck avenue, and 60 feet north of Bancroft way. Kettredge street is the next street north of Bancroft way, and runs parallel thereto. There are four car tracks running abreast on Shattuck avenue, and, commencing on the east side of said

avenue, these tracks are referred to in the evidence as tracks numbered 1, 2, 3, and 4. Tracks 1 and 2 are used by the Key Route, upon which it operates its local and inter-urban cars from the San Francisco pier to the city of Berkeley, and tracks 3 and 4 by the Southern Pacific Company for like purposes. The distance between the rails of each of these tracks is 4 feet 8½ inches. The sidewalk on the east side of Shattuck avenue is 14 feet in width, and the distance from this sidewalk to the east rail of track No. 1 is 29 feet. The distance from the west rail of track 1 to the east rail of track 2 is 7½ feet, and the distance from the west rail of track 2 to the east rail of track 3 is 12 feet, and from the west rail of track 3 to the east rail of track 4 is 12 feet and 3 inches. From the west rail of track 4 to the sidewalk on the west side of Shattuck avenue is 53 feet. The surface of Shattuck avenue between Bancroft way and Kettredge street is oiled macadam, and the rails of the respective tracks are substantially flush with the street. On the evening of October 20, 1922, at about 6:30 o'clock, the plaintiff left Pex Candy Store for the purpose of going to his hotel, which was located almost directly across Shattuck avenue from said store. As he walked out on the sidewalk in front of the candy store, he noticed a Southern Pacific train on track No. 3. This train had stopped for the purpose of receiving and discharging passengers just south of Bancroft way. It was dusk or dark at this time, and the lights in the store and the street lights were lighted. Plaintiff testified that he could see a man on the west side of Shattuck avenue in front of the door "that is, the outline of a human," and he could see cars thickly parked on the west side of Shattuck avenue as far north as Kettredge street. He identified the train south of Bancroft way on the third track as a Southern Pacific train by the lights that were in the train. There was no headlight on this train. From this fact plaintiff inferred that the train was going towards San Francisco and not towards Berkeley. After thus observing this train, the plaintiff walked to the curb of the sidewalk, and then around an automobile that was parked alongside the curb. As he walked around the automobile, he again saw the Southern Pacific train still standing south of Bancroft way on track No. 3. At that time a local Key Route car arrived from the north from Berkeley, and stopped on the first track in front of where plaintiff arrived as he walked around said automobile. He walked north along this car a distance of 15 or 20 feet, and passed around its rear end, and, when on the west rail of track No. 1, he again observed the Southern Pacific train, which was in a position similar to that which it occupied when he saw it on the two previous occasions, but

he could not tell whether it was in motion or not. It appeared to be standing still. Plaintiff then walked briskly in a northwesterly direction, and, when he reached about the middle of track No. 3, he was struck by said train and severely injured. His left foot was crushed by the wheels of one of the cars, as a result of which his left leg was amputated midway between the ankle and knee. He testified that as he walked in a northwesterly direction from the west rail of track 1 to the point where he was struck he looked west and south. "During that 30 feet I had no intimation at all of any kind or character that the train was going. I was walking across the track, and I judge I was about the middle of the Southern Pacific track; I judge the car was that struck me. I got a glance out of the corner of my eye, and I sprang into the air and backwards. The train was right on top of me then. Before I could spring backwards the front end of the train must have struck me. To the best of my recollection I think it was the front end." Plaintiff further testified that there was nothing to obstruct his view from the time he left the west rail of track 1, from which point he saw the Southern Pacific train for the third and last time south of Bancroft way, up to the time he was struck. This point on the west rail of track 1 from which plaintiff last saw the Southern Pacific train was designated and marked upon a map or exhibit before the trial court as "S-3." Plaintiff testified that, after he left this point S-3 he did not turn and look to his left to observe whether or not the Southern Pacific train which he had seen standing was approaching, and that during that time, if he had so turned and looked, he could have seen said train. Other witnesses testified that the train which struck plaintiff carried no headlight, and that no whistle or bell or any other warning was sounded or given by those in charge of the train after it left the point south of Bancroft way until it struck plaintiff. The witness Dyer testified that he was standing in front of the Pex Candy Store; that he heard no bell or whistle from the train; that he heard no rumbling or other sound from the train that he noticed until the brakes were applied; and that, "when I saw Smith with his leg under the train, my best judgment was that the train was traveling at the rate of speed they usually run along there. I think it is about 30 miles per hour."

[1, 2] There is no question, and but slight contention, if any, but that the evidence shows that the defendant was negligent in the operation of its train in the manner shown by the foregoing evidence. Shattuck avenue at the locality where plaintiff was injured was in the business district of the city of Berkeley. Of this fact the court has a right to take judicial notice. *Varcoe v.*

Lee, 180 Cal. 338, 181 P. 223; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125. Furthermore, the evidence shows that Pex Candy Store, a retail business house, was located on one side of said street, and a hotel and library were located on the other side, and a large number of automobiles were parked next to the curbs of said street, and from this evidence, aside from the judicial notice of the nature of the locality, which the court may take, we may infer that that portion of Shattuck avenue to which this controversy relates was in the business district of said city. Along this portion of Shattuck avenue the evidence shows the train of defendant was being operated at dark, or at the dusk of the evening, and at the rate of speed estimated to be 30 miles per hour without any headlight, and without giving any warning of its approach either by ringing a bell or sounding a whistle. We are satisfied that proof of these uncontradicted facts is sufficient to show negligence on the part of the defendant in the operation of said train.

[3] The record shows, however, that the ground upon which the motion for nonsuit was granted was, not that plaintiff had failed to show negligence on defendant's part in the operation of said train, but that the evidence on behalf of plaintiff showed as a matter of law that plaintiff was guilty of contributory negligence in failing to observe the train before stepping upon the track in front of it while in the act of crossing Shattuck avenue. The sole question, therefore, presented on this appeal is whether the plaintiff was as a matter of law guilty of contributory negligence.

[4] "Negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence." *Wahlgren v. Market Street Ry. Co.*, 132 Cal. 656, 663, 62 P. 308, 309, 64 P. 993; *Jansson v. National Steamship Co.*, 189 Cal. 187, 192, 208 P. 90. "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 336, 208 P. 125. In the light of the rule of law as expressed above, let us examine the acts of the plaintiff as revealed by the evidence just prior to and at the time he met his injury. After leaving his place of business for the purpose of going to his hotel, he looked across Shattuck avenue on three different occasions. First, when he was on the sidewalk in front of Pex's candy store; then when he had passed around the automobile parked in front of the store; and again from the rear of the Key Route street car on track 1, which had just

arrived from Berkeley. On each of these occasions he saw the Southern Pacific train on the third track, south of Bancroft way. On the first two of these occasions when he saw it the train was standing. On the third occasion he testified he could not say whether it was moving or not, but it appeared to be standing still. The train was then approximately 175 feet south of the point on the track where the plaintiff would cross it on his way to his hotel. The plaintiff was from 25 to 30 feet from this same point. Observing that the train facing him had no headlight, he assumed that it was traveling from him instead of in his direction. For this reason he made no further attempts to observe its movements, but walked briskly the distance of from 25 to 30 feet in a northwesterly direction, and was struck by the train when he was about in the middle of the track. He heard no sound from the train of any nature before it struck him, and he did not see it until it was on top of him. While he testified that he looked to the south and west after leaving point "S-3," where he last saw the train south of Bancroft way, he, of course, did not look in the direction in which the train was during this time, or he would have seen it. There was nothing to obstruct his view or to prevent his seeing the train had he looked. His testimony indicates that, after leaving point "S-3," he considered himself safe from any danger from cars or trains passing over said avenue, and was observing the automobiles as they traveled up and down the westerly side of Shattuck avenue over which he would pass in going to his hotel after he had left the four car tracks on said avenue. Do these facts present a question concerning which the minds of reasonable men might differ? Appellant had the right to the use of the street equally with the respondent. "Being between the tracks of an electric railroad upon a public street is not negligence per se. The street is for the use of the public, although the car, which can be operated only on the track, has the better right to that part of the thoroughfare, to which pedestrians must yield when necessary. The rights of a company operating street cars are otherwise not superior to those of persons who may be walking on the street." *Lawyer v. Los Angeles Pacific Co.*, 161 Cal. 53, 56, 113 P. 237, 238. See, also, *Runnels v. United Railroads*, 175 Cal. 528, 166 P. 18; *Woodhead v. Wilkinson*, 181 Cal. 599, 603, 185 P. 851, 10 A. L. R. 291. In *O'Connor v. United Railroads*, 168 Cal. 43, 141 P. 809, this court, on page 48 (141 P. 811), said:

"The streets of a municipality are for the use of the traveling public and the right of a street car company is only to use it in common with the public. The fact that the company has been granted a right to lay tracks and operate cars along the streets gives it no exclusive right to travel even over that portion of a street cover-

ed by its tracks. Other vehicles have a right to travel over the entire street, including the space between the tracks. Nor is this right restricted to the times when other portions of the street may be crowded or in bad condition. Nor is a traveler in doing so in any sense of the term a trespasser. As a member of the public he is entitled as a matter of right to use the entire street subject only to the limitation that, as the use of the street by the car company is confined to its tracks, a traveler may not unnecessarily interfere with or obstruct a car in its movement thereon. The car company is entitled in the interest of the public service to a free and unobstructed passage at all times of its cars over its tracks when necessary, and when such movement is being made free vehicles must yield a clear right of way to it for that purpose. *Shea v. Potrero and Bay View R. R. Co.*, 44 Cal. 414; *Clark v. Bennett*, 123 Cal. 275 [55 Pa. 908]; *Scott v. San Bernardino Valley Traction Co.*, 152 Cal. 610 [93 P. 677]; *Lawyer v. Los Angeles Pacific Co.*, 161 Cal. 53 [118 P. 237]. Hence, within the rule of these authorities, negligence on the part of the plaintiff cannot be raised from the mere fact that he was driving in proximity to the track of the defendant because he had a clear legal right to do so subject to the limitation that we have stated."

Furthermore, appellant was within his rights in passing over Shattuck avenue between blocks. *Raymond v. Hill*, 163 Cal. 473, 143 P. 743. On page 482 of this opinion (143 P. 747), the court said:

"As to foot passengers, the old common-law freedom of use of the king's highway has not been modified in this state by any positive enactment. So that it still remains the law that foot passengers have the right to use and traverse the highway at all its points, being chargeable only for the exercise of a due amount of care, which due amount of care, in its quantum is governed by the circumstances attending the use which the pedestrian actually makes. Thus in this state, even in populous streets of cities, pedestrians are not restricted to the crossings in traversing a street, but may cross it at any point."

[5] However, in crossing the street at a point other than at the regular crossing, and in a diagonal route, the exercise of greater degree of care was enjoined upon appellant than if he had used the established crossing. *Sheldon v. James*, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493.

[6] The case presented by the evidence before us is not one in which the pedestrian, without any heed or care as to the dangers he might encounter in crossing a busy street, walked blindly into the path of a passing train. On the other hand, the evidence of plaintiff shows that from the time he left his place of employment for the purpose of crossing Shattuck avenue his attention was directed to the objects in the street which might interfere with his safety in crossing it. Before stepping onto the street, he made observations as to cars and other vehicles.

After passing behind the automobile parked in front of the candy store, he again looked over Shattuck avenue. At this time a local Key Route car stopped in front of him, and, after walking around it, he, for a third time, looked for any danger that might beset his traveling across the street. The only thing he observed at this time was the defendant's train, which he thought was standing still on the third track below Bancroft way. From the fact that no headlight was showing on the train, he assumed that it was moving in an opposite direction from the place where he would cross said track. Believing that no danger was present from this train, he continued his trip across the street, and directed his attention to the automobiles which were passing over that part of the street which he would cross when he left the four car tracks thereon. It will thus be seen that he at least attempted to give his attention to his safety when crossing said street. He had the right to assume that those in charge of the respondent's train would operate it in a reasonable and careful manner. This was held in *O'Connor v. United Railroads*, 168 Cal. 43, 50, 141 P. 809, 812, where the court lays down the rule as follows:

"The foot passenger or driver of a horse has a right to expect that those in charge of street cars will operate them in the manner and run them at the speed which is customary at the particular place, and that they will give the usual warnings and signals, and take the usual precautions to avoid injury to others."

[7-9] Appellant had the right to assume, while crossing said street, that the motorman in charge of respondent's train would sound a warning bell or whistle as he crossed Bancroft way, a cross street. *Lawyer v. Los Angeles Pacific Co.*, supra, page 56 (118 P. 238). He undoubtedly had a right to assume that respondent's train was equipped with a proper headlight, and that, if said train was approaching the point where he was about to cross its track, the light from said headlight would be reflected along and upon the track where he was about to pass. It was not an unreasonable assumption on his part to assume, as he saw no headlight upon the train, that the train was not traveling in the direction where he would cross its track. Whether under these circumstances appellant was warranted in attempting to cross defendant's track without again looking to see whether the train was approaching is the question presented by the foregoing evidence. That this question is one of fact for the jury and not one of law for the court we have but little doubt. As bearing upon this question we refer to the language used by this court in *Mann v. Scott*, 180 Cal. 550, 554, 182 P. 281, 283:

"Whether, if she saw the automobile, respondent would have been warranted in going toward

the street car without further watching the automobile approach, relying upon a compliance by the appellants with the requirements of the ordinance, was a question upon which men's minds might well differ, and hence it was properly a case for the jury."

If it is such a question, then whether appellant was guilty of contributory negligence should have been left to the determination of the jury, and not to the court. In *O'Connor v. United Railroads*, supra, this court used language which we think aptly applies in the present action, as follows:

"While it is true that one cannot rely entirely and wholly upon the care of another and neglect the precautions which in a particular situation he should exercise, still, when he has a right to trust to the reasonable expectation that another will discharge some duty peculiar to such situation, it is proper that such fact should be taken into consideration by the jury in connection with such precaution as the plaintiff did take, and the jury determine therefrom whether or not under the circumstances his conduct was negligent or not."

We would also call attention to the following language from the case of *Scott v. San Bernardino, etc., Co.*, 152 Cal. 604, 611, 93 P. 677, 679:

"In a crowded street it is often necessary and not inconsistent with reasonable prudence for a person to cross the street in front of street cars, in motion or at rest, at a point so near that it would be *prima facie* an act of negligence, if attempted at another place where the streets are less crowded and the cars usually run faster. The rights and obligations of all persons using a public street are, in this respect, reciprocal. Each may rightfully expect that the other will, at the proper time, discharge his proper duty towards others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. But he frequently must, to some extent, depend on others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time."

To the same effect is *Clark v. Bennett*, 123 Cal. 275, 277, 55 P. 908. These authorities appear to us to be decisive of the question before us and to hold unquestionably that the case as made by plaintiff's evidence was one for the decision of the jury and was not one which should have been decided by the court.

[10] Respondent relies with some considerable assurance upon the testimony of appellant that he knew of the practice of the Southern Pacific Company to stop its north-bound trains south of Bancroft way and its south-bound trains north of Bancroft way. Undoubtedly appellant testified to such knowledge, but it was still a question for the

determination of the jury as to whether or not it was a want of ordinary care on the part of the appellant not to have kept in mind such element of danger while attempting to cross said street. *Oles v. Kahn Bros.* (Cal. App.) 253 P. 158. In the recent case of *Meindersee v. Meyers*, 188 Cal. 498, 503, 205 P. 1078, 1080, which was brought by husband and wife to recover damages for injuries sustained by the wife through falling into an excavation made in the street by the employees of defendant, and left in an unguarded condition, it was sought to show that the wife, who was injured during the nighttime, knew of said excavations and was therefore guilty of negligence in the use of the street in proximity thereto. This court held, however:

"Even assuming that their observation of the work done was more or less extensive during the day, it was for the jury to say whether it was a want of ordinary care for Mrs. Meindersee not to have the open excavation in mind when she returned home at 11 o'clock that night, for it has been repeatedly held that even with full knowledge of such danger one may be injured and yet be in the exercise of due care."

[11] Although the appellant had knowledge of the practice of the Southern Pacific Company to stop north-bound trains on the south side of Bancroft way, still when he observed the train standing on the south side of Bancroft way without any headlight, and concluded that it was a south-bound train, this practice of the company to stop north-bound trains south of Bancroft way may not have occurred to him at the time. This was not necessarily negligence on his part, for as it was said in *Meindersee v. Meyers*, supra, at page 504 (205 P. 1081):

"Forgetfulness of a known danger will not always operate to prevent such recovery, for to forget is not negligence unless it shows a want of ordinary care. Generally the question is one for the jury."

The following cases enunciate the same rule: *Roseberry v. Edwards F. Niehaus & Co.*, 166 Cal. 481, 483, 137 P. 232; *Jacobson v. Oakland Meat, etc., Co.*, 161 Cal. 425, 430, 119 P. 653, Ann. Cas. 1913B, 1194; *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 126, 40 P. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Oles v. Kahn Bros.* (Cal. App.) 253 P. 158; *Hayward v. Downer*, 65 Cal. App. 450, 451, 224 P. 265.

It follows from the foregoing that the trial court erred in granting defendant's motion for a nonsuit. For this reason we are of the opinion that the judgment should be reversed, and it is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

201 Cal. 110

McKIM et al. v. IMPERIAL IRR. DIST. et al.
(L. A. 8969.)

Supreme Court of California. April 22, 1927.

1. Waters and water courses ⇨226—Motive of directors of irrigation district in passing resolutions changing boundaries of divisions held immaterial (Irrigation District Act, § 15d [as added by St. 1917, p. 758, § 10]).

Motive of directors of irrigation district in passing resolutions attempting to change boundaries of divisions of district under Irrigation District Act, § 15d (as added by St. 1917, p. 758, § 10), was immaterial if they had power to pass them.

2. Waters and water courses ⇨226—Relative importance of area and population in division of irrigation district rests in directors' discretion (Irrigation District Act, § 15d [as added by St. 1917, p. 758, § 10]).

Where no division of irrigation district can be made which would equalize both area and population, question of which element shall be considered as more important must rest in discretion given to directors of district by Irrigation District Act, § 15d (as added by St. 1917, p. 758, § 10).

3. Waters and water courses ⇨226—Courts should sustain irrigation district directors' action changing boundaries of divisions in absence of abuse of discretion (Irrigation District Act, § 15d [as added by St. 1917, p. 758, § 10]).

Courts should sustain action of directors of irrigation district in changing boundaries of divisions of district under Irrigation District Act, § 15d (as added by St. 1917, p. 758, § 10), unless plain abuse of discretion appears from records.

4. Waters and water courses ⇨226—Change in numbering of divisions of irrigation district held not abuse of discretion of directors (Irrigation District Act, § 15d [as added by St. 1917, p. 758, § 10]).

Change in numbering of divisions of irrigation district by directors acting under Irrigation District Act, § 15d (as added by St. 1917, p. 758, § 10), allowing change in boundaries, held not abuse of discretion, where change was not arbitrary.

In Bank.

Appeal from Superior Court, Imperial County; Charles S. Burnell, Judge.

Action by J. H. McKim and others against the Imperial Irrigation District, organized and existing under and by virtue of the Act of March 31, 1897 (St. 1897, p. 254), and amendments and supplements thereto, and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Chas. L. Childers and D. B. Roberts, both of El Centro, for appellants.

Harry W. Horton, of El Centro, Ault & Anderson, of Calexico, and Philip Sterry, of Los Angeles, for respondents.

LANGDON, J. This appeal is by the defendants from a judgment declaring null and void certain resolutions of the board of directors of the defendant Imperial irrigation district by which said board attempted to change the boundaries of the divisions of said irrigation district in purported exercise of the discretion vested in said board by the California Irrigation District Act. (Laws 1897, p. 254, as amended). The judgment further decreed that the general irrigation district election, held on or about the 4th day of February, 1925, and conducted in conformity to the divisions attempted to be effected by said resolutions, is void and of no effect, and as a consequence thereof the purported election of the defendants Mark Rose, C. W. Brockman, and Thomas Blair, as directors of said irrigation district for divisions 5, 1, and 3, respectively, each is void.

The plaintiffs allege they are property owners in the irrigation district. A demurrer to the first alleged cause of action was sustained, and no amendment was made. The second cause of action, after setting forth the relation of the parties, the organization of the district, etc., charges that the resolutions changing the boundaries of the district were passed by three directors, voting, therefor, without any belief on their part that such changes ought to be made; that said directors did not vote in favor of such resolutions in good faith, and "did not vote to change and establish or change or establish the divisions as purported to be changed in said resolutions, because they in truth and fact did find or claim that it was necessary for the convenience of any electors or for the best interests of said defendant district, and that they did not in truth and fact in good faith establish the divisions as purported to be established in said resolutions on any basis of the same being as nearly equal in area and population as might be practicable; that in truth and fact the new claimed and purported division as set forth in said two resolutions did not create divisions more equal in area and population than were the said five divisions as established by said board of supervisors, and that the said divisions as purported to have been established by said resolutions are not in truth and fact more equal in area and population or as equal in area and population as may be practicable." There are other allegations of a similar nature.

The Imperial irrigation district was formed under the California Irrigation Act in 1911. At that time the area of the district was about 511,000 acres and the population less than 15,000. Upon the organization the district was divided into five divisions, and these continued practically unchanged until the resolutions of November 25th and 26th, 1924, as alleged in the complaint. At the time

of these resolutions, the population of the district had grown to over 50,000, and the divisions were grossly unequal in area and population; division No. 4, for instance, containing five times as much land and nearly twice as many people as division No. 1. This unsatisfactory condition was brought about by the inclusion of about 100,000 acres of land in the district, the natural growth of population and the extension of canals over the district. The resolution of the board of directors of November 25th endeavored to change the divisions, and the resolution of the succeeding day merely amended the former one by changing the numbers of two of the divisions. These resolutions were passed under the power given by the following provision of the California Irrigation District Act:

"The board of directors, when they deem it advisable for the best interests of the district, and the convenience of the electors thereof, may at any time, but not less than sixty days before an election to be held in the district, change the boundaries of the divisions or election precincts of the district or of both; provided, such changes shall be made to keep each division as nearly equal in area and population as may be practicable. * * *" Section 15d (as added by St. 1917, p. 758, § 10).

[1] At the outset of the trial the court recognized the rule that the motive of the directors was immaterial in passing the resolutions in question if they had the power to pass them, and refused to admit testimony regarding the motives of the directors. These rulings were in harmony with the cases of *Stevenson v. Colgan*, 91 Cal. 649, 27 P. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230, *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 24 L. Ed. 148, and *State v. Cunningham*, 83 Wis. 90, 53 N. W. 35, 117 L. R. A. 145, 35 Am. St. Rep. 27.

It follows that the findings of the trial court upon the motives and intent of the directors are immaterial and are not sustained by the evidence. They merely repeat the allegations of the complaint concerning these matters, and are directed to matters which the trial court expressly excluded from consideration.

We come next to a consideration of the finding of the trial court to the effect that the changes effected by the resolutions in question did not "keep or make each or any of said divisions as nearly equal in area and population, or area or population, as may be practicable," and that said resolutions make said divisions less equal in area and population and less equal in population than were the divisions as they existed prior to November 25, 1924. A comparison of the tables and maps in the record conclusively demonstrates that the resolutions did make the divisions more equal in area, and, indeed, respondent concedes this. The portion of

the finding directed to that matter is not sustained by the evidence. Upon the question of population, the evidence was not direct and satisfactory. The only information on the subject in the record is a stipulation of counsel that the population was approximately five to one with reference to the registration in the divisions. But, taking this estimate as accurate, it does not appear, upon the whole, that the population was made more unequal. Between certain divisions it was more equalized and between others it was made slightly more unequal.

[2, 3] This brings us to a consideration of the discretion involved in changing the boundaries. The directors were vested with power to change the boundaries "when they deem it advisable," provided such change shall be made to keep each division as nearly equal in area and population as may be practicable. This grants a very broad discretion, and the nature of the district, with its varying features, is such that no absolute rule for division can be formulated. Some sections of the district are much more densely populated than others; some include incorporated cities and others sparsely settled agricultural lands. The absence of any general rules upon the subject and the impossibility of mathematical accuracy in the divisions are made evident by the suggestions of the respondents as to how the district might best have been divided according to their ideas of practicability. It is perfectly obvious, from a survey of the maps and charts and relative scales appearing in the record, that no division can be made which would equalize both area and population. Both these elements must be taken into consideration and equalized as nearly as practicable, and, if equality in one element must be sacrificed somewhat for equality in the other, the question of which element shall be considered as the more important must rest in the broad discretion given to the directors. The directors are not compelled to defend their division as the most nearly perfect one possible, and this is conceded by respondents. Probably no two persons, acting in perfect good faith, would draw the same division lines upon the maps. It is because of this fact that a large discretionary power in the directors is necessary, and it follows as a matter of course that the courts should sustain them in their action unless a plain abuse of discretion appears from the records.

We think, therefore, that in making the changes in boundaries provided for in the resolution of November 25th the board of directors was exercising its authority within the discretion accorded to legislative bodies of this character.

[4] The other question presented by the appeal has reference to the numbering of the di-

visions carved out of old division No. 4. It was immaterial whether the most northerly division should be designated No. 3 or whether the southerly division should be designated No. 3. In the resolution of November 25th the southerly division was designated No. 3 and the northerly division was designated No. 4. In the amended resolution of November 26th, the northerly division was designated No. 3 and the southerly division was designated No. 4. Since the resolution of November 25th and the amendment thereof of November 26th must be considered as one resolution, it does not appear that there has been any arbitrary change in numbers. It may well be that the effect of the final numbering of these divisions was to insure representation of both of these divisions on the board of directors of the district.

Under the facts of this case, we think the board of directors exercised its authority within the provisions of the governing act.

The judgment appealed from is reversed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.

SHENK, J., being disqualified herein, does not participate herein.

201 Cal. 768

J. H. McKIM et al. v. IMPERIAL IRR. DIST. et al. (L. A. 9190.)

Supreme Court of California. April 22, 1927.

In Bank.

Appeal from Superior Court, Imperial County; Charles S. Brunell, Judge.

Hugh S. MacKinnon, of San Francisco, for appellant.

Ault & Anderson, of Calexico, Philip C. Sterry, of Los Angeles, and Harry W. Horton, of El Centro, for respondents.

LANGDON, J. This appeal is from the identical judgment involved in the case of McKim et al. v. Imperial Irrigation District et al., 255 P. 506 (No. 8969 of the records of this court), and is submitted upon the transcript and briefs filed in said case. The facts material to this appeal are set forth fully in the decision just referred to, and reference to the same will suffice here.

The judgment appealed from having been reversed in the companion case, further consideration of it upon this appeal becomes unnecessary and the questions presented by appellant herein become moot.

Accordingly this appeal is dismissed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.

SHENK, J., being disqualified, does not participate herein.

HUBBARD v. SAN DIEGO ELECTRIC RY. CO. (L. A. 8742.)

Supreme Court of California. April 15, 1927.

1. Appeal and error $\S$ 931(4)—Trial court's omission to find on affirmative defense of contributory negligence held not supplied by implication from judgment for plaintiff.

Where trial court omitted to find on the issue of contributory negligence presented by affirmative defense, such omission could not be implied from judgment for plaintiff on the complaint, where neither complaint nor findings asserted that defendant's negligence was sole and proximate cause of plaintiff's injuries.

2. Appeal and error $\S$ 1071(6)—Failure to find on issue of contributory negligence in giving plaintiff judgment held not reversible error, where there was no evidence of contributory negligence.

While failure to find on issue of contributory negligence when raised by way of affirmative defense usually constitutes reversible error, such failure held not prejudicial when the record failed to reveal any evidence tending to establish contributory negligence.

3. Negligence $\S$ 89(4)—Negligence of truck driver held not imputed to workman riding.

Negligence of truck driver at time of collision between truck and street car held not to be imputed to workman riding on truck and injured as result of the collision.

In Bank.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Ocie Hubbard against the San Diego Electric Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Read G. Dilworth, of Coronado, and V. F. Bennett, of San Diego, for appellant.

D. F. Glidden, of San Diego, and C. W. Noyes, of Los Angeles, for respondent.

PER CURIAM. This action was instituted by the plaintiff to recover damages for injuries alleged to have been sustained in a collision between one of the defendant's electric cars and a refuse truck on which the plaintiff was employed by the city of San Diego. At the time of the accident the refuse truck was being operated by one H. W. Preston, with whom the plaintiff was riding toward the city dumping ground. The complaint avers that said accident was caused by and resulted from the careless and negligent operation of the defendant's said electric

car. In its answer the defendant denies the charge of negligence and affirmatively alleges that—

"The sole, only, proximate and contributory cause of any such injury or damage was the carelessness, recklessness and negligence of plaintiff."

The action was tried by the court without a jury, and judgment for damages in the sum of \$300 was entered in favor of the plaintiff. The defendant thereupon prosecuted this appeal from said judgment, and the same was thereafter placed upon a special calendar of this court upon an order to the respondent to show cause why said judgment should not be reversed, or that such order be made as might be met in the premises. At the time of the placing of the cause upon said calendar, and the entry of the order to show cause, it appeared that the appellant's brief had been filed herein, but that no brief on behalf of the respondent had been filed, although the time for the filing of such brief under the rules of this court had long since expired. The respondent failed to appear upon the calling of said calendar, and the order to show cause was thereupon submitted.

[1] It is urged by the appellant as a sole ground for reversal of said judgment that the trial court failed to find upon the issue of contributory negligence, which omission, it is asserted, constitutes reversible error. An examination of the record discloses that the trial court found, with certain enumerated exceptions not of importance here, that the allegations of the complaint were true. No finding was made, however, upon the issue of contributory negligence presented by the appellant's affirmative defense. Nor do we think that said omitted finding may be supplied by implication, as in *Woodhead v. Wilkinson*, 181 Cal. 599, 602, 185 P. 851, 853, 10 A. L. R. 291, for in the instant case, as distinguished from the case cited, neither the complaint nor the findings actually made assert that the negligence of the appellant was the "sole and proximate cause of the injuries sustained by the plaintiff." We are of the opinion, however, for reasons presently to appear, that the judgment herein may be affirmed.

[2] While it is true that there are authorities to the effect that the issue of contributory negligence when raised by way of affirmative defense becomes a material issue upon which a failure to find constitutes reversible error (*Tucker v. United Railroads*, 171 Cal. 702, 704, 154 P. 835; *Maxwell v. Auto Stage Co.*, 46 Cal. App. 548, 550, 189 P. 710; *Huntington v. Vavra*, 36 Cal. App. 352, 354, 172 P. 166), nevertheless, it would appear that in the cases announcing such doctrine evidence had been adduced upon the trial tending to establish said issue of contributory negligence. We are of the opinion, based upon a scrutiny of the record herein, that this

appeal may properly be disposed of under that line of authorities which declares that a failure to find upon an affirmative defense does not constitute prejudicial and reversible error when the record fails to reveal any evidence tending to establish such affirmative defense. *Mohr v. North Rawhide Min. Co.*, 177 Cal. 264, 265, 170 P. 600; *McKelvey v. Wagy*, 157 Cal. 406, 409, 108 P. 268; *Roberts v. Hall*, 147 Cal. 434, 439, 82 P. 66; *Callahan v. James*, 141 Cal. 291, 294, 74 P. 853. In *Klokke v. Escailler*, 124 Cal. 297, 300, 56 P. 1113, 1114, it is declared that—

"In *Wise v. Burton*, 73 Cal. 175 [14 P. 684] it was said: 'This court will not reverse for want of a finding on an issue with respect to which there is no evidence.' * * *"

[3] The inquiry is therefore narrowed to the single proposition of whether evidence was adduced upon the trial tending to establish said affirmative defense. As indicated above, the respondent was not at the time of the accident operating the refuse truck upon which he was riding. He may not, therefore, be directly charged with any negligence which might have accompanied its operation. Moreover, the negligence, if any, of the operator of the refuse truck, may not, under the authorities, be imputed to the respondent. *Irwin v. Golden State Auto Tour Corp.*, 178 Cal. 10, 14, 171 P. 1059; *Parmenter v. McDougall*, 172 Cal. 306, 309, 156 P. 460; *Meyers v. So. Pacific Co.*, 63 Cal. App. 164, 168, 218 P. 284. The respondent is responsible only for the exercise of ordinary care on his own part. An inspection of the record fails to reveal any evidence of negligence on his part.

The judgment appealed from is therefore affirmed.

201 Cal. 74

HARVEY v. BERRY, (Sac. 3773.) ★

Supreme Court of California. April 19, 1927.

Rehearing Denied May 19, 1927.

Adverse possession §66(1)—Possession by grantor and successors to boundary line established by grantor and purchaser for 39 years held to make it true boundary (Code Civ. Proc. §§ 321-323).

Under Code Civ. Proc. §§ 322, 323, possession of land by grantor and her successors in title to boundary of land granted, marked out by parties, on which fence had been erected, for 39 years, made such line true boundary, regardless of alleged error therein and of section 321, and gave such parties ownership by adverse possession.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Edwin H. Harvey against B. S. Berry for an injunction, in which defendant asked for quieting of his title as affirmative

relief. From a judgment for plaintiff, defendant appeals. Affirmed.

Herbert Choynski, of San Francisco, and W. E. Kleinsorge, of Sacramento, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action brought by him against the defendant to restrain certain asserted acts of trespass upon a certain portion of the property alleged to belong to plaintiff, and to perpetually enjoin any further interference on the part of said defendant with the rights and ownership of plaintiff in said property. The defendant in his answer denies any ownership on the part of plaintiff in the particular strip of land upon which the defendant has entered and asserts ownership in himself therein, and as affirmative relief asks that his title be quieted thereto.

The facts as shown upon the trial and found by the trial court are practically undisputed and may be briefly stated as follows: During the year 1885 Ellen M. Butler was the owner of the record title to a certain lot in the city of Sacramento known as lot 10 in the block bounded by K and L and Twelfth and Thirteenth streets in said city, and running, according to the official records, 80 feet on L street by a uniform depth. On November 14, 1885, Mrs. Butler conveyed the west 44 feet of said lot to one John N. Young. At the time of such conveyance, the residence of Mrs. Butler was on the easterly portion of said lot 10, which portion thereof was inclosed by a board fence which was located on a line which ran 38.72 feet from the easterly line of said lot 10; and the portion of her home which formed the western bay window thereof extended to a point very near to said fence line. Mrs. Butler, after making said conveyance to Young, continued to occupy the premises to the eastward of said fence line for several years, but in about the year 1892 conveyed the easterly 38 feet of said lot 10 to one Edgar B. Carroll by a deed which was recorded on August 3, 1892, Carroll in the following year conveyed the premises by the same description to Virginia M. Carroll, which conveyance was also recorded. In 1895 the Carrolls united in a conveyance of said premises, also by the same description, to A. J. Johnston by a deed which was recorded on July 9, 1895. In the year 1906 Johnston conveyed the premises by the same description to the plaintiff and respondent herein, which deed was also duly recorded. Each of the foregoing grantees of said premises went in turn into actual occupation of the same and of the whole thereof up to said fence line, the said fence being maintained for its whole length until about the year 1908, when the front portion thereof was removed by mutual consent, and prob-

ably for the sake of sightliness, as between the then owners of the foregoing two portions of said lot 10, but without any then existing controversy over the boundary line between their respective properties. The city and also the county of Sacramento assessed taxes against said lot 10, assessing the east 38 feet thereof from and after the year 1892 to the Carrolls and their successors in ownership, which taxes had been paid by them up to the year 1909, when the frontage of that portion of said lot 10 was, upon such assessment, reduced to 36 feet. In the meantime John M. Young had by mesne conveyances transferred the westerly 44 feet of said lot 10 by that identical description to several successive grantees down to the defendant and appellant herein, and upon said westerly 44 feet of said lot 10 taxes have been regularly assessed to and paid by the successive transferees of Young. In the month of February, 1924, the defendant and appellant herein entered upon the strip of land about 3 feet in width which he claimed to own as the easterly 3 feet of his 44-foot portion of said lot 10, but which strip of land lay to the eastward of the aforesaid fence line and upon which a portion of the plaintiff's dwelling stood, claiming the right so to do, and to make excavations thereon for the purpose of the erection of a building upon his 44-foot portion of said lot 10 extending over said strip. Thereupon the plaintiff commenced this action.

The trial court found the foregoing facts, and further found as a fact that the said defendant and his predecessors in interest had never since the 19th day of July, 1892, possessed or used or occupied any portion of said lot 10 except the west 42 feet thereof; but that, on the contrary, the said Edgar B. Carroll and his successors in interest in and ownership of the said easterly portion of said lot 10 have claimed, possessed, and occupied the easterly 38 feet of said lot 10 under color of title and as the owners thereof continuously and adversely against all the world, and particularly against all owners and occupants of that portion of said lot 10 held and possessed by said defendant and his predecessors in interest therein, and have paid all taxes assessed to them thereon. As conclusions of law from the foregoing findings of fact, the trial court found that the plaintiff is the owner and in possession of the east 38 feet of said lot 10, and that the defendant is the owner and in possession and entitled to the possession of the west 42 feet thereof, and that the plaintiff is entitled to his injunction as prayed for in his complaint. The appellant attacks these findings and conclusions of law as unsupported by the uncontradicted evidence in the case, and, in support of his contention in that regard, urges that, inasmuch as the original owner of the whole of said lot 10, Ellen M. Butler, had in the year 1885 conveyed to the appellant's

predecessor, John M. Young, the westerly 44 feet of said lot 10 by that identical description, her retention of any portion of said 44 feet thereof thereafter must be held to have been permissive on the part of the grantees and not adverse, and that, this being so, the possession of the strip of land now in dispute by her grantee, Edgar B. Carroll, and by his successive grantees down to and including the plaintiff, must also be held to have been permissive and not adverse. The appellant cites in support of this contention the provisions of section 321 of the Code of Civil Procedure, and the cases chiefly of *Brandon v. Umpqua Lumber, etc., Co.*, 26 Cal. App. 96, 146 P. 46; *Potrero Nuevo Land Co. v. All Persons*, 29 Cal. App. 743, 156 P. 876; *De Frieze v. Quint*, 94 Cal. 653, 30 P. 1, 28 Am. St. Rep. 151; and *Tully v. Tully*, 137 Cal. 60, 66, 69 P. 700.

The respondent concedes the correctness of the rule laid down in *Tully v. Tully*, supra, to the effect that the holding over by a grantor of property or of any portion thereof after his grant will not suffice to raise the presumption of a holding adverse to his grantees, but will be presumed to be permissive; but the respondent, notwithstanding such concession, maintains that this principle cannot be given application to the successor of such grantor who receives a conveyance of a definite larger area of the entire premises than that which remained to his grantor after his previous conveyances, and who records his conveyance thereof and goes into actual and exclusive possession of such area under circumstances which must have conveyed notice to his neighbor of the actual and exclusive nature of his possession and claim of ownership thereto, such as, for example, the occupancy of the dwelling, a portion of which covered the area in dispute, or as the maintenance of a division fence upon the line dividing the easterly and westerly portions of the entire premises. The respondent contends that neither the section of the Code above cited nor the authorities relied upon by the appellant are applicable to such a state of facts, but that, as to the Code provisions, he is entitled to the full benefit of sections 322 and 323 of the Code of Civil Procedure relating to occupation under a claim of title founded upon a written instrument, and that, as to the decisions construing said provisions of the Code, the case of *Cummings v. Laughlin*, 173 Cal. 561, 160 P. 833, presents a complete analogy to the case at bar and is decisive of the instant controversy.

We are satisfied from an examination of

the foregoing cases and sections of the Code of Civil Procedure that the contention of the respondent herein must be sustained. The cases of *Potrero Nuevo Land Co. v. All Persons* and *Brandon v. Umpqua Lumber, etc., Co.*, supra, bear no true analogy to the facts of the case at bar. In the first of these cases the original title to the premises in question was nothing more than a lease thereof from the municipality of San Francisco for a long term of years. The grantees under the lessee received nothing more than a quitclaim conveyance from each to each carrying only the title which his immediate grantor had under the original lessee and upon which the claim of an adverse possession could not be built up as against the state. In the latter of the foregoing cases the foundation of the claim of adverse user rested on an easement or license to pass over the premises of the respondent given to one Hilton for the convenient operation of his lumber business for a limited number of years and thereafter continued in use by his successor in interest, the Umpqua Lumber Company. The trial court held that such continued use by the latter had none of the qualities of an adverse user, and that there was an entire absence of those significant circumstances of hostile assertion usually found where adverse possession is asserted. On the other hand, the case of *Cummings v. Laughlin*, supra, upon which the respondent relies, presents several significant identities to the facts of the case at bar. In that case there was an overlapping of description in the first and second deeds of the original grantor. He had nevertheless marked out what he conceived to be the boundary between the two tracts thus conveyed and had planted a line of trees along such boundary. His successor in interest under his second deed and his grantees had gone into possession of the land conveyed to them up to said boundary, and exercised exclusive dominion over it for a long series of years, and paid all the taxes which were assessed against him and them thereon. The court held that the plaintiff's title by adverse possession had been fully sustained. We think the foregoing case is decisive of the case at bar, and hence that the trial court was not in error in confirming the plaintiff's claim of ownership of the strip of land in dispute by adverse possession.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRES-
TON, J.; SHENK, J.

201 Cal. 29

MALMGREN et al. v. SOUTHWESTERN AUTOMOBILE INS. CO. (two cases).
(S. F. 11460, 11683.)

Supreme Court of California. April 13, 1927.

1. Venue ⚡7—Place of performance of automobile indemnity policy, as regards venue of action thereon, held county where injury should occur or judgment be obtained against assured (Const. art. 12, § 16).

Place of performance of insurance policy to indemnify assured against loss from liability imposed by law on account of bodily injuries to any person from assured's automobile, as regards venue of action thereon, held county where injury should occur and in which judgment against assured should be obtained, under Const. art. 12, § 16, providing that a corporation or association may be sued where contract is made or to be performed or where liability arises.

2. Insurance ⚡152(3)—Statutory provisions rendering indemnity carrier of insolvent assured liable to persons injured by automobile are part of policy (St. 1919, p. 776).

Provisions of St. 1919, p. 776, providing that no policy of insurance against loss or damage from automobile, suffered by another person, for which assured is liable, shall be issued, unless providing that insolvency of assured shall not release insurance carrier from liability, and that action may be brought against insurance carrier after judgment against assured, are as matter of law part of every policy of indemnity issued by company engaged in automobile liability indemnity insurance, inuring to benefit of the injured persons.

3. Pleading ⚡32—Stating legal effect of indemnification contract held proper pleading in injured person's suit against insurance carrier of insolvent debtor.

Setting forth legal effect of indemnification contract in injured person's suit against judgment debtor's liability insurance carrier is an approved method of pleading.

4. Insurance ⚡629(1)—Complaint of person injured by automobile against owner's indemnitor held proper pleading of statutory contractual relation (St. 1919, p. 776).

Complaint of person injured by automobile in suit against owner's indemnity insurance carrier, setting forth basic essentials of action, legal effect of indemnification contract, insolvency of assured, and demand for payment of judgment, sufficiently pleaded the contractual relation created between insurer and complainant under St. 1919, p. 776, providing that injured person may bring action against insurance carrier after judgment against insolvent assured.

5. Insurance ⚡612(1)—Return of execution unsatisfied is not condition precedent to action against indemnitor after judgment against assured (St. 1919, p. 776).

Return unsatisfied of execution on judgment against assured for negligently causing bodily injury by automobile is not prerequisite to commencement of action by judgment creditor

against insurance carrier under St. 1919, p. 776, rendering indemnity insurance carrier liable to third persons upon inability of assured to pay judgment.

6. Insurance ⚡591½—Statutory provisions, making indemnitor of insolvent assured liable to persons injured, cannot be modified by policy provisions (St. 1919, p. 776).

St. 1919, p. 776, providing that indemnity insurance carrier shall be liable to third persons suffering injuries from negligence, who obtain judgment against insolvent assured, is founded on principles of public policy, and cannot be enlarged, circumvented, defeated, or modified by any provision in insurance contract.

7. Insurance ⚡311(1)—Clause in statute that third person may bring action against indemnitor "subject to limitations" of policy does not bind person to waiver of statutory benefits (St. 1919, p. 776).

Under St. 1919, p. 776, providing that indemnity insurance carrier shall be liable to persons suffering injuries from negligence of assured after judgment, where assured is insolvent, the clause that an "action may be brought * * * on the policy subject to its terms and limitations, by such injured person," does not bind the person to waiver of benefits of the statute, but refers to matters concerning which insurer and assured could legally contract.

In Bank.

Appeals from Superior Court, Alameda County; T. W. Harris, Judge.

Action by E. J. Malmgren and another against the Southwestern Automobile Insurance Company, a corporation, upon a policy of indemnity insurance. From an order denying motion to change place of trial and from the judgment defendant prosecutes separate appeals. Order and judgment affirmed.

Kelby & Lawson and Samuel M. Garroway, all of Los Angeles, and Leon French, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondents.

SEAWELL, J. Two separate appeals are here presented. It is agreed that they may be considered together. The first, numbered S. F. 11460, is taken from the order denying appellant's motion for a change of the place of trial, and the second, numbered S. F. 11683, is from the final judgment entered in said action. The facts necessary to an understanding of the grounds of said appeals will be revealed as the discussion of the cases proceeds.

Grace Elizabeth Malmgren, wife of complainant E. J. Malmgren, recovered a judgment in the superior court of the county of Alameda in the sum of \$5,000, against one J. Arthur Eddy, for bodily injuries inflicted upon her in the county of Alameda as the result of the careless and negligent manner in which said Eddy drove and operated an automobile

owned by him. The judgment became final before the instant suit was filed. Appellant, a corporation engaged in a general automobile insurance business, with its principal place of business in the county of Los Angeles, was the insurance carrier of said Eddy. The latter being insolvent and unable to respond in damages or to pay any part of said judgment, the present action was brought in the county of Alameda against appellant corporation upon a policy of indemnity insurance issued by it to said J. Arthur Eddy to indemnify him against loss from the liability imposed by law upon the assured for damages on account of bodily injuries suffered by any person as the result of an accident occurring and caused by reason of the use, ownership, or maintenance of said automobile, as provided by an act entitled:

"An act relating to actions against an insurance carrier when the insured person is insolvent or bankrupt, or without property sufficient to satisfy execution on account of loss or damage insured against, and requiring policy to be exhibited in certain cases." Stats. 1919, p. 776.

The portion of said statute which bears upon the question presented by these appeals reads:

"No policy of insurance against loss or damage resulting from an accident to, or injury suffered by another person and for which the person insured is liable, * * * shall be issued or delivered to any person in this state by any domestic or foreign insurance company, authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy and stating that in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, his heirs or personal representatives as the case may be, to recover on said judgment. Upon any proceeding supplementary to execution, the judgment debtor may be required to exhibit any policy carried by him insuring against the loss or damage for which judgment shall have been obtained."

Article 12, § 16, state Constitution, provides:

"A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

[1-4] It may not be doubted that the contract of indemnity was to be performed in whatever county the injury should occur and

in which a judgment against the assured should be obtained. It is appellant's contention that no contractual relation is alleged or shown to exist between the injured party and the appellant. The provisions of the statutes, as above quoted, are, as a proposition of law, a part of every policy of indemnity issued by a company or corporation engaged in transacting the kind of indemnity insurance business which appellant was authorized by the law of the state to transact. It was a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy. The complaint sets forth the general basic essentials of the action, and paragraph III thereof alleges the legal effect of the indemnification contract. This is an approved method of pleading. *Santa Rosa Bank v. Paxton*, 149 Cal. 195, 86 P. 193. Paragraph V alleges that the insolvency and inability of the assured to pay said judgment or any part thereof existed on the day the injuries were inflicted and continuously thereafter, and a demand was made upon appellant and it refused to pay the same. The contractual relation which the law created between the insurer and third parties is unquestionably apparent from an inspection of the complaint.

[5-7] It is contended by appellant that its liability could not accrue under the provisions of the policy until an execution issued upon the judgment obtained against the assured, or judgment debtor, was returned unsatisfied by reason of the insolvency or bankruptcy of said assured. The statute of this state, which is the final word on this issue, does not make the return of the execution unsatisfied a prerequisite to the commencement of an action upon the policy. The statute of the state of New York has such a provision, and appellant had caused to be incorporated in its policy the language of the New York statute verbatim. The substantive law of this state cannot be enlarged, circumvented, defeated, or modified by any provision which the insurer may have elected to place in its contract in derogation of or in conflict therewith. The statute is founded upon principles of public policy, and an anomalous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the private agreements of two of the parties to a tripartite contract. If appellant's contention be sound, then it could, with equal justification, require the question of the assured's bankruptcy to be adjudicated by a competent tribunal before it would be obliged to recognize his insolvency or bankruptcy, or impose other conditions precedent to the injured person's right of action in derogation of express provisions of the law's mandate. We see no merit in the con-

tention. *Schoenfeld v. N. J. Fidelity & Plate Glass Insurance Co.*, 203 App. Div. 796, 197 N. Y. S. 606, relied upon as an authority in the instant case, is merely declaratory of the New York statute (Consol. Laws N. Y. c. 28, § 109), which provides that a cause of action does not accrue to the injured person until an execution issued upon the judgment against the assured has been returned unsatisfied by reason of insolvency or bankruptcy. No such language or language equivalent thereto is found in the statute of this state and neither appellant nor this court is given authority to interpolate the provision of the New York law into a California statute. The clause in the statute which provides that an "action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person," was not intended to defeat its purpose upon the theory that an action brought "on the policy" binds the injured person to a repudiation or waiver of the benefits of the statute expressly adopted for his protection, but it clearly has reference to those matters concerning which the insurer and assured could legally contract.

It may be pertinent to observe that not less than 40 days prior to the filing of the complaint herein respondents caused a writ of execution to be issued and directed to the sheriff of Alameda county. The day the sheriff made his return, indorsed wholly unsatisfied, is not noted. The writ was issued August 8, 1924, and bears as its filing date December 15, 1924. The complaint was filed September 18, 1924. Between the day of the issuance of said writ, to wit, August 8, 1924, and the day the complaint was filed, September 18, 1924, there was ample time for the sheriff to have made a legal return of the writ and thus overcome appellant's objection. No record was made as to when the return was made. But, however this may be, the undisputed record evidence is to the effect that the return of the sheriff was made at least 50 days before trial day. In the light of these facts it would require clear and unequivocal language to impose as an unalterable condition precedent to the commencement of an action the return of the writ of execution unsatisfied. Conceding that the return of the writ by the sheriff indorsed unsatisfied is inferentially a condition precedent to the bringing of the action, appellant's objection in the instant case is fully met by *Cordes v. Hammond*, 55 Cal. App. 55, 203 P. 131, and cases therein cited, wherein it is held that an allegation of the insolvency of a judgment debtor, followed by proof thereof, is a sufficient compliance with the provisions of the statute providing for a return of the writ of execution by the sheriff unsatisfied before suit may be commenced. In the instant case the insolvency of the assured or judgment

debtor was fully pleaded at all times named in the complaint, and proof of the fact was indisputably established by his own testimony.

The order denying the motion for a change of the place of trial from the county of Alameda is affirmed; the judgment appealed from is also affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

201 Cal. 48

O'CONNELL v. O'CONNELL. (S. F. 12168.)

Supreme Court of California. April 15, 1927.

1. Appeal and error ⇨597(2)—Presence of judgment roll and clerk's certificate in transcript is sufficient to support appeal.

Presence in transcript of judgment roll and clerk's certificate thereto in proper form is sufficient to support appeal from judgment and defeat motion to dismiss it.

2. Appeal and error ⇨110—Order denying new trial is not appealable.

Order denying a motion for new trial is not an appealable order.

3. Appeal and error ⇨635(1)—Appeal from order dismissing proceedings for bill of exceptions must be denied, where record does not show proceedings, order, or appeal.

Appeal from order dismissing proceedings for bill of exceptions must be denied, where record shows no such proceedings, order dismissing them, or appeal therefrom.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Walton J. Wood and Kirby S. Mahon, Judges.

Actions by Anna M. O'Connell against Daniel O'Connell, who filed a cross-complaint. From a decree setting aside an interlocutory decree for defendant and from orders denying his motion for a new trial, dismissing proceedings for a bill of exceptions, and other orders, defendant appeals. On motion to dismiss appeals. Motion to dismiss the first appeal denied, and motion to dismiss the second and third appeals granted.

Daniel O'Connell, of San Francisco, in proper.

Keyes & Erskine, of San Francisco, for respondent.

RICHARDS, J. The questions herein presented arise upon the motion of the respondent to dismiss certain appeals. The record contains the papers and proceedings in two separate actions, which are themselves so entangled, and which are so much further entangled in the transcript herein, as to require some orderly statement of the sequences of this litigation in order to a proper determi-

nation of the motions to dismiss the several appeals referred to in said transcript.

Anna M. O'Connell commenced an action for divorce against Daniel O'Connell on February 29, 1922, in the superior court of the city and county of San Francisco. The defendant appeared in said action by demurrer on June 8, 1922, and, upon the overruling of the same on September 8, 1922, he filed his answer on October 7, 1922, denying the allegations of the plaintiff's complaint, and also setting forth certain affirmative defenses thereto. The defendant also at the same time presented a cross-complaint, wherein he prayed for a divorce from his wife, and also asked for certain other affirmative relief relating to property of the parties in said action. The plaintiff responded to said cross-complaint in an answer filed October 26, 1922, denying the averments of the several counts therein, and reiterating her prayer for the granting of a decree of divorce in her favor. A trial was had upon the issues thus presented, wherein, as it appears from the recitals of the interlocutory decree, neither the plaintiff and cross-defendant nor her attorneys appeared, and wherein the court, after taking evidence offered on behalf of the defendant and cross-plaintiff, made its findings of fact and conclusions of law, and thereupon, and on June 3, 1924, made and entered its interlocutory decree of divorce in favor of the defendant and upon his cross-complaint. Thereafter, and on May 20, 1925, an order was made by the trial court setting aside and vacating said interlocutory decree of divorce upon the agreement in writing of the parties to that effect as recited in said order. Thereafter, and on June 5, 1925, the defendant and cross-plaintiff gave notice of a motion to set aside and vacate the aforesaid order, which motion was based upon the latter's alleged rescission of the agreement upon which said order had been entered. He also in the same document gave notice of a motion to have said court make and enter a final decree of divorce in favor of himself as cross-plaintiff and in accordance with the findings of fact, conclusions of law, and interlocutory decree which had theretofore been made and entered in said action. These latter motions came on for hearing before the court on June 30, 1925; whereupon, and after hearing thereon, the court made its order vacating, annulling, and setting aside its prior order made upon May 20, 1925, by which it had vacated its interlocutory decree made and entered on June 3, 1924. In the meantime the original plaintiff, Anna M. O'Connell, had commenced another action in equity to set aside the interlocutory decree which had been made and entered in favor of the cross-plaintiff in her original action, to which action the said cross-plaintiff in said original action appeared and answered. This latter action had come on for trial and been tried on July 10, 1925, and

on July 23, 1925, the trial court filed its findings of fact and conclusions of law therein, and on the same date made and entered its decree therein, setting aside the interlocutory decree of divorce in favor of the cross-plaintiff which it had theretofore made and entered in said original action. The court in said decree expressly recited that its purpose in making the same was to restore the parties to the same position as if said interlocutory decree had never been entered in said action. The trial court also and on the same date made and entered its order denying the application for a final decree of divorce, which had theretofore been made by the cross-plaintiff in the original action. On August 17, 1925, the defendant in the second action above referred to gave and filed his notice of appeal from the judgment which had been made and entered in said last-named action on July 23, 1925. On September 1, 1925, the defendant and cross-plaintiff gave and filed a notice of appeal from the order of the trial court denying his motion for a final decree of divorce. On September 22, 1925, the defendant and cross-plaintiff in the original action gave and filed his notice of appeal from seven separate orders which had been theretofore made in the second action above referred to, namely: (1) From an order denying his motion for the transfer of said action for trial before another judge; (2) from the order overruling the demurrer to the application for an injunction; (3) from an order refusing to strike out a certain affidavit which had been theretofore filed by the plaintiff in said action; (4) from an order issuing a certain special injunction restraining the defendant from doing certain acts during the pendency of the action; (5) from a preliminary injunction which had been made and entered by the court in said action; (6) from an order of said court denying the motion to dissolve said injunction; (7) from an order to show cause why the defendant should not be punished for contempt. On August 10, 1925, the defendant had given and filed in said second action a notice of intention to move for a new trial, which motion came on for hearing on September 18, 1925, before said court, and was upon the last-named date denied. The defendant also in the meantime presented a motion to retax costs, which the court had in due course denied. On October 2, 1925, the defendant gave and filed his notice of appeal from the order denying his motion to retax costs. On October 19, 1925, the defendant gave and filed his notice of appeal from the order denying his motion for a new trial. All of the said matters are embodied in the single transcript filed herein. The transcript contains in the body thereof a certificate entitled "Clerk's certificate to judgment roll," which apparently refers to the judgment made and entered on July 23, 1925, in the second action and to certain documents which, according to the

certificate of said clerk constitute the judgment roll in said action. The documents thus referred to are apparently the usual documents and files which should properly constitute a judgment roll, and said certificate must be held to refer to, and to certify only to, the correctness of the copies of the documents embodied in the judgment roll. At the close of the transcript there is a further certificate on the part of the clerk entitled "Clerk's certificate to transcript," which is in the usual form of a certification that the papers and orders contained therein are full, true, and correct copies of originals on file in his office. The transcript contains no other certificate or certificates than those above referred to.

Having thus disentangled these numerous appeals, and identified the two separate proceedings to which they respectively relate, we may now proceed to consider the respondent's motion to dismiss, which is the only matter thus far submitted for our consideration. For the purpose of determining said motion the transcript herein may be viewed in either one of two aspects: (1) As a transcript on appeal from the judgment and also from the order denying a new trial in the second of the above identified actions; or (2) as a transcript intended to embrace the record on appeal in both of the above-named actions. The respondent has apparently viewed the transcript in the first of these aspects, since her motion to dismiss the appeal or appeals relates only to the second of the aforesaid actions and to the appeals taken by the defendant and appellant therein. The respondent in her motion to dismiss expressly confines the same to action number 158293 in said superior court, which was the action brought by the respondent to set aside the interlocutory decree of divorce granted in the former action for divorce. The respondent herein moves to dismiss:

"(1) The appeal from the judgment and decree rendered in the above entitled action.

"(2) The appeal from the order of the court denying defendant's motion for a new trial in the above entitled action.

"(3) The appeal from the order of the court dismissing the proceedings for a bill of exceptions to be used on the first two mentioned appeals."

[1-3] Taking up these several motions in their order: (1) The motion to dismiss the appeal from the judgment and decree rendered in said second action must be, and is hereby, denied, for the reason that the record therein discloses that there is a judgment roll and clerk's certificate thereto in said action, which judgment roll is embraced between folios 483 and 586, inclusive, in said transcript, and the presence of which judgment roll and certificate thereto in proper form would suffice to support the appeal from the judgment therein and to defeat the re-

spondent's motion to dismiss said appeal. (2) The respondent's motion to dismiss the appeal from the order denying the defendant's motion for a new trial in said action must be, and is hereby, granted, for the reason that the said order was not an appealable order. (3) The appeal from the order of the court dismissing the proceedings for a bill of exceptions to be used upon the two last-named appeals must be denied for the reason that we can find in the record herein no such proceedings for a bill of exceptions and no such order of the trial court dismissing the same, and no appeal from any such order.

If, as suggested, this transcript is to be viewed as a transcript on appeal in the action to which the respondent's foregoing motions relate, there would remain no other portion of the transcript to be considered upon defendant's appeal from the judgment than that comparatively small portion thereof which has been identified as being the judgment roll in said second action. If, on the other hand, this transcript is to be treated as a transcript on appeal in the first of the separate actions above referred to, and to which the first eight appeals of the defendant and cross-plaintiff in said first action relate, it is sufficient at this time to say that the respondent has not in the instant proceeding asserted the insufficiency of such transcript or moved to dismiss said appeals.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

LANGDON, J., being disqualified, does not participate in the foregoing opinion.

82 Cal. App. 330

ALEXANDER v. MANTON JOINT UNION SCHOOL DIST. IN TEHAMA AND SHASTA COUNTIES. (Civ. 3112.)★

District Court of Appeal, Third District, California. April 14, 1927.

Rehearing Denied May 14, 1927. Hearing Denied by Supreme Court June 13, 1927.

1. Appeal and error ⇨1096(4)—Points affecting merits of case, necessarily decided on former appeal, embrace law of case.

Disposition of former appeal embraces law of case as to all points affecting merits of case, which it was necessary to decide to properly determine such appeal, and which were decided therein.

2. Schools and school districts ⇨141(2)—Principal of school, employed by contract for school year, may be dismissed by board of trustees, under statute; "permanent teacher" (Pol. Code, § 1609, subd. 5[j]).

Principal of school, employed by contract for school year, may be dismissed by board of trustees during school year for cause, after fair and impartial public hearing, under Pol. Code, § 1609, subd. 5(j), though he was not "permanent teacher."

3. Schools and school districts  142—Evidence held to support verdict denying damages to discharged principal of school, because disqualified to act as such (Pol. Code, § 1609).

Evidence held sufficient to support verdict denying damages to discharged principal of school, on ground that he was wholly disqualified for proper performance of duties as principal, in view of Pol. Code, § 1609.

Appeal from Superior Court, Tehama County; James W. Bartlett, Judge.

Action by W. J. Alexander against the Manton Joint Union School District in Tehama and Shasta Counties. Judgment for defendant, and plaintiff appeals. Affirmed.

M. J. Cheatham and James T. Matlock, both of Red Bluff, for appellants.

Fred C. Pugh, of Red Bluff, and Curtiss E. Wetter, of Corning, for respondent.

HART, J. This cause has previously been considered by this court upon an appeal by the defendant from the judgment entered upon a directed verdict in favor of the plaintiff. The judgment was reversed and the cause remanded for a new trial. *Alexander v. Manton Joint Union School District in Tehama and Shasta Counties*, 73 Cal. App. 252, 238 P. 742. At the second trial, the verdict of the jury, by which the cause was tried, was in favor of the defendant, and judgment was entered accordingly. The plaintiff has appealed from said judgment.

The plaintiff, a teacher of the defendant under a contract with the latter, was dismissed as such teacher upon charges preferred by the trustees of said district. This action was instituted by plaintiff, under the authority of section 1609, subd. 5, of the Political Code, to secure a judicial determination of the question whether the charges were true or false, and thus, if the charges were determined to be false or unfounded, obtaining a judgment nullifying the action of the defendant in dismissing him from his employment as teacher of its school.

The issues made by the pleadings are stated in the opinion of this court by Presiding Justice Finch on the former appeal as follows:

"The complaint alleges that on or about the 12th day of May, 1923, the plaintiff and the board of trustees of the defendant district 'entered into an agreement whereby plaintiff was employed as principal in the said Manton joint union school district at a salary of \$2,000 per year payable as follows: \$200 per month for 10 months, beginning such payments on October 3, 1923; * * * that pursuant to said agreement plaintiff performed the duties of principal of said Manton joint union school district continuously from the 10th day of September, 1923, to the 10th day of March, 1924, at which time the said board of trustees wrongfully and

without any cause discharged plaintiff and refused to permit him to perform the duties of principal any longer; * * * that under said agreement said board of trustees have paid plaintiff the sum of \$1,200 and no more, and by reason of the discharge of plaintiff as aforesaid, plaintiff has been damaged in the sum of \$800.'

"The answer admits the employment and the performance by the plaintiff of services thereunder up to the 10th day of March, 1924, as alleged in the complaint; denies that the board of trustees 'wrongfully * * * or without cause, or at all, discharged plaintiff on the 10th day of March, 1924,' alleges that the board of trustees, 'on the 24th day of March, 1924, dismissed plaintiff for unprofessional conduct, incompetency, evident unfitness for teaching, and persistent violation of and refusal to obey the school law of California and reasonable rules prescribed for the government of public schools in the county of Tehama;' and admits that 'plaintiff is entitled to be paid his salary under the provisions of his contract of employment for the period from March 10th to March 24th.'

"As a further and separate defense, the answer alleges that 'during the school year of 1923, and to and including the 10th day of March, 1924, plaintiff was guilty of * * * unprofessional conduct, incompetency, evident unfitness for teaching, persistent violation of and refusal to obey the school laws of California, and the reasonable rules prescribed for the government of public schools of the county of Tehama; that on the 12th day of March, 1924, charges were duly preferred in writing against plaintiff * * * for the causes in paragraph II hereof set forth, a copy of which charges is hereto annexed * * * and made a part hereof;' that a copy of such charges and a notice of the time and place of hearing to be had thereon were duly served upon the plaintiff; that said hearing was had March 24, 1924, and 'witnesses were called and sworn and gave testimony in proof of said charges and * * * said board of trustees upon the affirmative vote of a majority thereof, all of whom had been present throughout the entire hearing sustained said charges and dismissed plaintiff as principal of said school.'

On February 25, 1924, the trustees caused to be served upon plaintiff a notice, signed by three of the members of the board of trustees, to the following effect:

"You are hereby notified that your services will not be required after March 10, 1924."

On March 12, 1924, the plaintiff was served with a second notice, signed by the same trustees, and which read as follows:

"You are hereby again notified that our action on February 25, 1924, asking and demanding your dismissal, is final, and your services discontinued from that date. You will therefore be governed accordingly."

The plaintiff was either at the time of the giving of the last-mentioned notice, or at least upon the same day, served with a copy of the following charges preferred against

him by the trustees, the same being dated March 12, 1924:

"You will please take notice that the board of trustees of Manton joint union school district of Tehama county, Cal., request and demand your resignation and dismissal as principal of said Manton joint union school district, for the following causes and upon the following grounds committed and suffered to be done by you for the school year 1923-1924, in the manner following, to wit:

"Upon unprofessional conduct committed by you, for cursing and using profane and opprobrious language towards and addressed to a trustee of said district in the presence of said trustee, and in the presence of the pupils of said district on the school grounds of said school, on February 19, 1924.

"By continuously disobeying the orders, and requests of said board of trustees during the school term of 1923-1924, to wit: To maintain order on the school grounds and see that the rights of the smaller pupils were respected. By not forbidding vulgar and profane language on the school grounds. By refusing innumerable times to accept or obey any orders for the benefit and welfare of the school from the trustees.

"Incompetence by reason of defective hearing, and being unable thereby to hear and understand ordinary conversation, and thus unable to hear recitations or make corrections when necessary to the classes under his instructions, and being also prevented thereby from hearing vile and obscene language used in the school room.

"Refusal to obey reasonable rules prescribed for government of said public school by refusal to co-operate with any of the educational agencies of the offices of the superintendents of schools of Tehama and Shasta counties. By refusing to allow pupils to participate in the benefits of the county library, the said district allowing \$160 for said purpose.

"By failing to co-operate with county nurse and attendance officer in putting over the health program and attendance program prescribed by the county board of education. By ignoring and refusing to discuss the program of the music supervisor of Tehama county. By refusing to make any report to the attendance officer of absent pupils.

"By refusing to discuss school problems with the superintendent of schools of Tehama county regarding the benefit and welfare of the school, and by waving an iron ramrod over her head, and stated he would not listen to what said superintendent had to say, notwithstanding the fact that said superintendent had been requested to talk on said matters by said board of trustees.

"And you are further notified that the hearing of the above charges will be heard before the board of trustees of said District at the schoolhouse in said district on the 24th day of March, 1924, at 11 a. m. of said day."

The foregoing charges were signed by three of the trustees.

The trustees of defendant apparently assumed that the notice to plaintiff, dated February 25, 1924, declaring his dismissal as a teacher and demanding his resignation op-

erated ipso facto to effect a dismissal, for, upon the giving of said notice, they immediately appointed a successor to plaintiff, who likewise took charge of the school as the principal thereof, in the place and stead of the plaintiff.

The time fixed for the hearing of the charges in the notice of March 12th given to the plaintiff was the 24th day of March, 1924. A trial of the plaintiff upon the charges was held upon said day, with the result that the plaintiff was dismissed from further service as a teacher of said school.

Plaintiff, among other contentions, maintained at the first trial and on the appeal from the judgment in the action as thus tried:

"That the court was without jurisdiction to determine the truth or falsity of the charges; and that, since the board had given plaintiff notice of dismissal without a trial and had placed another teacher in charge of the school, it had no authority to try him thereafter, because he was no longer a teacher in the school."

The court below, at the former trial, seems to have taken that view of the case, and accordingly directed the jury to find for the plaintiff. This court, in disposing of the former appeal, disapproved the theory upon which the case was then determined, in the following language:

"If the trustees have authority to dismiss a teacher for cause without a trial, then in case of a wrongful dismissal he would undoubtedly have a cause of action on his contract, and in such action the court would have jurisdiction to determine, as in other alleged breaches of contract, whether there was just cause for his dismissal. If the trustees have not such authority, then the attempted dismissal of plaintiff was abortive, and the subsequent trial of the charges against him was a proper procedure for the termination of the contractual relations between the parties. If the trustees had attempted to dismiss plaintiff, after a trial upon charges preferred against him, but upon insufficient notice, or without any notice of the hearing, it would hardly be contended that they might not thereafter treat their attempted dismissal as a nullity and proceed anew to a hearing after a sufficient notice thereof. No reason appears why they could not pursue a similar course where no charges had been preferred, no notice given and no hearing had."

Supporting the foregoing views, the opinion cited and quoted an excerpt from the case of *White v. Wohlenberg*, 113 Iowa, 236, 84 N. W. 1026, a case which, in the facts, is parallel to this.

The opinion also called attention to the following provision of subdivision 5 of section 1609 of the Political Code:

"Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law."

The opinion, referring to the foregoing provision, among other things, said:

"Section 1609 prescribes the grounds and the proceedings for the dismissal of a teacher for cause. It would be difficult to give the provision quoted any meaning other than that, upon the discharge of a teacher for any alleged cause, he is entitled to maintain an action in court to determine the truth or falsity of the charges preferred against him."

For the reasons stated in the foregoing excerpts from our opinion, and for errors growing out of the rulings of the court regarding the question of the admissibility of certain proffered testimony, the judgment entered on the former trial of the action was reversed.

[1] To support the present appeal, the points above referred to, with other points, are urged, but the disposition of the former appeal embraces the law of the case as to all points, at least those fundamentally affecting the merits of the case, which it was necessary to decide to properly determine the appeal and which were decided therein.

For a reversal of the judgment with which we are presently concerned, the plaintiff also urges: 1. That subdivision 5 (j) of section 1609 of the Political Code, upon which the charges against him purport to be founded, has exclusive reference to the dismissal of "permanent teachers"; that, since he was not a "permanent teacher," but was by contract with the trustees employed by them as a teacher for a definite or determinate period of time—that is, for the school year only—the proceeding before the trustees purporting to constitute a public hearing of the charges was wholly nugatory or of no legal force or effect. 2. That section 1609 of the Political Code is unconstitutional and consequently void. 3. That the verdict is not supported by the evidence. 4. That the court erred in refusing to grant plaintiff's motion to strike from the answer certain of its allegations, and also erred in certain rulings upon the evidence. 5. That the court's charge to the jury involved in a certain particular an erroneous statement of the law.

[2] The point first stated is concluded by the decision of this court on the former appeal. As will be observed from the last above given extract from the opinion, we, in effect, held that the procedure for the dismissal of teachers, as prescribed by section 1609, applied to all teachers, whether permanent or employed only for the school year, or whether principal or subordinate in degree of authority. The conclusion thus arrived at is in perfect accord with the provisions of section 1609 relative to the dismissal of teachers. Paragraph (i) of the fifth subdivision of said section expressly vests the board of trustees of the school district with the power "to dismiss probationary teachers

during the school year for cause only, as in the case of permanent teachers." It is clear that the plaintiff was only a probationary teacher or a teacher employed for the school year. Certainly he was a principal of the school, and principals are expressly included among the teachers mentioned in subdivision 5 (j) of section 1609 against whom charges may be preferred, and who may, if the charges are sustained, be dismissed by the board of trustees upon a public hearing thereof. Section 1609, subdivision 5 (j), specifically sets forth the grounds upon which a permanent teacher, or a principal, whether permanent or probationary, may be dismissed, and the two paragraphs immediately following subdivision 5 (j) prescribe the procedure to be pursued to effect such dismissal, if, under the proofs, a dismissal is justly to be ordered. The grounds of dismissal as enumerated in the first paragraph of said subdivision are "immoral or unprofessional conduct, incompetence, evident unfitness for teaching, persistent violation of or refusal to obey the school laws of California, or reasonable rules prescribed for the government of public schools."

The counsel for the plaintiff has not pointed out wherein section 1609 of the Political Code offends any provision or mandate of the state Constitution, and, therefore, as the section, so far at least as are concerned the provisions affecting the questions involved in the present controversy, does not appear to be out of gear with the Constitution, we will not assume the burden of subjecting the section to a critical analysis (which, without the aid of counsel, would probably be required) to ascertain whether in any respect it does not square with some particular provision of our organic law.

[3] The next consideration to which attention is invited involves the contention that the verdict of the jury is not afforded support by the evidence. An examination will show, as thus we have been convinced, that there is no force to this contention. The written charges filed before the trustees against the plaintiff, together with notice to the latter that the same would be heard on the 24th day of March, 1924, at the hour of 11 o'clock a. m., at the schoolhouse of said district, were introduced in evidence. The notice was dated March 12, 1924, and was personally served on the plaintiff on said day by M. L. Bouton, constable of Sierra township, which embraces a portion of the Manton joint union school district. Bouton was subsequently appointed by the county superintendent of schools as a member of the board of trustees of said district, to fill a vacancy on said board. He testified that he was present as such trustee on the 24th of March, when the hearing of the charges was had; that the plaintiff did not attend the hearing, although, when he served him

with the notice and a copy of the charges, the plaintiff was at his cabin, which was situated not more than 75 yards from the schoolhouse. Mads Neilsen, clerk of the board of trustees, testified that he was present at the hearing; that testimony in support of the charges was taken, and that, on the conclusion of the taking of the testimony, the board, after considering and discussing the testimony, by a vote of four to one of the trustees, found the charges to be true. At the trial of this action, Neilsen testified that plaintiff had ordered magazines and other periodicals for the use of the school without authority from the trustees so to do; that, upon instruction from the board, he notified plaintiff to countermand the order for said publications; that, on one occasion, he was urgently asked by certain persons residing near the school to go to the school grounds and put a stop to fighting and the use of profane language which were being indulged in between and by the pupils; that he went to the school grounds while a recess of the school was pending and found that the complaint thus made against the conduct of the male pupils was well founded; that he spoke to plaintiff about the matter and remarked to him (plaintiff) that he was not maintaining proper discipline over the boys while they were on the grounds during the recess periods, to which plaintiff replied by calling the witness a "d---n liar." Miss Lang, county superintendent of Tehama county during the plaintiff's employment as principal of the Manton high school, testified that the plaintiff's management of the school was not in accord with instructions given by her as to the course of study outlined, in that, under his method, there was not that co-ordination between his school and the Red Bluff high school which would entitle the pupils earning the same to the high school credits; that, in her interview with the plaintiff, she attempted to impress upon him the "absolute necessity" of such co-ordination, so that the pupils would not lose the credits to which as such they were entitled; that she called his attention to the fact that the pupils had not received such credits; that the plaintiff became very angry with witness, and, at the same time, having a "ramrod" in his hand, "he waved it over my head and in front of my face." Miss Lang testified to other acts of insubordination on the part of plaintiff with reference to the curriculum of his school and as to the unauthorized ordering by him for the school of certain magazines, the bills for which she refused to approve, and proceeded: That in the fall of 1923 she called for the assembling of a teachers' institute for Tehama county, it being her legal duty as county superintendent of schools to do so in each year (Pol. Code, § 1560), that she gave the plaintiff due legal notice of the time and

place of the holding of the institute, and that he failed to attend, giving no reason, so far as she could remember, for his absence therefrom. The section of the Political Code last mentioned makes it the duty of every public school teacher of the county to attend the annual institutes, unless prevented for some valid cause or reason. The witness, as did other witnesses, testified that the plaintiff's power to hear was so much impaired that he was not always able to understand what others would say to him in the ordinary conversational tone of voice and that questions propounded to him generally had to be repeated to him before he could understand them. In fact, the plaintiff, while being examined as a witness at the trial of this action in the court below, admitted that he was "hard of hearing," and the manner of his answers to questions there propounded to him by counsel clearly enough appears in the record before us to substantiate that statement. Miss Lang testified (there being no objection to the question eliciting that testimony) that (as obviously is true) chronic auricular nerve trouble to the extent of seriously impairing the sense of hearing constitutes a disqualification in a person as a teacher of public school. A number of pupils of the school testified that certain other pupils conducted themselves in school, while it was in session, in a disgraceful manner; that some of the offending pupils, during the school sessions, had been heard to call the plaintiff opprobrious names, such as "d---n fool"; that, in fact, they addressed or referred to him during the school sessions in language even more scurrilous and unfit to be repeated herein. It was shown that, immediately after the attempted but abortive order of dismissal and the notice thereof under date of February 23, 1924, and after the legally futile attempt by the board of trustees, on making said order and giving said notice, to appoint and install a successor to plaintiff as principal, the latter induced a number of the pupils to absent themselves from the school and attend a school conducted by him at his residence, near the schoolhouse. The theory upon which plaintiff proceeded in pursuing that course was, manifestly, that the notice of his dismissal of February 23, 1924, was legally ineffective. But it is not necessary further to review herein the testimony presented by the defendant in support of the charges upon which plaintiff was dismissed by the trustees as principal of the school. It is enough to say that the testimony tending to show that plaintiff was wholly disqualified for the proper performance of the duties of a principal of a public school; or, for that matter, to discharge the duties of a subordinate teacher in such school, amply supports the verdict. Substantially the same testimony was presented before the board of trustees in its in-

vestigation of the charges against the plaintiff, which resulted in the order of dismissal.

The motion to strike out certain parts of the answer and the objections to certain evidence were predicated upon the general proposition that the notice of dismissal of February 23d, to take effect on March 10th, legally operated as a dismissal of plaintiff, and that the trial of the charges on March 24th, in pursuance of the notice given plaintiff on March 12th, was hence nugatory and without effect. The theory of that proposition was and is that (as we have seen the counsel for plaintiff contends) there is no procedure prescribed by law for a public hearing of charges against a probationary teacher and his dismissal for cause upon such a hearing; that, therefore, the allegations of the answer setting up the proceedings before the trustees on March 24th, eventuating in his dismissal by the trustees, were immaterial and should have been stricken out, and, consequently, evidence of acts and conduct of the plaintiff as a teacher subsequent to the date of the service upon him of the notice of dismissal of February 25th, and which tended to substantiate the charges set forth in the notice of March 12th, was not only immaterial and irrelevant, but prejudicial to the rights of the accused at the trial. These points are disposed of adversely to the position of the plaintiff thereon by the earlier discussion herein. The objection by plaintiff to the following part of the court's charge to the jury has likewise been disposed of:

"Said trustees were authorized by the law to dismiss the plaintiff as principal of said school during the school term for cause and after a fair and impartial public hearing."

There are certain other objections to the court's rulings as to the legal propriety of certain evidence which do not merit special notice herein.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

82 Cal. App. 407

GIBBS v. PETERS et al. (Civ. 4265.)

District Court of Appeal, Second District, Division 2, California. April 18, 1927.

Frauds, statute of § 118(3)—Vendor's letters, offering to execute deed on unfulfilled condition, and declining to sign deed sent her, held not "memorandum" of new contract (Civ. Code, §§ 1624, 1698).

Vendor's letter to bank, indicating willingness to execute deed on payment of certain sum within stated time, which lapsed without acceptance of offer, and her undated letter to title company stating, in reply to letter inclosing deed for signature, that all transactions concerning property must be done through bank,

which would instruct her when deed was to be signed, held not a note or memorandum, sufficient under Civ. Code, § 1624, to constitute written contract required by section 1698 to alter such a contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Memorandum.]

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Louise H. Gibbs against Jack Peters and others. From the judgment, plaintiff appeals. Reversed.

J. W. Morin, of Pasadena, for appellant.
Ray C. Eberhard and Floyd M. Hinshaw, both of Los Angeles, for respondents.

WORKS, P. J. This is an action to quiet title. Plaintiff was the owner of a certain parcel of real property. She and one of the defendants Peters entered into a certain agreement in writing, whereby she agreed to sell the property to Peters and he agreed to buy it. The contract provided for the payment of the purchase price in certain monthly installments. Peters assigned to defendant Sharpe his interest in the contract, and the latter promptly paid the installments due under it up to a certain time, whereupon, under date November 6, 1920, plaintiff wrote to a certain bank a letter in which she said:

"This is to authorize you to accept of Mr. John Sharpe \$1,200 and to cancel his debt to me on [the real property mentioned]. Providing this note to be placed in your hands and stated amount \$1,200 be placed to my account in your bank not later than 1:30 p. m. on Monday of Nov. 8, 1920."

Sharpe, however, received notice of the proposition embraced in this letter so late that he was unable to pay into the bank, within the time limit fixed by the letter, the amount named in it, but he did lodge the money with a certain title company. Thereafter certain conversations were had between plaintiff and Sharpe, and following that the title company, under date November 15th, wrote plaintiff a letter, in which it was said:

"Inclosed find grant deed, Gibbs to Sharpe which kindly sign and have acknowledged before a notary public and return to this office together with your demand for use of same, immediately. We have been holding funds to pay for this instrument for several days and the other parties to our escrow are becoming impatient over the delay caused by your failure to call at this office and sign the deed as originally arranged. Kindly give this matter your immediate attention. * * *"

To this letter plaintiff, by an undated note, answered thus:

"In reply to yours of Nov. 15 would say: All transactions concerning [the real property already mentioned] must be done through [the

bank above referred to]. I have communicated with them concerning this matter and they will instruct me when a deed is to be signed. I also hold a copy of the original agreement with Mr. Sharpe which he has not fulfilled."

Under date November 17th the title company wrote the bank the following letter:

"We are in receipt of a letter from Louise H. Gibbs * * * advising that all matters pertaining to a deed from Mrs. Gibbs to Mary A. Sharpe * * * must be done through your office, as you hold for collection the contract of Mrs. Gibbs covering above property, in favor of Jack Peters. We are inclosing herewith a deed, which would ask that you kindly have Mrs. Gibbs sign and have acknowledged and return to this office and we will promptly remit the stipulated amount of \$1,200 as per agreement of the parties concerned. As we are unable to close this escrow on account of the long delay in waiting for this deed, would thank you for your prompt attention to the matter. However, we cannot pay for the deed until the instrument is delivered to this office which, however, seems to be contrary to Mrs. Gibbs' demands."

The president of the bank then wrote appellant, in a letter dated November 18th:

"I am inclosing herewith grant deed covering property formerly sold to Mr. Jack Peters. The title company advises us that you have agreed to accept \$1,200 in settlement of your contract. If that is true, please advise us to that effect and return the inclosed deed properly executed before a notary public."

Appellant answered this letter by a memorandum written at the bottom of the sheet which contained it. She said:

"The above statement was true Nov. 8 but when Mr. Sharpe failed to comply to my request to have \$1,200 in your care not later than Nov. 8 I found that I would be obliged to collect that amount from another source at a great loss to me. I do not need the money now, so we will let it remain as it is on monthly payments."

This communication ended the negotiations between the parties. Sharpe, apparently electing to stand upon the letters, together with such oral negotiations as ran along with them, discontinued the payment of the installments called for by the contract of sale, and thus put himself in default. On December 16, 1921, more than a year after the negotiations were terminated, appellant filed her complaint in the present action. It was in the usual form of a complaint to quiet title. Sharpe in his answer denied the allegations of appellant's pleading, and set up an affirmative defense, in which he alleged

the assignment of the contract of sale by Peters to himself, and averred that he was the owner of the property involved "under and by virtue" of it. Decree went for defendant Sharpe, and this appeal by Mrs. Gibbs is the result.

Respondent Sharpe asks an affirmance of the judgment on the ground that he was entitled to a deed from appellant under the negotiations which took place between them. Appellant insists that the right to a deed does not exist because of the language of section 1698 of the Civil Code:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement and not otherwise."

Respondent counters with the contention that the writings signed by appellant, notably the undated letter in response to the communication of the title company written on November 15, 1920, amounted to a new agreement between the parties, and that they were sufficient to operate as such, under the language of the opening sentence of section 1624 of the same Code to the effect that certain contracts are invalid "unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent."

We can see nothing in the writings signed by appellant which constitute a note or memorandum of any contract, no matter what was attempted to be agreed to during the oral negotiations between the parties. In her letter of November 6th to the bank appellant indicated a willingness to execute a deed upon the payment, within a stated time, of a certain sum of money. This offer was not accepted, and all proceedings under it expired by lapse of the time set. Her undated letter to the title company shows neither that she agreed, nor had theretofore agreed, to extend the time fixed in her first letter, or that she agreed, or had theretofore agreed, to execute a deed upon any consideration whatever, except upon a compliance with the terms of the original contract of sale made to Peters. In truth, her letter shows no promise whatever, nor is it a note or memorandum of any promise she had already made. It is unnecessary to refer to other defects in the paper when it is sought to be considered as an effective note or memorandum within the statute.

Judgment reversed.

We concur: CRAIG, J.; JOHNSON, Justice pro tem.

82 Cal. App. 342

GARDINER v. HOLCOMB et al. (Civ. 5199.)★

District Court of Appeal, First District, Division 1, California. April 15, 1927.

Hearing Denied by Supreme Court June 13, 1927.

1. Corporations ⇨432(12)—Evidence held not to sustain finding that director's use of corporate notes as collateral in borrowing money for corporation was unauthorized.

Evidence held not to sustain finding that neither corporation nor president never delivered or authorized delivery or use of corporate notes by corporate director as collateral security for purpose of borrowing money for corporation.

2. Appeal and error ⇨989—Appellate court will inquire into findings only to ascertain if supported by evidence.

Appellate court is precluded from making any further inquiry of findings of trial court other than to ascertain if there is any evidence of substantial character, and not inherently weak or improbable, which supports the finding.

3. Appeal and error ⇨1010(1)—Trial court's findings must be supported by evidence, and mere conclusion or general statement is insufficient.

Findings of trial court must be supported by evidence and against positive and direct evidence of a fact a mere conclusion or general statement will not meet the definition of substantial or any evidence.

4. Subrogation ⇨41(6)—Evidence held not to sustain finding that corporate president signed note without knowledge that corporate notes were pledged as collateral, as affecting his right on paying note to hold collateral furnished by fellow indorser.

Evidence held not to sustain finding that corporate president, at time of becoming surety on note, had no knowledge that notes of the corporation were pledged as collateral, as bearing on his right on payment of note to recover against collateral furnished by fellow indorser.

5. Bills and notes ⇨237—Forbearance to sue on note secured by collateral corporate notes held sufficient consideration to render corporate president signing renewal note maker for value as concerned accommodation indorser.

Forbearance by holder of note secured by corporate notes as collateral to proceed with right of action against corporation and guarantors including corporate president held a sufficient existing and moving consideration sufficient to render the corporate president signing renewal note a maker for value, and not an accommodation party or surety, so far as concerned person signing such renewal note as accommodation party only.

6. Bills and notes ⇨49—"Accommodation paper" is bill or note signed without consideration for purpose of accommodating some other person (Civ. Code, § 3110).

"Accommodation paper," under Civ. Code, § 3110, is a bill or note to which the drawer or

maker has put his name without consideration for purpose of accommodating, by a loan of his credit, some other person who is to provide for the bill or note when it falls due.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accommodation Paper.]

7. Bills and notes ⇨49—Accommodation paper is usually in consideration of benefits expressly or impliedly promised.

Accommodation paper is usually in consideration of benefits expressly or impliedly promised, rather than as a favor to maker of note, and, if maker receives consideration directly from payee, it is not accommodation.

8. Bills and notes ⇨49—Where person lending his credit to aid maker seeks to accomplish thereby legitimate object of his own, act is not for "accommodation."

While a party's intent may be to aid a maker of note by lending his credit, if he seeks to accomplish thereby legitimate objects of his own, and not simply to aid maker, the act is not for "accommodation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accommodate—Accommodation.]

9. Bills and notes ⇨49—Corporate president, signing renewal note secured by collateral corporate notes guaranteed individually by directors, held not "accommodation maker."

Where corporate notes guaranteed by individual indorsements by directors were pledged as collateral security to note given by one of directors for purpose of procuring funds of corporation, corporate president, subsequently signing renewal of such note, held not an accommodation maker, since he received a valuable consideration equally with directors executing note.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accommodation Maker.]

10. Bills and notes ⇨237—Accommodation indorser is not liable for contribution or otherwise to one signing note not as accommodation party.

Indorser for accommodation only for purpose of lending credit cannot be held liable either for contribution or otherwise, where other person signing note which was secured by collateral notes of corporation of which he was president, which note was guaranteed individually by directors, was not accommodation party.

11. Contribution ⇨1—Person paying only equitable share cannot require contribution.

One who has paid no more than what he in equity and good conscience might have paid cannot require contribution.

12. Bills and notes ⇨49—Accommodated party may not sue accommodation party.

Party for whose accommodation paper was made may not sue accommodation party.

13. Bills and notes ⇨49—Person signing note for valuable consideration cannot seek recovery from other person signing purely as accommodation party.

Corporate president having signed note secured by collateral corporate note in turn guar-

anted by directors individually, having signed note for valuable consideration, and being accommodated thereby, can seek no recovery from other person signing note purely as accommodation party.

14. Subrogation $\Leftrightarrow$ 31(2)—Corporate president, paying note indorsed by him, held not entitled to hold collateral of accommodation indorser pledged also to secure individual note of director also paid by president and thereafter repaid to him.

Where corporate president, signing note executed by director and secured by collateral corporate notes guaranteed by directors individually, paid off such note, and also another note of director, he was not entitled to hold other collateral security deposited by accommodation indorser, because of paying such individual note of director, where such note has been discharged and collateral attached thereto released.

15. Husband and wife $\Leftrightarrow$ 268(1)—Wife held not liable to extent of separate holdings for money appropriated by husband on theory that it became part of community.

Wife held not independently and individually liable to extent of her separate holdings for money appropriated by husband on theory that it necessarily became a part of the community, since to establish such principle of law would be to destroy wife's capacity to hold public property at all.

16. Subrogation $\Leftrightarrow$ 2—Indorser, paying note, cannot recover on collateral pledged by accommodation party thereto.

Where corporate president, signing note secured by collateral corporate notes, paid amount due thereunder, he was not entitled to recover against collateral pledged by accommodation party to such note.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action in interpleader by J. R. Gardiner against Wilhelmina Johanna Holcomb, N. Frank Morse, and another, wherein defendants named filed cross-complaints. From a judgment in favor of defendant N. Frank Morse against defendant Wilhelmina Johanna Holcomb, and from an order denying a new trial, defendant Wilhelmina Johanna Holcomb appeals. Reversed.

Fredericks & Hanna, of Los Angeles, for appellant.

Bishop & Wellington, of Santa Ana, for respondent.

Marks & Launer, of Fullerton, and J. A. Gardiner, of Santa Ana, for trustee.

PARKER, Justice pro tem. This is an appeal by Wilhelmina Johanna Holcomb, defendant, cross-defendant, and cross-complainant, from a judgment rendered against her and in favor of N. Frank Morse, defendant, cross-defendant, and cross-complainant, which said judgment awarded to N. Frank

Morse the sum of \$11,319.49 paid into court by plaintiff, and determined that appellant had no right or claim thereto. The order of the court, denying appellant's motion for a new trial, is also before us for review.

Plaintiff, Gardiner, commenced this action in interpleader. He asserted that he held a contract for the purchase of certain lands from defendants Wilhelmina Holcomb and Meta Zeyn and one C. E. Holcomb; that, pursuant to the terms of said contract, he was obligated to pay a certain sum of money; and that defendant N. Frank Morse claimed some interest in the contract and the payments due thereunder. The said plaintiff asked that he be permitted to pay into court the sums due and that the various parties defendant litigate their claims thereto. Thereafter it was agreed by all parties that plaintiff pay to the clerk of the superior court all moneys remaining due on the contract and receive his deed for the premises. And it was further agreed and stipulated that of the moneys so paid the defendant Zeyn be paid one-half without further suit and that she be dismissed from the proceedings. Both of these stipulations were executed. The amount remaining was \$11,319.49, and the issue in the trial court, and likewise here, is between Wilhelmina Johanna Holcomb and N. Frank Morse. Each of these named claims the fund and they have set up their claims through various pleadings. While one C. E. Holcomb was named as a party to the original contract, it was agreed that he had no interest therein and was but a nominal party.

To avoid needless repetition and possible confusion, the defendant Wilhelmina J. Holcomb will be hereinafter referred to simply as Mrs. Holcomb, and the original contract of purchase and sale entered into between the plaintiff, Gardiner, and the various defendants, will be referred to hereinafter as the Gardiner contract. And it may be noted without further repetition that C. E. Holcomb is and was at all of the times embraced within the history of the transactions involved the husband of Mrs. Holcomb.

In order that there may be a clear understanding of the points here for determination, it is necessary to detail at some length the facts of the case as presented in the trial court.

C. E. Holcomb and N. Frank Morse, with others, were the directors and owned almost the entire capital stock outstanding of the Pacific Mausoleum Company, a corporation, which will hereafter be referred to as the corporation. This corporation had been engaged in business for some years, and during the years from 1915 to 1919 had considerable difficulty in securing funds to carry on its business or to progress as outlined by its directorate. Much indebtedness had

accrued and the need for funds was acute. Accordingly in April, 1919, at a regular meeting of its stockholders, the corporation decided to borrow the sum of \$80,000, and to execute a trust deed upon its property for that amount. On the same date and following the meeting of the stockholders the directors of the corporation held a special meeting and took up this matter of raising funds. It was by them decided, and the decision evidenced by a resolution spread upon the minutes, that the corporation proceed to negotiate a loan in the sum of \$80,000, and that such loan should be secured by a deed of trust upon certain property of the corporation. From the minutes it appeared that negotiations had been carried on through C. E. Holcomb, a director, and he had arranged that a person named Jacobs and another Lyons should receive a bonus for placing the loan. The resolution provided that the loan of \$80,000 should be evidenced by 16 notes each in the amount of \$5,000, and that as security for the total amount the corporation should execute a trust deed to be placed upon certain property in Oakland, Cal. It was a part of the resolution that said notes and each of them be further secured by the individual indorsements of the directors of the corporation. Accordingly the corporation did execute, through its president and secretary, the 16 notes each in the amount of \$5,000, and upon each note was indorsed the unconditional guaranty of C. E. Holcomb and N. Frank Morse and three other directors. The notes of the corporation were signed by Morse, as president; and one Pomeroy, as secretary, and each note was dated April 5, 1919, and payable 12 months after date. The payee named in the notes was C. E. Holcomb. These notes, executed as aforesaid, were then sent to the corporation's assistant secretary in Oakland for the purpose of consummating the proposed loan through Lyons and Jacobs. The record in the case stops with the statement that the proposed deal did not go through, and the corporation was left where it started. In some manner the 16 notes were then delivered to Mr. Holcomb. Within a short time the said Holcomb sold one of the notes for its face value, \$5,000, and the proceeds of the sale were turned over to the corporation. Thereafter on June 30, 1919, the said C. E. Holcomb borrowed from the First National Bank of Los Angeles the sum of \$40,000, and as security for the payment of the loan made and delivered to the bank a promissory note, and deposited with the bank as collateral security for the payment of the said note 10 promissory notes of the corporation, each in the amount of \$5,000, and being 10 of the 16 notes hereinbefore referred to. In December of 1919 the note of C. E. Holcomb became due and the same was renewed by him.

In June, 1920, the bank notified Holcomb that it considered the security for his indebtedness to be inadequate and demanded that he furnish more collateral or greater security, with the alternative that the bank would proceed to enforce payment of the note therefore given. At this juncture C. E. Holcomb approached Mrs. Holcomb and requested that she sign the note with him, telling her that the notes of the corporation were pledged and that no liability would be fastened upon her, as the notes of the corporation had all been indorsed by the directors. Without consideration of any sort and for the purpose of lending her credit to the maker, Mrs. Holcomb joined in the execution of a new note to the bank for the \$40,000. As heretofore detailed Mrs. Holcomb was a one-half owner of the Gardiner contract and of the proceeds thereof. This ownership was separate in her, having come to her through inheritance, and there being no claim or evidence that the contract or the proceeds thereof or the property involved therein in any respect lost its character as separate property or ever was dedicated to or became merged in the community of Mrs. Holcomb and C. E. Holcomb, her husband. Upon joining in the note she pledged therewith the Gardiner contract, by assignment to the bank, as further security for the note. C. E. Holcomb likewise solicited Morse to go on this same \$40,000 note at the time of renewal in 1920, explaining to Morse that the bank required further security under threat of enforced collection. Thereupon Morse became surety on the note, and the note with the bank was then as to the bank the note of C. E. Holcomb, Mrs. Holcomb, and Morse. In May, 1921, Morse paid the note and also another note that C. E. Holcomb had with the bank in the sum of \$6,000, taking from the bank an assignment of all of the collateral deposited. Here it may be stated that while the collateral deposited was security of all of the C. E. Holcomb indebtedness, yet the \$6,000 note was otherwise secured, and Morse was paid off on this and that note delivered up and does not enter into the instant controversy. The collateral retained by Morse was the Gardiner contract and the 10 corporation notes before described.

On this state of facts Morse contends that he became the owner of the Gardiner contract and entitled to the proceeds thereof, in so far as the amount otherwise due Mrs. Holcomb is concerned.

The facts as narrated hereinbefore are the generally admitted facts leaving out the facts over which a controversy arises. Therefore, before taking up the questions of law applicable, it is further necessary to make determination from the findings or otherwise of other material facts.

The court found in finding I that neither the corporation nor N. Frank Morse ever delivered or authorized the delivery to or use

of said 10 notes by C. E. Holcomb as collateral security for the purpose of borrowing money for the corporation from First National Bank of Los Angeles. Neither did said C. E. Holcomb have authority to make any assignment or transfer thereof or representations concerning the same for that purpose. And in finding II, that neither the bank nor Morse ever had notice of the misuse and appropriation of said 10 notes, or of funds borrowed by said C. E. Holcomb, until after the signing and delivery by the parties of the renewal note to the bank. And in finding V, that both Mrs. Holcomb and Morse signed the note in question as cosureties, and neither individually received any property or thing for the placing of their names on said notes. Appellant attacks these findings and each of them as being unsupported by the evidence.

With respect to finding V it would appear that this is in part a conclusion of law, as well as a finding of fact, and possibly a direct finding as to the capacity in which the parties signed might have been omitted. The entire case centers about this finding, and if this one particular finding is sustained, it would determine the case. It is a mixed question of law and fact and will be so treated.

We feel it needless, and it would perhaps necessitate much repetition, to take up each of these disputed findings and review the evidence applicable to each. The record discloses that there is little real conflict in the facts, and by a brief review of the evidence, in addition to what already appears, the conclusion will be manifest.

After the execution of the 16 notes referred to hereinbefore the evidence is uncontradicted that all of the officers and directors of the corporation knew that the plan proposed had fallen through. They knew that these notes were not going to be used to negotiate any loan in Oakland for the amount of \$80,000, and that this scheme of financing was abandoned. This was in April, 1919. Then in the month of May, following, the corporation received from C. E. Holcomb the sum of \$5,000 as proceeds from one of the notes delivered to a new party. The secretary of the corporation somewhat evasively testified that this in itself would not indicate that the original plan was abandoned, because it might have been that the parties with whom the original negotiations were planned might have been able to take part only of the amount. On this same point Morse, the president of the corporation, testified practically to the same effect, but added further that the board of directors in regular meeting had authorized the sale of this one \$5,000 note. C. E. Holcomb testified that after the original plan had failed he explained to the other directors that the only way money could be obtained was on the personal note of himself secured by these notes as collateral, and that he was given

the notes and told to get the money. Morse testified that he was at all times the president of the corporation, as well as one of the directors; that the corporation and its directors looked to C. E. Holcomb to finance the building operations and to finance the corporation and to supply money from time to time when necessary; that previous to the time he (Morse) signed the note in question he knew that 10 \$5,000 notes had been turned over to C. E. Holcomb to raise money at various banks; and that the minutes of the corporation seem to have called for the 10 \$5,000 notes to be sold or disposed of at a discount.

Morse further testified that the 16 \$5,000 notes were issued for the purpose of taking up the outstanding obligations of the company, and that C. E. Holcomb was about the only one who appeared to be in a position where he might be able to finance the company, and the way he financed it was by his securing loans for the company at the various banks.

[1] Again Morse testifies that the corporation did deliver the said 10 notes to C. E. Holcomb; that the latter did receive the said promissory notes as trustee for said corporation, and did promise that he would negotiate the said notes for the use and benefit of said corporation, and would pay to said corporation all money received by him from his negotiating or selling said notes or any of them; and that the board of directors had authorized Holcomb to sell the notes.

The only evidence to sustain the finding is evidence to the effect that no specific authorization appears in the minute books of the corporation, coupled with the bald statement of the secretary that he knew of no authorization, and likewise the general statement of Morse that, as far as he knew, the minutes never showed Holcomb authorized to negotiate or sell the notes other than as in the first resolution stated.

As to the necessity of formal resolution or the requirement as to the minutes showing the fact, reference may be had to *Leitch v. Marx*, 21 Cal. App. 208, 181 P. 328; *Cyclops Iron Works v. Chico Ice Co.*, 34 Cal. App. 15, 166 P. 821.

[2] On the question of the conclusiveness of the findings of the trial court we may concede that the rule of law governing appellate procedure precludes this court from making further inquiry than to ascertain if there is any evidence of a substantial character, and not inherently weak or improbable, which supports the finding, and, if such be disclosed, the finding should stand irrespective of what evidence there might be opposed to the finding.

[3] However, without regard to the qualifications of the rule, but accepting it in all its strength, there is still the necessity that there be some support for the finding, and that, as against the positive and direct evidence of a

fact, a mere conclusion or general statement will not serve to meet the definition of substantial or any evidence. See *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, 93 P. 377, 14 L. R. A. (N. S.) 913, 14 Ann. Cas. 1159; 2 Cal. Jur. 918 et seq.

We conclude that finding I is not supported by the evidence and that there is no substantial evidence to support it.

[4] As to finding II to the effect that Morse never knew that the notes of the corporation were pledged as collateral when he signed the \$40,000 note in question, much the same evidence is applicable to this finding. The finding has its only support in the bare statement of Morse that he had no knowledge of this fact. On this we have the testimony of C. E. Holcomb that he explained this fact to Morse prior to his going on the note; also the testimony of Morse as hereinbefore detailed covering the activities of Holcomb and his connection with the corporate finances and banks. And in addition we have the physical fact of the note itself containing the statement that the notes were held as collateral. From the record before us there is no contention that the fact of the 10 notes being collateral did not appear on the face of the note before signature by Morse. Morse admits that he read the note and that he signed it, and then simply adds that he had no knowledge that the notes were part of the collateral. It is inferred that possibly the notes were changed after signature, but there is no evidence even suggesting such a course.

We conclude that finding II is not supported by the evidence. This court will, of course, decline to make findings, but we thus review the findings made preliminary to a discussion of the controlling finding, to the end that the views expressed herein may not be restricted by findings that might conflict therewith.

The main issue in the case goes to the character and liability of the parties signing the \$40,000 note in question as between themselves. The appellant contends that Mrs. Holcomb was purely an accommodation party and that C. E. Holcomb and Morse were the accommodated parties. Respondent contends that both Mrs. Holcomb and Morse were sureties for C. E. Holcomb, granting possibly that they were both accommodation parties.

At the time Mrs. Holcomb and Morse went on these notes the situation may be thus summarized: The corporation Pacific Mausoleum Company had issued 16 notes secured by deed of trust, payable to C. E. Holcomb. The purpose in view was the raising of money to meet the obligations of the company then due and to provide funds to some extent for carrying on the corporation's business. Both C. E. Holcomb and Morse, as directors, together with the other directors, individually guaranteed the payment of each of

these notes. While it was planned that the money could be raised from a certain source, the source failed, and the notes were given to C. E. Holcomb to negotiate. Incidentally it might be noted that C. E. Holcomb and Morse each owned approximately 12,000 shares of the stock of the company out of a total of 113,000 shares issued. The total stock owned by the directors guaranteeing the notes was 44,995 shares. Morse knew at all times that C. E. Holcomb was negotiating these notes with various banks and also of his own guaranty thereon. C. E. Holcomb, in procuring the money evidenced by the \$40,000 note, had pledged 10 of the notes in question, and the bank with whom the pledge was deposited as security was threatening enforced collection and foreclosure of the pledge. With these facts known to Morse, as the evidence discloses, he signed the renewal note and thereafter paid the same.

As to Mrs. Holcomb it is conceded that she received nothing, was not a stockholder in the corporation, and comes squarely within the definition of an accommodation party.

[5] The court found as a fact that of the \$40,000 realized from these notes the sum of \$18,000 was paid to the corporation and that C. E. Holcomb appropriated to his own use the balance. It might be here noted that C. E. Holcomb claimed that the said balance was due him from the corporation for a prior indebtedness. Whatever may have been the true condition, the corporation was not a party to this action, nor was the bank; and surely we cannot anticipate what defenses might have existed as against enforcement of the corporation notes and the guaranty attached to each. The bank holding these 10 corporation notes, in the event of default of the promissory note of C. E. Holcomb, for which they were collateral, had an undoubted right of action against the corporation and against the guarantors on the notes; and the finding of the court in this action does not in any way determine the corporation's liability or the liability of the guarantors. And with this right of action the forbearance to proceed was a sufficient, existing, and moving consideration, sufficient to render Morse a maker for value, and not an accommodation party or a surety, as far as concerns Mrs. Holcomb.

[6] Accommodation paper is a bill or note to which the drawer or maker has put his name without consideration for the purpose of accommodating by a loan of his credit some other person who is to provide for the bill or note when it falls due. Civ. Code, § 3110; 8 Cor. Jur. p. 252.

[7, 8] Accommodation paper is not often issued gratuitously; on the contrary, it is usually in consideration of benefits expressly or impliedly promised rather than as a favor to the maker of the note. If a maker receives consideration directly from the payee it is

not an accommodation. While a party's intent may be to aid a maker of a note by lending his credit, if he seeks to accomplish thereby legitimate objects of his own and not simply to aid the maker the act is not for accommodation. *Thompson v. Whitney*, 17 Hawaii, 107 et seq.

Accommodation paper means commercial paper made, accepted, or indorsed for the benefit of another, without consideration. It is made for the purpose of a loan of credit to the person accommodated. A loan of credit is the universal test of the character of the paper. *In re Quality Shop (C. C. A.)* 205 F. 266.

[9, 10] From these references to the general characteristics of accommodation paper it is clear that Morse was not an accommodation maker on the note here involved. It seems hardly to be questioned that he did receive a valuable consideration equally with C. E. Holcomb. In support of this conclusion the following cases are cited: *Cushing v. Gore*, 15 Mass. 69; *Interstate Trust Co. v. Irwin*, 138 Ia. 325, 70 So. 313; *Reed v. Pueblo First Nat. Bank*, 23 Colo. 380, 48 P. 507; *Backer v. Grummett*, 39 Cal. App. 101, 178 P. 312. Indeed, it seems so obvious from a mere recital of the facts that Morse was merely substituting his own obligation as well as that of C. E. Holcomb. Such being the situation, and it being conceded that Mrs. Holcomb had no interest either in the corporation note nor as a stockholder of the corporation, and being purely an indorser for accommodation and for the purpose of lending her credit to the transaction, she cannot be held liable either for contribution or otherwise.

[11] The principle underlying contribution is purely equitable in origin and application; and it is well-settled law that one who has paid no more than what he in equity and good conscience might have paid cannot require proportionate contribution under the facts here. *Backer v. Grummett*, 39 Cal. App. 101, 178 P. 312; *American Bonding Co. v. Nat. Bank*, 99 Am. St. Rep. 480; *Allen v. Perrine*, 103 Ky. 516, 45 S. W. 500; *Brown v. Sheldon State Bank*, 139 Iowa, 83, 117 N. W. 289.

[12] In *Williams v. Hasshagen*, 166 Cal. 386, 137 P. 9, is announced the general doctrine, likewise applicable to the case at bar, that the party for whose accommodation the paper was made may not sue the accommodation party.

[13] Mrs. Holcomb being purely an accommodation party, and Morse having signed the note for a valuable consideration, and being accommodated within the rules governing, it follows that he could seek no recovery from her. It may be here added that the trial court made a finding of fact that it did not appear that Pacific Mausoleum Company was not able to pay all the notes.

There are other points raised by appellant which it becomes unnecessary to discuss. However, respondent makes various contentions to support the judgment, and we may briefly dispose thereof.

[14] It appears that when Morse paid off the \$40,000 note the bank held also another note of Morse in the amount of \$6,000, and that under the collateral deposit the Gardiner contract was liable as security for this note. Before the bank would release the collateral Morse was obliged to pay off the \$6,000 note. Respondent urges that he holds the Gardiner contract thus received by him and is entitled to the proceeds thereof irrespective of the other note. There are two answers to this. The lesser note has been discharged and the collateral attached thereto has been released and the note delivered up to the maker; also the amount remaining due thereon was only \$2,000, and even if unpaid the liability of the Gardiner contract would still be far less than the amount here in controversy.

Another point urged by respondent is based upon a finding of the court that, of the \$40,000 secured by C. E. Holcomb, the sum of \$18,000 was given to the corporation, and that the remaining \$22,000 went into and was used for the benefit of the community property of himself and Mrs. Holcomb, and that at the time C. E. Holcomb borrowed the said sum of \$40,000 he was a director of the Pacific Mausoleum Company, and that at all times subsequent thereto the said C. E. Holcomb held and now holds stock in said company as the community property of himself and Mrs. Holcomb.

[15] Little aid can be given respondent from this finding, even conceding that it is supported in fact. It is conceded, however, by all sides that the only support of the finding is the presumption that all property not owned by either spouse at the time of marriage, or subsequently acquired by gift, devise, bequest, or inheritance, etc., is community property. We are not going to review the history of the community idea at this time. The Supreme Court, in the recent case of *Stewart v. Stewart*, 249 P. 197, has settled and determined just what the rights of the wife are in respect to the community; and the law as announced there precludes consideration of the liability of Mrs. Holcomb under the finding here discussed. It is apparent that duties and rights are correlative; and if it were the law that the separate property of the wife were liable in every transaction wherein a presumption arose that the community property may have been benefited, then the doctrine of *Stewart v. Stewart* needs instant revision. To hold that, because C. E. Holcomb appropriated money of the corporation, necessarily it became a part of the community, and that, therefore, it follows that the wife is independently and individually liable to the extent of her separate holdings

would be establishing a new principle of law, and one destructive of the wife's capacity to hold separate property at all.

If the respondent seeks to make Mrs. Holcomb a principal of the note in question by reason of the fact that her husband was a director and stockholder, and that the stock was community property, then a complete new theory is interjected into the case, because if Mrs. Holcomb becomes a principal by reason of her community interest in the stock it surely follows that Morse would be a principal by reason of his individual interest. It then follows that the note has been discharged, and the present action fails.

[16] Finally, respondent contends that he is not seeking any recovery from Mrs. Holcomb by way of contribution, but that he stands upon the claim that he has paid the note as surety and is entitled to the collateral, regardless of the status of the one who owned the collateral or who might have pledged the same; in other words, his contention is that, regardless of the fact that Mrs. Holcomb may be an accommodation party, and conceding the law to be that the party accommodated cannot recover against the accommodation party, nevertheless, the respondent can retain the collateral that Mrs. Holcomb pledged by way of further accommodation. Illustrating, if A. is purely an accommodation maker with B. for the accommodation of B. and without consideration, and pledges collateral for the payment of B.'s debt, then B., upon payment, can retain the benefit of A.'s collateral. We deem this contention unworthy of discussion.

Many other questions have arisen out of the facts of this case and have been urged by the respective parties. We deem it unnecessary to discuss the same, as all of them hinge upon the determinations here made.

For the reasons given the judgment is reversed and likewise the order denying appellant's motion for a new trial.

We concur: TYLER, P. J.; CASHIN, J.

82 Cal. App. 249

WILLETT et al v. SCHMEISER MFG. CO.
et al. (Civ. 5783.)

District Court of Appeal, First District, Division 2, California. April 8, 1927.

1. Appeal and error $\S$ 1040(12)—Overruling demurrer to one defendant's counterclaim for price of goods sold only by it held not prejudicial, though complaint for money loaned charged defendants jointly.

In action for moneys loaned, plaintiffs were not prejudiced by overruling of demurrer to counterclaim solely in favor of one defendant, though complaint charged both defendants jointly, where court concluded from evidence that plaintiffs loaned no money to other defend-

ant, and that counterclaimant only sold plaintiffs goods which were basis of counterclaim.

2. Set-off and counterclaim $\S$ 42—Counterclaim solely in favor of defendant, which alone sold goods on which based, held permissible in action for moneys loaned, though complaint charged defendants jointly (Code Civ. Proc. $\S$ 438).

Where plaintiffs, suing for moneys loaned, loaned none to individual defendant, and corporate defendant only sold goods to plaintiffs, counterclaim solely in its favor for price thereof was permissible under Code Civ. Proc. $\S$ 438, though complaint charged defendants jointly.

3. Appeal and error $\S$ 907(3)—In view of presumption, failure to make certain findings cannot be considered on judgment roll appeal.

Alleged errors in not making certain findings cannot be sustained on appeal based on judgment roll; it being presumed, in favor of judgment, that no evidence was introduced which would have sustained such findings.

4. Trial $\S$ 396(3)—Findings as to when leveler was delivered and accepted and purchase price became due held not outside issues presented by counterclaim for price.

Findings that defendant, on January 27, 1922, sold and delivered to plaintiffs one leveler for agreed price, and that plaintiffs accepted delivery, and purchase price became due on March 1, 1922, when satisfactory trial was completed and term of credit expired, held not outside issues presented by counterclaim for price alleging sale and delivery within two years before June 12, 1922, to be paid for nine days after trial, which was had more than 60 days before June 13, 1922.

5. Appeal and error $\S$ 931(3)—Trial court will be deemed to have inferred facts supporting judgment from facts found, and appellate court will not draw contrary inference therefrom.

Trial court's findings will be construed to uphold, rather than defeat, its judgment thereon, and, when other facts supporting judgment may be inferred from facts found, such inference will be deemed to have been made by court, and appellate court will not draw therefrom any contrary inference.

6. Appeal and error $\S$ 544(1)—Whether court should have made finding giving allowances as for credit terms on goods sold cannot be considered on appeal on judgment roll.

Whether court should have made finding giving plaintiffs allowances as for terms of credit on levelers, for price of which defendant counterclaimed, cannot be considered on appeal based on judgment roll; record showing no evidence of any term of credit.

7. Appeal and error $\S$ 1071(6)—Plaintiffs, recovering nearly \$50 more than entitled to, were not prejudiced by absence of finding entitling them to \$3.25 interest.

Plaintiffs, given judgment for nearly \$50 more than they were entitled to, in action for moneys loaned, were not prejudiced by error, if any, in not finding them entitled to credit

terms on sale of goods for price of which defendant counterclaimed, where they were thereby deprived of no more than \$3.25 interest on amount of their loans.

8. Appeal and error ☞704(2)—Party claiming that findings contradicted pleadings should bring up evidence.

Party claiming that findings improperly contradicted pleadings should bring up evidence, so that court of review can see whether any errors were committed.

9. Sales ☞365—Findings that levelers were delivered on January 17th and 27th, and that buyers accepted delivery March 1st, held not contradictory.

Findings that levelers, for price of which defendant counterclaimed, were sold and delivered to plaintiffs on January 17th and 27th, and that plaintiffs accepted delivery on March 1st, held not contradictory, though not clear as to date of delivery.

10. Sales ☞365—Findings that articles were delivered within two years "last past," and delivery accepted on certain date, held to show delivery before filing of counterclaim for price; reference being to date of filing complaint.

Findings, signed December 29, 1923, that defendant sold and delivered articles, for price of which it counterclaimed, within two years last past, and that plaintiff accepted delivery on or about May 1, 1922, held not insufficient to support judgment on counterclaim as not showing delivery before filing thereof; language being referable to date of filing of complaint June 12, 1922.

11. Set-off and counterclaim ☞55—Debtor's noninterest-bearing claim should be set off against creditor's interest drawing claim as of date of maturity.

Debtor's noninterest-bearing claim should be set off against creditor's interest drawing claim as of date it became due and owing.

12. Interest ☞47(1)—Filing of counterclaim for price of articles sold constitutes "demand," required to entitle seller to interest (St. 1919, p. lxxxiii, § 1).

Filing of counterclaim for price of articles sold to plaintiffs constitutes demand, required by St. 1919, p. lxxxiii, § 1, to entitle seller to interest, as of date of filing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Demand.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Walter M. Willett and another against the Schmeiser Manufacturing Company and another. From the judgment entered, plaintiffs appeal. Affirmed.

A. C. Lowell, of San Francisco, for appellants.

Grant & Bailey, of Woodland, for respondents.

STURTEVANT, J. The plaintiffs commenced an action to recover a judgment for moneys loaned. The defendants appeared separately and answered. The Schmeiser Manufacturing Company in its answer set up a counterclaim in three different counts. A trial was had before the trial court sitting without a jury. Findings were made in favor of the plaintiffs on their two separate causes of action, and in favor of the defendant the Schmeiser Manufacturing Company on its counterclaim, and against the plaintiffs and in favor of the defendant T. G. Schmeiser. A judgment was entered in accordance with the findings, and the plaintiffs have appealed on the judgment roll. The appellants enumerate sixteen alleged errors. They may be classified as follows: (1) That the trial court erred in overruling their demurrer to the counterclaim of the defendant corporation; (2) in failing to make certain findings; (3) that it made certain findings outside of the issues; (4) that certain findings contradicted the pleadings; (5) that certain findings are conflicting; (6) that the findings do not support the judgment; and (7) that the judgment in favor of the Schmeiser Manufacturing Company should not have included interest prior to the date of the filing of the counterclaim by that company. We will discuss the several points as classified by us in the order stated.

[1, 2] The plaintiffs assert that their complaint was an action by them charging the defendants jointly. They assert that the counterclaim was for a claim solely in favor of the company, and, as such, that it was not permissible because it did not run in favor of both defendants. It is not at all clear that plaintiffs' complaint charged the defendants jointly. Conceding, solely for the purposes of this decision, that it did and that the trial court erred in overruling the demurrer interposed by the plaintiffs, the alleged error was without prejudice. As will hereinafter appear, on the trial, and after hearing the evidence, the trial court reached the conclusion that T. G. Schmeiser was not loaned any moneys by the plaintiffs, and that it was the company and not T. G. Schmeiser that sold the plaintiffs the goods, wares, and merchandise which were the basis of the counterclaim. Therefore the action was one in which the counterclaim was permissible. Code Civ. Proc. § 438; *Roberts v. Donovan*, 70 Cal. 108, 114, 9 P. 180, 11 P. 599.

[3] The alleged errors to the effect that the trial court failed to make certain findings cannot be sustained on this appeal. As recited above, the appeal is based on the judgment roll. On such a record it will be presumed in favor of the judgment that no evidence was introduced which would have sustained the findings which the plaintiffs claim should have been made.

[4] The appellants claim that the trial court made findings outside of the issues. We think it did not do so. The record is not a model, but it can be understood. The counterclaim in legal effect alleges:

"That within two years prior to June 12, 1922 (the date the action was commenced), the defendant sold and delivered to the plaintiffs one leveler for the agreed price of \$1,085 to be paid for in cash nine days after trial had; that the trial was had more than 60 days before June 13, 1922; that the price has not been paid, and is now due and payable."

On those subjects the findings are: That on or about January 27, 1922, defendant Schmeiser Manufacturing Company sold and delivered to the plaintiffs one leveler for the agreed price of \$1,085; that plaintiffs accepted delivery on March 1, 1922 (that is, on that date a satisfactory trial had been completed and the term of credit expired); that the purchase price became due and payable March 1, 1922. A similar set of facts is presented as to the other leveler. Similar reasoning is applicable.

[5-7] As to this branch of the case the rule to be followed is stated as follows:

"The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment, this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment." *Breeze v. Brooks*, 97 Cal. 72, 77, 31 P. 742, 744 (22 L. R. A. 257).

If we have erred in the foregoing reasoning, the error rests in this, that the date of acceptance is a term narrower than we have used, and that the trial court should have made a finding giving the plaintiffs an allowance, as for a term of credit, of nine days on the ten-foot leveler and two weeks on the other leveler. To that suggestion there are two answers. In the first place, on the record before us we do not know that there was any evidence produced showing any term of credit. In the second place, assuming that the trial court erred when it found that the date of acceptance and the due date coincided and that the plaintiffs should have been allowed the terms of credit as pleaded, then the fact would be that the plaintiffs have, by such findings, been deprived of interest for a maximum period of two weeks on \$1,100 (the amount of their loans) at 7 per cent. or a total sum of not to exceed \$3.25. However, as we shall presently see, they were given a judgment that was nearly \$50 more favorable to them than it should have been, and they have not been prejudiced by the error.

[8] The plaintiffs claim that certain findings contradicted the pleadings. That is fre-

quently true. However, if a party would claim that the findings improperly contradicted the pleadings, that party should bring up the evidence that a court of review can see whether any errors were committed.

[9] The plaintiffs call to our attention the fact that, as to the levelers the trial court found that they were "sold and delivered" January 17, 1922, and January 27, 1922, respectively. They then note that it also found that "plaintiffs accepted delivery" of the levelers on March 1, 1922. Thereupon they argue that the findings are contradictory. That does not necessarily follow. The findings may not be clear as to the date of delivery, but they are not contradictory.

[10] The same condition of the pleadings and of the findings exists as to the remaining implements which are the subject matter of the counterclaim. However, the plaintiffs attack the findings as to the sales of those implements as insufficient to support the judgment. The findings as to the items mentioned in finding No. 5 and finding No. 6 are framed in the same form. Each one is "that within two years last past the defendant Schmeiser Manufacturing Company sold and delivered (naming articles). That plaintiff accepted delivery of (naming articles) on or about May 1, 1922. * * *" The complaint was filed June 12, 1922. The findings were signed December 20, 1923. The plaintiffs contend that the foregoing record does not show a delivery before the filing of the counterclaim. It certainly does. The language used was referable to the date of the filing of the complaint—not to the date the findings were signed. *Metropolis, etc., Sav. Bank v. Barnet*, 165 Cal. 449, 453, 132 P. 833.

[11, 12] This brings us to the point last discussed in the briefs. How was the item of interest to be computed? In the first place, there is an old rule, which must be borne in mind, and then there is a new rule, which must also be borne in mind. The old rule is as follows:

"The claim of the debtor not bearing interest, should be set off against that of the creditor drawing interest, as of the date of the time it became due and owing." *Waterman on Set-Off* (2d Ed.) § 663.

As found by the trial court, the two loans of the plaintiffs, \$100 made in February 27, 1922, and \$1,000 made March 1, 1922, each bore interest at seven per cent. As found by the trial court, the price on each leveler was "due and owing" on March 1, 1922. The total was \$2,085. On the date last mentioned the amount of the loans made by the plaintiffs, principal and interest, was \$1,100.06. The difference between those totals was \$984.94. Until demand made by it the defendant was not entitled to interest. *Stats. 1919, p. lxxxiii, § 1*. However, the filing of its counterclaim constituted a demand as of the date it was filed, June 30, 1922. *Burks v. Weast*,

67 Cal. App. 745, 752, 228 P. 541. On that date there was due defendant \$984.94, the balance above mentioned, and also the cost of the other implements included in the counterclaim, \$1,950 or the total sum of \$2,934.94. The findings were signed December 20, 1923. The interest, on the balance due, \$2,934.94, at seven per cent. for the period elapsing between the date the counterclaim was filed and the date of the findings, would be \$302.44, and the total amount of principal and interest would be \$3,237.38. However, the trial court allowed the defendant only \$3,191.76. The judgment was more favorable to the appellants than the record warranted.

We find no prejudicial error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

82 Cal. App. 306

STEWART et ux. v. SPANO. (Civ. 4408.)

District Court of Appeal, Second District, Division 2, California. April 12, 1927.

1. New trial ☞138—On failure to notify of entry of judgment held to prevent running of time for filing notice of intention to move for new trial (Code Civ. Proc. § 659).

Under Code Civ. Proc. § 659, where notice of entry of judgment was not given, time within which notice of intention to move for new trial could be filed never commenced to run.

2. Appeal and error ☞345(1)—Failure to give notice of intention to move for new trial within 60 days after entry of judgment held to bar appeal (Code Civ. Proc. §§ 659, 939).

Under Code Civ. Proc. § 939, time for taking appeal from judgment runs from actual entry of judgment and not from notice thereof, and, if notice of intention to move for new trial is not filed within 60 days after entry of judgment, right of appeal is forever lost, regardless of fact that time within which notice of intention to move for new trial never commenced to run, under section 659, because of failure to give notice of entry of judgment.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by T. G. Stewart and wife against Joseph Spano. From a judgment for plaintiffs, defendant appeals. Appeal dismissed.

Joseph A. Allard, of Pomona, Allen J. Mitchell, of Los Angeles, and Nichols, Cooper, & Hickson, of Pomona, for appellant.

Ralph E. Homann, of Los Angeles, and Isaac Jones, of Ontario, for respondents.

WORKS, P. J. There is pending in this action a motion to dismiss the appeal. The moving papers show that the judgment from which the appeal is attempted to be taken was entered July 12, 1922; that on July 14 notice that the judgment had been signed by

the judge who tried the action was mailed by respondents' counsel to appellant's counsel; that on November 14 a notice of intention to move for a new trial was filed by appellant; and that the notice of appeal from the judgment was filed on February 15, 1923.

[1, 2] It will be observed that the record fails to show that notice of the entry of judgment was ever given. Therefore the time within which a notice of intention to move for a new trial could be filed never commenced to run. Code Civ. Proc. § 659. Nevertheless, no proceedings for a new trial were pending here within the meaning of the provision contained in section 939 of the Code of Civil Procedure, to the effect that the time within which to appeal from a judgment does not expire until the lapse of a certain period after disposition is made of a motion for a new trial. This provision has no application to a case in which the notice of intention is not given until more than 60 days after the entry of judgment. In such a situation the right of appeal is forever lost at the expiration of the 60 days, as under other language of section 939 the time for taking an appeal from a judgment runs from the actual entry thereof, and not from notice of such entry. Ransom-Crummey Co. v. Beggs, 185 Cal. 279, 196 P. 487; Smith v. Questa, 58 Cal. App. 1, 207 P. 1036.

The appeal is dismissed.

We concur: THOMPSON, J.; JOHNSON, Justice pro tem.

82 Cal. App. 381

ORTON et al. v. DABNEY. (Civ. 4833.)

District Court of Appeal, Second District, Division 1, California. April 12, 1927.

1. Appeal and error ☞1050(1)—Overruling objection to question as calling for conclusion held not ground for complaint, where circumstances show conclusion correct.

The circumstances so strongly supporting the "conclusion" that error in overruling objection to question as calling for "conclusion" becomes unimportant, it is not available as ground of complaint.

2. Mines and minerals ☞75—Application for, and extension of, mining lease held part of single agreement, so former is not superseded by latter (Civ. Code, § 1625).

Written offer or application by lessee for extension of mining lease and the written extension held, under the circumstances, to be parts of single agreement, so that offer is not superseded under Civ. Code, § 1625, as a mere part of negotiations.

3. Mines and minerals ☞75—Waiver in application for extension of mining lease of right to notice of termination of lease held to control in interpretation of more general term of extension.

Specific provision in application for extension of mining lease that, if drilling has not been

started by certain date, lease shall be void, and lessee will deliver quitclaim without notice, controls in the interpretation of the more general terms of the extension, the two being parts of single agreement.

4. Evidence — 416—To determine whether instruments were parts of same contract resort may be had to circumstances of execution.

Where it cannot be determined from inspection whether several instruments were intended to be parts of single contract, resort may be had to evidence of the circumstances under which they were executed.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Clarence Orton and others against Henry R. Dabney. Judgment for plaintiffs, and defendant appeals. Affirmed.

Henry Harris, of Los Angeles, for appellant.

Head, Rutan & Scovel, of Santa Ana, for respondents.

YORK, J. The defendant appeals from a judgment rendered against him in favor of the respondents quieting title to certain real property, and also a judgment in the sum of \$1,130 as and for rent under an oil lease covering such real property.

The respondents, or, in some instances, their vendors, had executed a so-called community oil lease to the appellant, for which they had received approximately \$9,000. Subsequently the respondents, in consideration of appellant agreeing to pay \$10 per month per lot, executed what purported to be an extension of that lease. Appellant contends the respondents have no cause of action, and were entitled to no relief because respondents had failed to give appellant a written notice of his failure to perform and of their intention to enforce a forfeiture for that failure; appellant contending that the giving of 30 days' notice was a condition precedent to the right of respondents to declare the lease forfeited and re-enter the land. Appellant raised the question by demurrer to the complaint, and by objecting to the introduction of any evidence at the time of trial. The demurrer was overruled, as was the objection. The exact day of the month the original lease was signed does not appear in the record, except that the lease upon its face purports to be signed "on the ——— day of February, 1921."

The complaint recites the ownership of the property, the making of the lease—setting it out in *hæc verbè*—and in said complaint they set out the execution of an extension of said lease wherein and whereby the period for commencing drilling operations under said lease was extended to the 23d day of March, 1922; and they allege further in the complaint that no drilling operations were commenced upon the said real property

before or on the 23d day of March, 1922, and that no drilling operations had been commenced since the 23d day of March, 1922. The complaint was verified upon the 22d day of May, 1922, and filed the same day. Evidence as to the contents of such extension was introduced at the time of the trial, and, although there was objection thereto, the trial court found against all of the contentions of the appellant, and same was properly admitted, for the reason that there was introduced in evidence a letter signed by appellant stating that on, to wit, October 4, 1921, the date for drilling under the original lease had expired; that, after the receipt of this signed statement, the extension referred to was obtained apparently upon the strength of the statements made in the letter or offer signed by the appellant. The undisputed evidence shows that the appellant failed to commence drilling operations within the time limited under the offer and extension granted, or at all, and his interest to the land was ended before the suit was filed. But the lease, having been recorded, cast a cloud upon the plaintiffs' title, and it was necessary for them to file suit to quiet title in order that it might appear of record that the contingency upon which the lease had been given, and upon which it had terminated, had occurred; yet the appellant had refused to deliver, and had not delivered, a quitclaim deed, as he agreed to do in the extension and offer. The objection to the offer which was introduced as Exhibit 2 herein was predicated on the ground that it was an attempt to vary the terms of the written instrument introduced as Plaintiffs' Exhibit 3. It was a part of the written negotiations entered into between plaintiffs and defendant after the failure of defendant to drill under the original lease; the only thing done by defendant in connection with the drilling being merely the deposit of certain lumber upon part of the property covered by the lease, which lumber was later removed on account of the failure of defendant to pay for same. The evidence in this case therefore practically shows an abandonment by defendant. Read together with the lease, the offer preceding the extension and the extension itself allow us to reach no other conclusion than that it was intended that the lease and all terms thereof should become null and void, if drilling operations were not actually started within the time limited; that is, that all rights of defendant were absolutely terminated upon his failure to commence drilling by March 23, 1922. The extension reciting the facts as to ownership of land more than covers any objection that might be made upon the ground that notice was to be given of the signing of 75 per cent. of the owners of land described in the lease. No question was raised in appellant's brief as to the validity of the judgment of \$1,130, and there-

fore we make no special comment as to the appeal from that portion of the judgment.

And particularly as to any question of necessity for notice, and as to any question of a showing of satisfactory title vested in the lessors to not less than 75 per cent. of the lots included in block 1002, Vista Del Mar Tract, Huntington Beach, Cal., it is a matter that is fully covered by the recitals in the so-called "extension for lease" in evidence, including both the Plaintiffs' Exhibits 2 and 3, which the trial court for the reason heretofore given properly held were to be construed together—and such lease and such extension, read together, do away with any necessity for either notice of failure to drill or question of title, as therein is recited the full data as to ownership, and it is therein provided that drilling must be started on a day certain, and payment of rental must be made as therein set out. And the drilling was not commenced as specified, or at all, and default was made in payment of rental due.

The judgment of the trial court is therefore affirmed.

CONREY, P. J. I concur in the judgment. Concerning the facts as stated in the main opinion, it should be added that the witness J. H. Stewart testified that the lumber was not placed on the leased land. Also, since the extension agreement, which was signed by defendant as well as by the plaintiffs, contained a recital that the extension was to run from the 23d day of September, 1921, this was an admission that the time limited by the original lease for beginning of work by lessee had expired at that date; and was an implied admission that the showing of "satisfactory title," necessary to start time running on the original time limit for beginning of work by lessee, had been completed at least 90 days before September 23, 1921.

It was provided in the lease as follows:

"In the event lessee shall fail to fully perform any covenant or condition hereof on his part to be kept, performed or observed, and except as hereinafter provided, and the lessors desire to enforce a forfeiture on account of such failure to perform and observe, the lessors shall give the lessee notice in writing of such failure to perform and observe, and of lessors' desire to enforce a forfeiture by reason thereof, and if within thirty (30) days thereafter lessee has not remedied the breach so complained of, or performed and observed, the requirement the breach of which is so complained of, then the lessee shall, at lessors' option, forfeit all rights in and to this lease, and this lease shall terminate and be at an end. * * *"

The lease also contained an agreement concerning a possible extension of the lease in terms as follows:

"It is further agreed, however, that the time for the commencement of such work may be extended at the election of the lessee for an ad-

ditional period, not to exceed three (3) months, in consideration for which extension the lessee shall pay the lessors the sum of ten (\$10.00) dollars per month per lot. It is further mutually agreed between the parties hereto that if drilling operations for oil are not actually started on the premises within the said three (3) months, or said extended period of three (3) months additional time above mentioned, this lease and all the terms herein shall become null and void with no further effect on the lessors hereto."

It will be noted that the agreement subsequently made for extension of the lease was for a period of 6 months, and was not merely limited to the originally contemplated extension of 3 months. The extension agreement says:

"And whereas, the final date allowed for commencing drilling operations under said lease was September 23, 1921, and whereas, Henry R. Dabney is desirous of securing an extension of said lease for an additional period, not to exceed six months from September 23, 1921, under the same terms and conditions and rentals as specified under the lease above mentioned, * * * we hereby renew said lease and grant an extension of the time in which drilling operations are to be commenced, up to and including the 23d day of March, 1922; it being understood and agreed by all of the parties hereto that the lease above mentioned is to continue and hold in force the same as the original time with regard to all other terms and conditions mentioned therein and stipulated therein to be performed, including the rental and royalty to be paid."

The principal contention and ground of appeal by appellant is that, by reason of the terms of the original lease, together with the terms of the extension agreement, the right of the lessors to enforce forfeiture and termination of the lease on account of the failure to commence drilling operations on or before March 23, 1922, is conditioned upon the giving of notice of the desire of lessors to enforce such forfeiture, just the same as if, without any agreement of extension of the lease, the lessors had attempted to enforce the forfeiture by reason of failure to begin drilling operations within the period of time specified in the original lease. Respondents, on the other hand, contend that, by the terms of the extension agreement, the lease on and after March 23, 1922, became null and void by operation of the extension agreement itself; and further contend that their interpretation of the lease and extension agreement is confirmed and made certain by reason of a written offer addressed to J. H. Stewart, by means of which appellant applied for, and obtained, the extension agreement. For the purpose of establishing their interpretation of the extension agreement, appellants offered in evidence, and the court, over the objection of respondent, received in evidence, the said written offer, together with testimony explaining the circumstances under which said written offer was made.

From this evidence it appears that J. H. Stewart, who was one of the lessors, not only represented the lessors in the negotiation for said extension agreement, but also was paid a sum of money by appellant to assist appellant in obtaining such extension. In this written offer, dated October 4, 1921, appellant said:

"It is further agreed that the provision in the parent lease regarding the 'failure to fully perform any covenant or condition to be kept' under said lease by me shall have no effect as to the final date under which drilling operations are to be started under said extension. In other words, on March 23, 1922, if drilling operations have not been started, this lease or extension of lease is to be null and void, without privilege of a period of grace or without any recourse, and I agree to deliver a quitclaim deed on said date to said demised property without any notice from the landowners if I have not started drilling operations by that time."

[1] Stewart used this written offer in his negotiations with the lessors, and they all saw it before they signed the extension agreement. In order to more conveniently distribute this information to the numerous lessors, appellant gave Stewart several copies of said written offer. Stewart testified that, based on this offer, he and the other owners granted the extension. Appellant objected to the question calling for this statement, as a question calling for the conclusion of the witness. Technically, this was a good objection, at least as to the other owners, but the circumstances so strongly support the "conclusion" that the error in the court's ruling becomes unimportant.

[2-4] Appellant contends that the admission in evidence of said written offer was directly in violation of section 1625 of the Civil Code, which reads as follows:

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." As illustrating the point, appellant cites, among other cases, *Newhall v. Burns*, 31 Cal. App. 549, 161 P. 14, wherein this court said: "Where an agreement extending the time for making payment of an instalment of the purchase price of real property expressly provided that the agreement was 'subject to all of the terms, covenants, and conditions' of the original contract of sale, such provision had the effect of carrying into such agreement all of the terms and conditions of the original contract, including the provision that time was of the essence of the contract, and no express declaration in such agreement to that effect was essential."

So here it is argued that, as the extension agreement, after providing for the time to which the lease was extended, provided that the lease was to continue in force "the same as the original time with regard to all other terms and conditions mentioned therein and stipulated therein to be performed," the condition and requirement of notice preceding forfeiture, as stated in the original lease, is equally applicable to the term as extended.

While the general rule is as stated in section 1625 of the Civil Code and in the decisions cited by appellant, their application to the present case is controlled by the fact that the written offer or application for extension of the lease, and the written extension itself, when executed under the circumstances to which I have referred, are but parts of one single contractual transaction; each of them being, and by the parties intended to be, part of the agreement. The written offer signed by appellant directly and specifically declared a waiver by appellant of his right to notice of termination of the lease in case he failed to start drilling operations within the time limited. This waiver should control in the interpretation of the more general terms of the extension agreement as signed by the lessors. The decision on this point should be governed, and, in my opinion, it is governed, by the rule that several contracts relating to the same matter, between the same parties, and made as parts of substantially one transaction, are to be taken together. As was said in *Torrey v. Shea*, 29 Cal. App. 313, 316, 155 P. 820, 821, the question as to whether or not several instruments between the same parties were contemporaneously executed and intended by the parties thereto to cover a single transaction oftentimes cannot be ascertained from an inspection of the instruments themselves; "and consequently, if the intention of the parties be either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made, for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments." See, also, *Greathouse v. Daleno*, 57 Cal. App. 187, 206 P. 1019; *Spotton v. Dyer*, 42 Cal. App. 585, 588, 184 P. 23; *Merkeley v. Fisk*, 179 Cal. 748, 754, 178 P. 945.

For the reasons above stated, I concur in the judgment of affirmance herein.

I concur: HOUSER, J.

82 Cal. App. 265

JONES v. COONEY et al. (Civ. 5308.)★

District Court of Appeal, Second District, Division 1, California. April 11, 1927.

Hearing Denied by Supreme Court June 9, 1927.

Municipal corporations §187—Police chief, retired at half pay, held entitled to increase in pension when chief's salary was raised.

One, retired from police department of Los Angeles at half pay when salary as chief of police was \$400 per month, held not limited to half that sum, but entitled to increase in pension when salary of chief was raised to \$500 per month.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Mandamus by Charles A. Jones against P. J. Cooney and others, substituted for O. M. Souden and others, to require defendants, as the Fire and Police Pension Department of the City of Los Angeles, to increase petitioner's pension. Judgment for petitioner, and defendants appeal. Affirmed.

Jess E. Stephens, City Atty., and Claude H. McFadden, Deputy City Atty., both of Los Angeles, for appellants.

John B. Haas, and John D. Home, both of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a judgment which resulted from the issuance of a peremptory writ of mandate in the court below.

The following facts are taken nearly verbatim from the statement of the case appearing in appellant's opening brief:

Charles A. Jones, the respondent herein, for many years was a member of the police department of the city of Los Angeles. On or about the 4th day of January, 1922, he was the duly appointed, qualified, and acting chief of police in said city, at which time he was regularly retired from further service in said police department; that at the time of his retirement he had served more than 20 years in said police department, and at said time there was in effect an ordinance of the city of Los Angeles which, among other things, provided as follows:

"Whenever any member of the police department, as defined in section 13 hereof, shall have served for twenty (20) years or more in the aggregate in any capacity or rank whatever, said commission shall, upon his written request, or without such request if it be deemed for the good of said department, order and direct that such person be retired from further service in the police department. From the date of making such order, or from the date such order becomes effective, the services of such person in the police department shall cease, and such person so retired shall thereafter during his lifetime be paid from such fund a yearly pension equal to one-half of the amount of the

salary attached to the rank or position which he may have held in said police department at the time of such retirement. Such pension shall be payable in equal quarterly installments.
* * *

It also appears:

That at the date of respondent's retirement the salary attached to the rank of chief of police was the sum of \$400 per month; that after the retirement of respondent, to wit, on the 8th day of November, 1922, there was adopted by the electors of the city of Los Angeles an amendment to the charter of said city, which said amendment, among other things, contains the following provision:

"* * * The provisions as herein in this charter contained shall apply to all members of the fire and police departments as in this section defined, and to all members of said departments who have heretofore been granted pensions: Provided, however, that all pensions granted heretofore and still in operation shall remain and continue to operate the same as when granted."

That on the 13th day of November, 1923, there became effective as an ordinance of the city of Los Angeles an ordinance increasing the salary of the chief of police of said city from \$400 to \$500 per month; that on June 12, 1924, respondent presented to the official body of the city of Los Angeles, having jurisdiction thereof, to wit, to the fire and police pension department of the city of Los Angeles, composed of appellants herein other than Ned T. Powell and John S. Myers, and to said Ned T. Powell as treasurer, and to John S. Myers as auditor, of the city of Los Angeles, a demand for the sum of \$328.33, which sum respondent claimed as due to him between the 13th day of November, 1923, and the 12th day of June, 1924, because of the increase as aforesaid in the salary of the chief of police of said city of Los Angeles; that thereupon the said fire and police pension department rejected respondent's demand, and the said Ned T. Powell, as treasurer of the city of Los Angeles, refused to pay the same, and the said John S. Myers, as auditor of the said city of Los Angeles, refused to audit said demand, on the ground that respondent was not entitled to the sum as set forth in said demand, and that respondent was entitled to only one-half of the sum of \$400 per month and was not entitled to one-half of the sum of \$500 per month, said latter sum at said time being the amount of the salary of the chief of police of the city of Los Angeles, as provided in the ordinance to which reference heretofore has been had herein; that thereafter respondent instituted an action in mandamus to compel appellants to allow, audit, and pay the claim of respondent as aforesaid, which action resulted in a judgment that a peremptory writ of mandate should issue requiring appellants to approve, audit, and pay said demand of respondent. As hereinbefore noted, this appeal is from that judgment.

The question is not a new one in this jurisdiction. Either directly or in principle it has been ruled upon adversely to each of the contentions of appellants in each of the following cases: *Aitken v. Roche*, 48 Cal. App. 753, 192 P. 464; *Rumetsch v. Davie*, 47 Cal. App. 512, 190 P. 1075; *Whitehead v. Davie*, 189 Cal. 715, 722, 209 P. 1008; *Klench v. Board of Pension Fund Commissioners* (Cal. App.) 249 P. 46; *Home v. Souden* (Cal. Sup.) 250 P. 162.

Whatever may be the rule in other jurisdictions, the attention of this court has been attracted to no case decided by any court in this state which detracts from the line of authority as announced by the cases to which reference has been had. It would serve no useful purpose to restate the reasons for such decisions which have been so ably presented.

Relying, therefore, upon such authorities, it is ordered that the judgment be and it is affirmed.

We concur: CONREY, P. J.; YORK, J.



82 Cal. App. 356

RUTLEDGE et al. v. BARGER et al.
(Civ. 3240.)

District Court of Appeal, Third District, California. April 15, 1927.

1. Forcible entry and detainer ☞11(1)—Demand for surrender of premises is unnecessary before commencement of action of forcible entry (Code Civ. Proc. § 1159).

In action of forcible entry under Code Civ. Proc. § 1159, no notice or demand for surrender of premises is necessary before action is commenced.

2. Forcible entry and detainer ☞4—Breaking of lock to enter building held to constitute forcible entry.

Allegations and proof showing that defendants broke lock in order to enter building held sufficient to show forcible entry.

3. Landlord and tenant ☞112(2)—In lessees' action of forcible entry, lessors' acceptance of payment of money due for water held to waive default.

In action of forcible entry against lessors, lessees' payment and lessors' acceptance of money due for water held to waive default in such payment.

4. Landlord and tenant ☞76(3)—Requirement of lessors' written consent to assignment by lessees held waived by accepting rentals with knowledge.

Lessors, by accepting rentals due and payable under lease with knowledge of assignment, held to waive necessity of written consent to such assignment required by terms of lease.

5. Husband and wife ☞214—Forcible entry judgment against husband and wife as lessors held justified, though wife did not actively participate in actual entry.

In action of forcible entry against lessors, judgment against defendant wife, as well as husband, held justified, in view of record, though she did not actively participate with him in forcible entry.

6. Trial ☞66—Reopening case, on plaintiffs' unsupported motion, for introduction of further evidence, held not abuse of discretion.

Reopening case, on unsupported motion of plaintiffs, for introduction of further evidence, held not abuse of discretion, where defendants were not prejudiced, since it was within discretion of court to reopen case on its own motion.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by W. P. Rutledge and others against C. A. Barger and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

P. J. Wilkie, of Sacramento, for appellants.
Elliott, Atkinson & Sitton and W. A. Latta, all of Sacramento, for respondents.

FINCH, P. J. This is an action of forcible entry upon real property consisting of a lot and a store building thereon. Judgment was entered in favor of plaintiffs for restoration of possession and for damages. The defendants have appealed from the judgment.

The evidence shows and the court found that in December, 1923, the defendants, as owners, leased the property to W. P. Rutledge and James Tully (plaintiffs herein) and William Fehr and C. O. Thomson, for a term of three years; that the lessees went into possession under the lease and conducted a grocery and general merchandise business in the building; that in December, 1925, Fehr and Thomson transferred their interest in the property and business to the plaintiffs; that the plaintiffs "ever since said transfer have held said premises and paid to the defendants, and said defendants with knowledge of said transfer accepted, all rentals due and payable under said lease; and said plaintiffs up to the 18th day of June, 1926, have held and occupied the said store and premises as tenants pursuant to the terms of said written lease; that on or about the 18th day of June, 1926, during the temporary absence of plaintiffs from said store building the said defendants did wrongfully, unlawfully, forcibly, and without right, and by force and violence, break open the doors of said store building and tear off the lock on said doors, and by forcible means and methods entered upon said real property then in the actual undisturbed and peaceable possession of plaintiffs, and did oust and eject plaintiffs from possession thereof"; that the

"defendants removed from said store building all the goods, wares, and merchandise therein contained belonging to plaintiffs and deposited them in the rear of the adjoining premises"; that by reason of the acts of defendants the plaintiffs have been damaged in the sum of \$314.72.

Appellants contend that the court erred "in overruling defendants' demurrer to the complaint, * * * in denying defendants' motion for a nonsuit, * * * in reopening the case on the unsupported motion of the plaintiffs, * * * in denying defendants' motion for a new trial."

[1, 2] In support of the first ground it is urged that the "complaint attempts to set up a cause of action for forcible entry and unlawful detainer, under the provisions of subdivision 2 of section 1160 of the Code of Civil Procedure," and that it does not allege that the plaintiffs demanded a surrender of the premises before the action was commenced. It is clear that the action is one of forcible entry, defined by section 1159 of the Code of Civil Procedure. No notice or demand was necessary. 11 R. C. L. 1169. It is contended that there was no show of force, threat, or intimidation alleged. It is alleged and the uncontradicted testimony shows that the defendants broke the lock in order to enter the building. This was sufficient to constitute a forcible entry. *California Products, Inc., v. Mitchell*, 52 Cal. App. 312, 314, 198 P. 646.

[3] Appellants contend that the plaintiffs were in default at the time of the forcible entry, and that, therefore, the defendants, under the terms of the lease, had the right to take possession of the premises. Plaintiffs had paid all installments of rent as they became due, but they had failed to pay for water used by them. On the day of defendants' entry they demanded such payment and the plaintiffs paid the same. King testified that such payment was made and accepted prior to defendants' entry. By accepting the payment the defendants waived the default.

[4] The lease contained a covenant against assignment by the lessees without the written consent of the lessors. Such written consent was not given, but Mrs. Barger was employed by plaintiffs in their business and Mr. Barger was "in and out" of the store after Fehl and Thomson had transferred their interests to the plaintiffs. During all that time King was in charge of the store and each month he paid the rent to Mr. Barger; the checks given in payment thereof being signed by King. The evidence is sufficient to support the finding that "said defendants, with knowledge of said transfer, accepted all rentals due and payable under said lease." They thus waived the necessity of a written consent to the transfer. 16 R. C. L. 838.

[5] The evidence does not show that Mrs.

Barger actively participated in the forcible entry. Appellants contend that, therefore, the judgment against her is unauthorized. The defendants are husband and wife. The lease recites that the property in suit is "owned by said first parties." Mr. Barger acted for the lessors in all matters pertaining to the lease. The defendants answered jointly. The answer contains no denial by Mrs. Barger of responsibility for the acts of her husband, and the efforts of both defendants at the trial were directed toward the justification of such acts. It does not appear from the record that any contention was made at the trial that Mr. Barger was not acting for both defendants in forcibly taking possession of the premises, but the only inference to be drawn from the evidence is that he was so acting for both. Under such circumstances, the court was justified in holding both defendants liable for the damages suffered.

[6] It was not an abuse of discretion to reopen the case for the introduction of further evidence. It does not appear that the defendants were prejudiced thereby. The character of the showing made by the plaintiffs in support of their motion to reopen the case is immaterial, in view of the fact that the motion was granted, because it was in the discretion of the court to reopen the case on its own motion. *Badover v. Guaranty Trust, etc., Bank*, 186 Cal. 775, 777, 200 P. 638.

Defendants moved for a new trial, but offered nothing in support thereof, except the record of the trial. What has already been said, therefore, disposes of appellants' contention that it was error to deny a new trial.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

82 Cal. App. 324

BERRATA v. SALES et al. (Civ. 3232.)★

District Court of Appeal, Third District, California. April 13, 1927.

Hearing Denied by Supreme Court June 9, 1927.

1. Municipal corporations ~~§~~ 601—Compliance with procedure established by general law is requisite to validity of zoning ordinance under city charter of Petaluma (*Petaluma City Charter*, art. 3, §§ 19, 68; *St. 1915*, p. 708, and as amended by *St. 1921*, p. 772).

Under *Petaluma City Charter* (*St. 1911*, p. 1799), which omits to provide any procedure for adopting zoning ordinance, and provides (article 3, § 68) that, in absence of procedure for carrying out any granted or implied power, the general law shall prevail, and article 3, § 19, granting police and ordinance making powers, compliance with procedure established by general law is requisite to validity of zoning ordinance sought to be passed pursuant to *St. 1915*, p. 708, and as amended by *St. 1921*, p. 772, relating to city planning commissions and their powers.

2. Municipal corporations ☞601—Property owners are entitled to notice of proposed zoning ordinance.

Property owners are entitled to notice of proposed passage by city council of zoning ordinance limiting the use of property.

3. Municipal corporations ☞601—Published notice of zoning ordinance, not describing districts except by referring to map filed with clerk, held not "publication" within charter requirements (Petaluma City Charter, art. 6, § 12).

Publication of notice of proposed zoning ordinance, describing zones by reference to official map filed with city clerk, but not naming streets or blocks, and without publication of map, held not "publication" within Petaluma City Charter (St. 1911, p. 1799) art. 6, § 12, providing that no ordinance shall be passed until publication in full in official newspaper.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Publication.]

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Joe Berrata against W. L. Sales, individually and as Mayor of the City of Petaluma, and others, to prohibit enforcement of a zoning ordinance. Judgment for plaintiff, and defendants appeal. Affirmed.

Fred S. Howell, of Petaluma, for appellants.

E. J. Dole, of Petaluma, for respondent.

PLUMMER, J. Plaintiff had judgment in an action instituted to prohibit the defendants from enforcing a certain ordinance numbered 284, charter series, entitled, "An ordinance establishing certain districts or zones and regulating the use of property and the location of various industries and business or commercial establishments in the city of Petaluma," and the defendants appeal.

The city of Petaluma is a municipal corporation, operating under a freeholders' charter, effective in 1911 (Stats. 1911, p. 1799). On November 19, 1923, the city council of the city of Petaluma adopted an ordinance creating a planning commission, according to the provisions of the act of the Legislature of 1915 (St. 1915, p. 708), and as amended by an act approved May 27, 1921 (Stats. 1921, p. 772). See, also, act of the Legislature, approved May 31, 1917 (Stats. 1917, p. 1419). Thereafter, said commission reported to the city council a draft of a proposed zoning ordinance and also a map of the several proposed zones. On the 20th day of July, 1925, the proposed ordinance was introduced in the city council of said city of Petaluma and the zoning map just referred to filed with the city clerk. Thereafter, and on the 23d day of October, 1925, the city council ordered that said proposed ordinance be published once in full in the Petaluma Argus, a newspaper of

general circulation and the official newspaper of the city of Petaluma; that said ordinance was published on the 26th day of October, 1925; that on the 2d day of November, 1925, said purported ordinance was adopted by the city council of the city of Petaluma.

The trial court held the proposed zoning ordinance void on two grounds: (1) That the procedure provided by the act of the Legislature, approved May 31, 1917, relative to the adoption of zoning ordinances by municipalities, was not complied with; and (2) that the proposed ordinance was not published in full, as required by section 12 of article 6 of the Charter of Petaluma.

The charter of the city of Petaluma, approved by concurrent resolution of the California Assembly on the 14th day of February, 1911 (Stats. 1911, p. 1799), contains the following relative to the powers of the city: Section 19 of article 3:

"To exercise police powers and make all necessary police and sanitary regulations, and to adopt ordinances and prescribe penalties for the violation thereof."

Other sections specifying the powers of said council are also set forth, and then in the same article we find section 68, reading as follows:

"In the absence of any procedure for carrying out or effectuating any granted or implied power or authority, the general law of this state where applicable and where not inconsistent with any express provision of this charter shall prevail and shall be followed."

Section 12 of article 6 specifies that no ordinance shall be passed by the council within 5 days after its introduction, " * * * nor until its publication at least once in full in the official newspaper of the city of Petaluma," etc.

[1] The charter of the city of Petaluma contains no sections relative either to the power or procedure in adopting zoning ordinances, but assuming, without deciding, that section 19 of article 3 granted this power, irrespective of the act of the Legislature referred to, which also purports to grant to municipalities such power, the omission in the charter of any procedure for adopting such an ordinance renders section 68 of article 3 applicable, and by the terms of said section the procedure provided for in the act of the Legislature becomes the procedure that must be followed by the city council of the city of Petaluma in adopting such ordinances.

[2] The trial court found that the procedure mapped out in the act of the Legislature was not followed, in that no notice was ever given by the city council, as required by the act of the Legislature referred to. This is apparently conceded by the appellants, but the contention is made that under section 19 of article 3 of the City Charter, granting to

the city council the power to make all necessary police regulations, etc., a zoning ordinance can be adopted without following the procedure provided by the general law. We do not need to discuss whether, under section 19 of article 3 granting police powers to the city council, authority is conferred to adopt a zoning ordinance, but from the omission in the city charter to provide any procedure therefor, we must hold, as above stated, that the general law prevails, and, unless the procedure there specified is substantially followed, the proposed ordinance does not become effective. It needs no citation of authority to support the statement that notice of the proposed passage of a zoning ordinance limiting the use of property which, otherwise, naturally attaches to the property in question is a substantial matter and is one of which property owners are entitled to notice. The property owner, as has been so frequently said in other cases, is entitled to have his day in court.

[3] As hereinbefore stated, the trial court held that the proposed ordinance was not published in full, as required by section 12 of article 6 of the Charter of Petaluma. The transcript in this particular shows the following:

"Ordinance No. 284. Section 1. For the purpose of regulating and restricting the location of dwellings, businesses, commercial establishments and industries, and for the purpose of designating the location of properties to be used for certain specified purposes, the city of Petaluma is hereby divided into, and there are hereby established, districts or zones designated on a certain map to be known as 'the official zoning map of the city of Petaluma,' and it shall be unlawful, except as herein otherwise provided, to erect, construct, alter or maintain buildings, or make use of properties, or carrying on trades or callings, within the city of Petaluma except as provided by this ordinance and specified on the said official zoning map of the city of Petaluma. Said 'the official zoning map of the city of Petaluma' is filed with the city clerk of the city of Petaluma and is hereby referred to and made a part of this ordinance."

Subdivision (a) of section 1 provides a district to be known as a residence district or zone coincident with the city limits of the city of Petaluma.

Subdivision (b), relating to business or commercial districts, reads:

"A business or commercial district or zone is hereby created and designated on the official zoning map of the city of Petaluma."

The official zoning map of the city of Petaluma was not published. It will be seen from the quotations which we have set forth of the proposed zones that no streets are mentioned, and, so far as the published ordinance is concerned, it cannot be ascertained therefrom where the commercial district or business or zone created by the ordinance exist in the city of Petaluma.

On the part of the appellants it is insisted that the reference to a map on file with the city clerk is a sufficient publication, and to support this contention the case of *Chase v. Trout*, 146 Cal. 350, 80 P. 81, is cited. A reference to that case, however, shows that there is a wide distinction between the facts there considered and the facts in this case. In the case of *Chase v. Trout*, the question as to the sufficiency of a resolution of intention preliminary to ordering a street improved was held sufficient. In that case, the resolution, after naming the streets to be improved, contained, as provided by law, a description of the work, to wit:

"The [said] street" was to "be graded, graveled, and guttered in accordance with the plans and profiles on file in the office of the city engineer and specifications on file in the office of the city clerk of the city of Los Angeles. * * * That a cement curb be constructed along each line of the roadway of said street, [etc.] 'that a cement sidewalk five feet in width be constructed along each side of said street,' etc."

The court held that there was a substantial compliance with the law requiring publication, as it gave to the property owners a notice that the street or streets upon which their property abutted were to be improved, materials to be used were mentioned, and the improvements generally to be made. Here there is nothing contained in the ordinance showing the residence streets or blocks or the business streets or blocks. In the case of *Park v. Pacific Fire Extinguisher Co.*, 37 Cal. App. 112, 173 P. 615, the court had before it, in considering a street improvement proposal, a question almost identical with that which we are here considering. The resolution of intention providing for the work failed to name the streets, but referred to a map, and the court said:

"In construing this portion of the proceeding the purpose of the provision that the streets shall be named in the resolution of intention must be taken into account. That purpose seems to be the giving of information to the property owners as to the intention of the city council to improve the street in front of their property, or some other streets, the expense of which will be made a burden upon their property by taxation."

The resolution of intention was held to be fatally defective for failure to name the streets upon which the improvements were to be made and the burden of taxation imposed.

In the recent case of *O. T. Johnson Corporation v. City of Los Angeles*, 198 Cal. 308, 245 P. 164, decided in 1926, the Supreme Court held that an ordinance concerning the opening and improving of streets and fixing the burden of taxation was fatally defective for failure to contain the names of the streets, and that the omission to name the streets constituted a failure to comply with a jurisdictional requirement.

The power of municipalities to adopt zoning ordinances and the extent to which such ordinances may limit or prohibit business has been argued at length by counsel, but, from the fact that the judgment of the trial court must be affirmed for the reasons herein stated, whatever we might say as to such questions would be wholly unnecessary to the decision in this case, and could only be classed as obiter, we refrain from any consideration thereof.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

82 Cal. App. 280

Ex parte OWEN. (Cr. 973.)

District Court of Appeal. Third District, California. April 11, 1927.

Habeas corpus ¶44—Appellate court cannot issue writ of habeas corpus while similar undetermined application is pending in superior court.

Appellate court is without jurisdiction to issue writ of habeas corpus, where similar application is pending and undetermined in superior court.

Application by F. W. Owen, on behalf of Norine Owen and others, minors, for a writ of habeas corpus. Writ denied.

Busick & Leeper, of Sacramento, for petitioner.

PER CURIAM. This is an application for a writ of habeas corpus to determine the right to the custody of the minor children named in the petition. The applicant made a similar application for a writ of habeas corpus in the superior court of Sacramento county and said application is now pending in that court and undetermined. This court, therefore, is without jurisdiction to issue the writ. 29 C. J. 116.

Writ denied.

82 Cal. App. 307

WEBB v. CASASSA et al. (Civ. 3035.)

District Court of Appeal, Third District, California. April 12, 1927.

1. Sales ¶181(11)—Evidence, in action for breach of contract to deliver grapes, held to support finding against defendants on cross-complaint alleging plaintiff's failure to procure cars for shipment.

In action for breach of contract to deliver grapes to plaintiff for shipment and marketing and in payment for shook purchased from plaintiff, evidence held sufficient to support finding against defendants on cross-complaint alleging

plaintiff's failure to perform agreement to procure necessary cars for shipment.

2. Executors and administrators ¶438(10)—Lessee of vineyard on shares held not necessary party to action against lessor's executors for breach of contract in singular number to deliver grapes to plaintiff (Civ. Code, §§ 1659, 1660).

Under Civ. Code, §§ 1659, 1660, lessee of grape vineyard for half of returns was not necessary party to action against lessor's executors for breach of contract in singular number to deliver grapes to plaintiff for shipment and marketing and in payment for shook sold to lessor, though contract was executed by both lessor and lessee.

3. Assignments ¶129—Assignor of account as collateral security held proper party plaintiff in action for breach of contract.

One, assigning account against defendants as collateral security, still had interest in property assigned, and hence was proper, though not necessary, party plaintiff in action for breach of contract.

4. Parties ¶76(1)—Objection that assignor was not real party in interest entitled to sue must be presented by demurrer or answer (Code Civ. Proc. § 434).

Objection that plaintiff was not real party in interest, and hence could not sue for breach of contract, because of his assignment of account against defendants, was one of nonjoinder of necessary parties, which must be presented by demurrer or answer, under Code Civ. Proc. § 434.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by H. E. Webb against Armand Casassa and another, executors of the last will and testament of Domenico Casassa, deceased, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

W. F. Cowan, of Santa Rosa, for appellants.

H. T. Kyle, of Santa Rosa, for respondent.

FINCH, P. J. During the year 1923 Domenico Casassa was the owner of a vineyard near Santa Rosa, which he had leased for that year to A. Finocchio, the returns from the vineyard to be divided between the parties to the lease. In August of that year Casassa and Finocchio entered into an agreement with the plaintiff, designated as a "grape shipping contract," and providing, among other things, as follows:

"The undersigned grower hereby authorizes and instructs H. E. Webb, * * * as his agent to arrange for the loading in cars of the grapes hereinafter specified, to procure loading materials, to employ loading labor, to arrange for state and federal inspection, and to market said grapes upon the terms hereinafter stated. * * * The grower agrees to harvest said grapes properly and to deliver them into cars

at any shipping point to be designated by the said Webb within reasonable hauling distance from above-mentioned premises."

The agreement provided for the payment to the plaintiff of a commission for his services. It was signed by Casassa and Finocchio and also by the plaintiff. Casassa and Finocchio executed another instrument, reading as follows:

"In consideration of the sale and delivery of certain shook to me by H. E. Webb of the agreed value of \$437.50, receipt of which is hereby acknowledged, I hereby sell and agree to deliver to the said Webb—delivery to be made f. o. b. cars, in containers and condition as provided in a certain grape shipping contract * * * heretofore made by me with the said Webb—such quantity of the grapes described in said grape shipping contract * * * as shall amount in net value, at the current platform price at time and place of shipment, to the said above-mentioned sum agreed upon as the purchase price of said shook. Delivery under this sale shall comprise all of the grapes picked by me during the 1923 season beginning with the first, until sufficient quantity shall have been delivered to discharge this contract.

"No. 3,500 at 12½¢.

"[Signed] D. Casassa, Grower.
"A. Finocchio."

No grapes were delivered to the plaintiff under either contract, but Casassa and Finocchio sold their grapes to other persons. The plaintiff delivered shook to them as provided for by the second contract. The complaint alleges that Casassa and Finocchio refused to perform the terms of the first contract, to plaintiff's damage, and also that they refused to pay the amount specified in the second contract, and prays for judgment in accordance with such allegations. Copies of the contracts are attached to and made a part of the complaint. The answer does not deny the execution of the contracts. It does deny the alleged purchase of grape shook. It admits that no grapes were delivered to the plaintiff, but alleges that—

The "plaintiff was not to receive such grapes until arrangements had been made for cars in which to ship the same, and that the said plaintiff failed and neglected when said grapes were ready for shipment and market to procure necessary cars for the shipment thereof, and by reason thereof the said D. Casassa and the said A. Finocchio were compelled to and did sell the grapes * * * at a loss of \$900, more or less."

Substantially the same facts are alleged by way of cross-complaint, and judgment for defendants is demanded in the sum of \$900. Casassa died subsequent to the transactions stated and a claim against his estate was presented by the plaintiff for the amount herein demanded, but the same was not allowed by the defendant executors.

The court found that Casassa and Finocchio refused to deliver their grapes to the plaintiff, as provided in the first contract,

but that "the amount of profit which this plaintiff would have gained from a full performance of said contract upon both sides does not appear"; that Casassa and Finocchio purchased from plaintiff "3,500 grape shook at the agreed price and value of 12½ cents apiece, aggregating the sum of \$437.50; * * * but the said Casassa and Finocchio never did deliver any grapes to this plaintiff, and never did pay any part of the agreed value of said shook." The court found against the defendants on their cross-complaint. Judgment was entered in favor of the plaintiff for the sum of \$437.50, the agreed price of the shook. The defendants have appealed from the judgment.

[1] The evidence is not only sufficient to support the finding that the allegations of the cross-complaint are untrue, but wholly insufficient to support a finding that they are true. There is evidence to the effect that the shipping season for grapes, in the Santa Rosa district, opened about September 20, 1923; that rain fell on the following day and for a few days thereafter; and that "the grapes, after being rained on, would not reach their eastern destination in a marketable condition." Finocchio testified:

"Q. Did you and Mr. Casassa go to see Mr. Webb? A. One time. * * * I went down there Sunday morning, and he said he was going to open in a few days. * * * After that I waited, and about four or five days, and I went down there myself, and I don't find nobody. * * * And I waited four or five days more, and I go again, and I don't find nobody. * * * I didn't see him no more."

Appellants say that the Sunday referred to by the witness was September 16th. Defendant Domenico W. Casassa testified:

"I went * * * with my father to see Mr. Webb on account of the grapes were right to ship. * * * He * * * told Mr. Webb * * * he wanted to know what he was going to do about the grapes; that the grapes on hand now were ripe and he wanted to know what he was going to do about them. So Mr. Webb said that he had not found any price on the eastern market yet, and as soon as he could possibly find any prices that he would let my father know. * * * After three or four days * * * I met him (Webb) at his home again. * * * I asked him then what his intentions were; that my father wished to know. And he said until then he hadn't none, but in a day or so he could find out, and would let my father know."

The witness testified that the time he and his father went to see Webb was five or six days before the first rain. Mrs. Webb testified that five or six days after the heavy rain Mr. Casassa, Sr., and either Finocchio or Casassa's son, called at plaintiff's place of business, and—

"Mr. Casassa wanted to know when Mr. Webb would be ready to ship again, and Mr. Webb told him just as soon as the grapes were dry and in marketable condition, he would be glad to ship.

And he told him that he must leave them on the vines a few days to let them dry out thoroughly. * * * And then Mr. Casassa asked what the market price was, and Mr. Webb told him. * * * It was very low; I think it was between 35 and 40 f. o. b. And Mr. Casassa shrugged his shoulders, and said that he thought he could do better, and that he would wait awhile. And Mr. Webb says, 'Just as soon as your grapes are ready, let me know, and I will take care of you.' * * * He left, saying he would notify Mr. Webb."

Plaintiff offered himself as a witness, but, on objection by defendants, based upon the provisions of section 1880 of the Code of Civil Procedure, he was not permitted to testify. There is nothing in the foregoing testimony to show a failure of performance of the contract on the part of the plaintiff. It appears rather that the growers acquiesced in plaintiff's suggestion that the shipment of grapes be delayed. Neither does it appear that shipments were unreasonably delayed.

[2] Appellants contend that the shock contract is joint and not several and that, therefore, Finocchio is a necessary party. Since Casassa and Finocchio were both interested in the crop of grapes in question, they both received the benefit of anything done for their preservation and preparation for market. "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." Civ. Code, § 1659. The contract in question is in the singular number throughout. "A promise, made in the singular number, but executed by several persons, is presumed to be joint and several." Civ. Code, § 1660. Appellants rely on the case of *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 P. 1088. There is nothing in that case to sustain their contention. The presumptions mentioned in sections 1659 and 1660 are disputable. In the case cited the obligation was expressly joint and, of course, the express intention of the parties overcame the presumption that the promise was joint and several.

[3, 4] Plaintiff's account against the defendants was assigned in writing to the California Pine Box Distributors, as collateral security. That company thereafter instructed the plaintiff to collect the account, but made no written assignment thereof to him. Appellants contend that, because of such assignment, the plaintiff is not the real party in interest, and therefore cannot maintain this action. The fact of such assignment was not set up as a defense in the answer, although the defendants had been notified of the assignment before the suit was commenced. The assignment was by way of security only, and the plaintiff still had an interest in the property assigned, and was, therefore, a proper party plaintiff, though not a necessary party. *Stackpole v. Pacific Gas*

& Elec. Co., 181 Cal. 700, 702, 186 P. 354; *Allen v. Chatfield*, 34 Cal. App. 785, 788, 168 P. 1149. Conceding that the California Pine Box Distributors should have been made parties to the action, appellants' objection "is one of nonjoinder of necessary parties and must be presented in the manner prescribed by the Code for presenting such an objection." *Stackpole v. Pacific Gas & Elec. Co.*, supra, page 704 (186 P. 355); *Code Civ. Proc.*, § 434; *Pye v. Eagle Lake Lumber Co.*, 66 Cal. App. 584, 592, 227 P. 193.

The other contentions of the appellants are so clearly without merit that no specific discussion thereof is deemed necessary.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

82 Cal. App. 255

**HAWI MILL & PLANTATION CO., Limited,
v. FINN, Sheriff, et al. (Civ. 5452.)**

District Court of Appeal, First District, Division 1, California. April 9, 1927.

1. Escrows ⇨13—Completion of escrow by full payment and delivery of mortgages relates back to date papers were placed in escrow.

While no title passes by conveyance of mortgages held in escrow until condition of escrow is so far performed as to entitle grantee to possession of mortgages, completion of escrow by payment in full and delivery of mortgages relates back to date when papers were placed in escrow.

2. Trial ⇨136(4)—Construction of statute of foreign country is fact question for trial court, where controversial question inviting expert testimony.

Construction of foreign law is question of fact for trial court, where founded on unwritten law of foreign country, such as common or civil law, while question arising on statute law of foreign country is one of law, where statute only is before court, and, when construction of statute is controversial question inviting expert testimony, it becomes a question of fact.

3. Appeal and error ⇨1011(1)—Court's finding, on conflicting expert testimony, that cable was sufficient written consent to mortgagee's planting of crop on mortgagor's land under Mexican law, will not be disturbed.

Trial court's finding of fact, on conflicting expert testimony, that cable was sufficient consent in writing to mortgagee's planting of crop on mortgagor's land under Mexican Law of Accession, will not be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Replevin by the Hawi Mill & Plantation Company, Limited, against Thomas F. Finn,

Sheriff of the City and County of San Francisco, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Knight, Boland, Hutchinson & Christin and Knight, Boland & Christin, all of San Francisco, for appellants.

McCutchen, Olney, Mannon & Greene and John F. Cassell, all of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This case involved a dispute over 3,975 bags of coffee, worth about \$74,382, grown on nine fincas or coffee plantations in the state of Chiapas, Mexico, during the winter of 1920-21, and brought to San Francisco in April and May, 1921. When the coffee arrived in San Francisco, it was attached and taken from the possession of respondent by the appellant Thomas F. Finn, the sheriff of the city and county of San Francisco, under writs of attachment in an action commenced by the appellant Geo. A. Moore & Co. on April 26, 1921, entitled "Geo. A. Moore & Co., a Corporation, Plaintiff, v. Hidalgo Plantation & Commercial Company, La Zacualpa Plantation & Harrison Company, Defendants." Respondent filed a third-party claim; the appellant Geo. A. Moore & Co. gave the statutory bond to the appellant sheriff, and the latter refused to deliver back the coffee to respondent. Thereupon respondent commenced the present action in replevin against the appellants Geo. A. Moore & Co., Sheriff Finn, and the surety on the latter's official bond, to recover possession of the coffee. The trial court found in favor of the respondent; found that respondent owned and was entitled to the possession of the coffee; that neither the appellant Geo. A. Moore & Co. nor its attachment debtors, who were defendants in the attachment action, had any ownership or right to possession of the coffee, and entered judgment accordingly. All of the defendants have appealed from these judgments.

The respondent is a corporation in possession and operating some nine fincas or coffee plantations in Mexico. The coffee which is the subject of the controversy was raised by the respondent and another corporation known as the Chiapas Coffee Company on these plantations. The respondent, however, is the successor of that company, taking over all its rights.

There were a number of questions involved and decided by the trial court, but there is one which is determinative of the case, and that is as to the ownership of the coffee. The question of ownership depends upon whether under the Mexican law a mortgagee in the occupancy of real property and cultivating it with the knowledge and consent of the mortgagor is the owner of the crop he raises. The plaintiff in this case was the mortgagee of the plantations upon which this

coffee was raised. It and its assignor, Chiapas Coffee Company, were in possession and cultivating them with the knowledge and consent of the mortgagors, and the coffee involved here was part of a crop so raised. The two corporations which were indebted to the appellant Geo. A. Moore & Co. and as whose property the coffee was attached were mortgagors.

The two corporations which the appellant claims are the real owners of the coffee are two California corporations organized by a man named Harrison some time prior to 1908. They were organized by him for the purpose of acquiring and operating plantations in Mexico, and he has always been their president and general manager. These two corporations purchased some nine fincas or plantations in Mexico. The Mexican law, however, prohibited a foreign corporation from holding the legal title to land within a certain distance from the coast, and the fincas involved were within this distance. To avoid the prohibition the legal title to the fincas was taken in two so-called *sociedad colectivos* or partnerships formed under the Mexican law and constituting each of one of the California corporations and Harrison.

For the purpose of raising funds the California corporations issued a large number of what are called "acre certificates." The certificates specify on their face that the owner thereof is entitled to so many shares not of stock in the company, but in the coffee and rubber plantations belonging to the company. The by-laws provide that each share represents one acre in these plantations. The certificates also specify that in consideration of the payment to the corporation of \$400 per share the corporation will plant one acre for each share and harvest and cultivate the same for a certain length of time and the owner of the certificate will be entitled to the profit from the crop grown. The shares or acre certificates so sold called for an acreage nearly equal to the total acreage of the plantations.

In 1908 one of the *colectivos* or partnerships, together with the California corporation and Harrison, who composed it, executed a mortgage on the fincas which belonged to that particular *colectivo* in favor of a firm known as Sigmund Robinow & Son, and in 1912 the other *colectivo* or partnership, together with the California corporation and Harrison, who composed it, executed a mortgage on the plantations which belonged to it in favor of two men by the names of Revuelto and Braun. Later, in 1913, Revuelto acquired by assignment all the rights under the 1908 mortgage in favor of Sigmund Robinow & Son. The situation then after 1913 was that there were two mortgages outstanding on the plantations executed both by the *colectivos* and by the California corporations and that these two mortgages were

owned by Revuelto and by Revuelto and Braun.

Financial difficulties came upon Harrison and his two companies, and proceedings for the foreclosure of the two mortgages were commenced. In 1914 a stipulation in writing was made in the foreclosure proceedings by the mortgagees on the one side and the two collectivos or partnerships on the other together with Harrison and his two corporations. This stipulation recited that there were urgent need for further funds to operate the plantations and realize upon their crops and that the only person disposed to advance the necessary funds was Revuelto, one of the mortgagees, who would do so on condition that he be repaid out of the first fruits of the plantations and that he and Braun, the other mortgagee, be authorized to superintend and control the application of the moneys. The stipulation then asked that the court approve the arrangement agreed upon and the court made its order doing so.

It does not appear with certainty whether or not Revuelto entered into actual possession of the plantations at this time. It does appear, however, that he advanced very considerable sums under the arrangement, which, as has been said, entitled him to repayment out of the first fruits of the plantations. It also appears that neither these advances nor the mortgages have ever been repaid and that the plaintiff succeeded to all the rights of Revuelto and Braun. The plantations continued to be operated under the arrangement mentioned until 1916. At that time, if not before, Revuelto, the mortgagee, entered into the occupancy of the plantations and this with the knowledge and consent of the mortgagors. Revuelto and after his death his estate remained in possession of the plantations, operating them and cultivating and harvesting their crops until the spring of 1917. At that time Chiapas Coffee Company purchased the mortgages from the Revuelto estate and Braun and purchased also the credits for the moneys advanced by Revuelto and his estate for carrying on the plantations pursuant to the arrangements detailed. The Chiapas Coffee Company remained in occupancy similarly operating the plantations until January, 1921. At that time it transferred all its rights to the respondent, and the respondent took possession and has been in possession ever since.

It is evident that the acre certificate holders supplied the money with which Harrison's two companies operated and were the parties chiefly interested beneficially through the companies. The two companies getting into financial difficulties, the certificate holders organized themselves into a corporation for their own protection. This corporation was called the Chiapas Coffee Company. The mortgages and claims of Revuelto and Braun were, of course, superior to the rights of the

certificate holders, and foreclosure being threatened and in fact commenced, the certificate holders undertook to purchase and finally did purchase those mortgages and claims, paying therefor something in excess of \$250,000. This was done in 1917. When the Chiapas Coffee Company purchased the mortgages, it was part of the arrangement that the possession of the plantations should be turned over to the Chiapas Company, and this was done. The arrangement for the purchase of the mortgages by the Chiapas Company and its taking over of possession of the properties was the result of negotiations covering a considerable period of time, to which Harrison, representing himself, his two companies, and the two collectivos holding the legal title, was party, and the arrangement made was made with their consent. This is evidenced by two writings appearing in the record, one a letter written by Mr. Harrison to a Mr. W. H. McNerney, who represented the acre certificate holders, dated October 5, 1916, and reading as follows:

"In reply to your letter of even date, and in accordance with a conversation had with you this morning, I wish to confirm the statements made to you at that time, in substance as follows: I will agree to sign a Deed of Transfer of all the coffee properties in the State of Chiapas, Mexico, or all properties, wherever situated, belonging to the certificate holders of the Hidalgo Plantation & Commercial Company, and the certificate holders of the Las Zacualpa Plantation Company and or Hidalgo Plantation & Commercial Company and La Zacualpa Plantation Company, at any time such a document is prepared, subject, of course, to the mortgages outstanding against these properties in the names of Messrs. Revuelto and Braun, Mr. W. S. Fisher and Mr. Jose Revuelto."

The other is a cable which Harrison sent to one Manuel Gris, the attorney in fact of himself and his California corporations in Mexico. The cable is dated February 5, 1917, and reads:

"Business Revuelto Braun finally concluded. Turnover to Graham Ker absolute control properties covered by Revuelto Braun mortgage."

The Graham Ker mentioned in the cable was the agent of the Chiapas Coffee Company in Mexico, and the plantations were turned over to him by the Revuelto estate pursuant to the purchase of the Revuelto and Braun claims and mortgages and with the consent of Harrison and his companies, as indicated in the letter and cable.

[1] That the Chiapas Company purchased the two mortgages in 1917 is not strictly accurate in one sense. The arrangement for the purchase was made in 1917, and the occupancy of the plantations was taken by the Chiapas Company at that time. The full purchase price of the mortgages, however, was not paid, but only a part, and the papers were placed in escrow against payment in

full. Such payment in full was later made and the terms of the escrow met.

Appellants contend that the conveyance of the mortgages was not complete until the final payment made in June and July, 1921, respectively, and the mortgages which had been held in escrow delivered, and that therefore title did not pass until such delivery, and consequently neither respondent nor its predecessor was a mortgagee in possession at the time of the harvesting of the crop nor at the time of the levy of the attachment, and cites us to *Whitney v. Sherman*, 178 Cal. 435, 173 P. 931. The case cited merely holds that no title passes until the condition of the escrow is so far performed that the grantee is entitled to the possession of the deed; that as the escrow was abandoned, the deed was not delivered pursuant to the escrow instructions, and it therefore became effective only at the time of the delivery. While that is true, it is likewise the rule that when the escrow is complete its completion relates back to the date when the papers were placed in escrow (*McDonald v. Huff*, 77 Cal. 279, 19 P. 499; *Marr v. Rhodes*, 131 Cal. 270, 63 P. 364), so that in all legal effect the Chiapas Company in 1917 both acquired the mortgages and took possession then, which the mortgagees previously had.

From 1917, when the possession was taken by the Chiapas Coffee Company, all of the money which went into the upkeep and operation of the plantations, including the entire expense of producing and marketing the coffee here involved, was paid by the Chiapas Coffee Company or by respondent. The appellant *Geo. A. Moore & Co.*, on the other hand, claims as a creditor of the collectivos upon an unsecured indebtedness which arose prior to February, 1914. As the coffee attached would not have been produced but for the financing of the plantations by the Chiapas Coffee Company and respondent, the equities of the case are with respondent.

The main question in the case is the construction of certain Mexican statutes. As appellants express it in their brief:

"As we view it, the point involved is really very narrow and very simple, though at first, by reason of the long history, seems complex. It is, whether under the laws of Mexico one who is in physical occupation of land, without claim or right of title, becomes the owner of coffee grown on the land."

The Mexican statute applicable to the controversy here presented is the chapter on "Accession," containing a number of articles. The articles pertinent to the case are as follows:

"Art. 773. The ownership of properties gives a right to all which they produce, or which is united or incorporated with them naturally or artificially. This right is called 'accession.'

"Art. 789. He who builds, plants or sows in bad faith on the land of another shall lose what is built, planted or sown, without having the

right to claim any indemnification from the owner of the soil, or of retaining the thing.

"Art. 792. It is understood that there is bad faith on the part of the builder, planter or sower, when he makes the planting or sowing, or permits, without reclamation that another may do so, with his material on land which he knows is another's, without previously asking the owner for his consent in writing."

[2] The question as to the sufficiency of the consent in writing under article 792 contained in the letter written by O. H. Harrison to W. H. McInerney, who represented the acre certificate holders, and the cable sent by Harrison to Manuel Gris, the attorney in fact of himself and his California corporations in Mexico, to turn over absolute control to Graham Ker (the agent of the Chiapas Coffee Company) of the properties covered by Revuelto and Braun's mortgage, is attacked by appellants. Appellants contend that under the principles of law the construction of this "Title on Accession" is for the court, while respondent contends the determination of a foreign law is a fact for the jury, or for the court, if a jury is waived, which, under a conflict of the evidence, will not be disturbed on appeal.

Numerous authorities have been cited from other jurisdictions, but none from this state. These authorities do not seem to be entirely in accord; however, the authorities seem to agree, at least to the extent that where a foreign law is founded on the unwritten law of a foreign country, such as the common law or the civil law, the question is regarded as one of fact to be found by the trial court as a fact, and where the question to be determined arises upon the statute law of a foreign country and the statute itself is all that is before the court, the question becomes one of law. But when the construction of the statute is a controversial question, as it is in this case, which invites the testimony of experts, it likewise becomes a question of fact.

Appellants criticize the consent in writing, claiming that it is not sufficient, that it does not describe what is to be done under it, etc. If, as appellants contend, the construction of this section is purely a question of law, could this court with the section only before it, and without reading anything into it, hold that the consent means a formal document containing some particular phraseology descriptive of what is to be done under it, or would it not be a more reasonable construction to hold that the section requires merely a writing signed by the party to be charged and that the right of the planter, grower, and cultivator to the crop cannot be acquired through a mere oral agreement?

The question as to the character of the written consent required being the main controverted question in the case, it became necessary to determine the issue. This could be done only by determining the construction placed on the statute by the judicial opin-

ions of the courts of Mexico or by the testimony of experts learned in the law of that country. There being no judicial opinions or decisions and the issue being submitted on the testimony of experts, the question became one of fact. It is not necessary to review the authorities cited, as the question here involved has been passed upon in *Compania Trans. de Petroleo v. Mexican Gulf Oil Co.* (C. C. A.) 292 F. 846, decided since the instant case was tried, which case is the latest judicial expression on the question and involves the construction of a Mexican statute. In that case the court says:

"Beginning with *The Amelia*, sub nom. *Talbot v. Seeman*, 1 Cranch, 1 and 38, 2 L. Ed. 15, the law has been as stated by Chief Justice Marshall: 'That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, * * * cannot be questioned.'

"We had occasion recently in an admiralty case to restate this now settled principle, and to cite some well-known authorities, *Taya's Sons Co. of New Orleans v. Compania Arrendataria* (C. C. A.) 280 F. 825. See, also, *Hudson River Pulp & Paper Co. v. Warner*, 99 F. 187, 188, 39 C. C. A. 452; *The Asiatic Prince*, 108 F. 287, 289, 47 C. C. A. 325. In 10 Ruling Case Law, 'Evidence,' 319 (cf. *Bank of China v. Morse*, 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676), it is stated: 'There is some controversy whether the proof of foreign laws should be addressed to the court or the jury. It involves, however, no serious conflict, and depends entirely upon the form in which the foreign law is presented. Although what the foreign law is, is usually denominated a question of fact, yet, when it merely involves the construction of a written statute or the interpretation of judicial opinions, it becomes a question of law.'

"We need not pause, however, to mark the line between court and jury in a case confronting the trial court, because here, where the construction of Vera Cruz statutes was a *controversial question below, which invited the testimony of experts*, the judgment of the court determined as a fact [italics ours] (*Hanley v. Donoghue*, 116 U. S. 1, 6 S. Ct. 242, 29 L. Ed. 535; *Chicago & Alton R. R. v. Wiggins Ferry Co.*, 119 U. S. 615, 622, 7 S. Ct. 398, 30 L. Ed. 519) that plaintiffs became the owners of the oil on its being reduced to possession and had a cause of action for the value of the oil taken by the trespasser."

[3] In the instant case three experts were called as witnesses to testify as to whether or not the cable from Harrison constituted a

sufficient consent in writing under the Mexican law of "Accession." Mr. Verna Estanol, called by respondent, testified that under article 792 all that is necessary is that the consent is in writing, "but there is no special formality attached thereto," and with reference to the cable sent by Harrison to Manuel Gris, the attorney in fact of himself and his California corporations in Mexico, that such cable "is a consent in writing as required by article 792"; that if an American corporation should be in the actual physical occupancy of some coffee plantations in the state of Chiapas in Mexico and paid all the expenses of planting, cultivating, harvesting, and marketing the coffee from those plantations, and the person or persons in whom the legal title is vested knows of all the circumstances, it would have been acting in good faith according to the Mexican law, because it had been acting with the knowledge and consent of the other party, the owner of the land. Mr. Estanol further testified that the requirement of the "consent in writing" prescribed in article 792 does not apply at all in a controversy other than one between the parties themselves—between the owner of the land and the cultivator of the crop—that the lack of consent in writing only makes a contract void in disputes between the parties, and, further, under the Mexican law, when a transaction has become fully executed, the requirement of a written contract or other writing evidencing the transaction possesses no further materiality, and so, of course, if this construction of the statute be correct, and written consent under the circumstances here presented is not required, article 3194 of the Mexican Civil Code, requiring contracts affecting the possession of immovable property to be registered, has no application.

Mr. Arturo Guajardo and Mr. Manuel G. Salinas, called by appellants, testified to a contrary construction of the statute. The trial court, however, on this conflict in the evidence found for respondent, and such finding, being a finding of fact, will not be disturbed on appeal.

In view of the foregoing, discussion of the remaining points presented would be academic.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

82 Cal. App. 322

BUTLER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5634.)

District Court of Appeal, Second District, Division 1, California. April 13, 1927.

1. **Certiorari** ⚡6—Party neglecting to timely appeal from order dismissing action held not entitled to certiorari to require trial court to proceed.

Where party failed to give notice of appeal within time allowed after court's order dismissing action, certiorari would not lie to require trial court to proceed.

2. **Mandamus** ⚡4(1)—Plaintiff held not entitled to mandamus to require trial of action, dismissed on other grounds than lack of jurisdiction; appeal being proper remedy.

Where trial court dismissed action upon other grounds than for want of jurisdiction, plaintiff held not entitled to mandamus to require court to proceed after time for appeal had expired; appeal being the proper remedy.

Application by Rozellia O. Butler for certiorari and mandamus to be directed to the Superior Court of California in and for Los Angeles County and Frank C. Collier, Judge, and to compel the court to proceed with the trial of an action for divorce. Writs denied.

William J. Clark, of Los Angeles, for petitioner.

CONREY, P. J. This is an application "for a writ of review and a writ of mandamus," and, particularly, to compel the court to proceed in an action of divorce wherein the court has made an order dismissing the action.

[1] It would appear that the petitioner is not entitled to a writ of review, since she had a right of appeal. The petition shows that she did give notice of appeal, but that through some mistake or inadvertence she failed to perfect that appeal within the time allowed by law. I fail to discover anything in the cases cited in petitioner's memorandum of authorities sufficient to sustain Mr. Clark's claim that, in such cases as this, a writ of review will be granted after the right of appeal has been thus lost. The decisions are definitely to the effect that, in any case where the law gives the right of appeal from the order sought to be reviewed, a writ of review will not issue. The case of *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 P. 978, which seems to be the leading authority relied upon by petitioner, was a case originating in a justice's court, wherein, of course, there was no right of appeal from the judgment rendered by the superior court dismissing the appeal of the cause to that court.

[2] I am also inclined to the opinion that a writ of mandate should not issue in this case. It is true that in a certain line of cases where courts have dismissed actions

and have declined to proceed with the trial thereof, and where the ground of such ruling by the court was that the court did not have jurisdiction of the action or appeal, and where the higher court determined that the lower court did have such jurisdiction, the writ of mandate has issued to compel the court to resume its jurisdiction and proceed with the action on its merits.

I am not at all sure that the petition herein shows that the superior court, in dismissing the action of *Butler v. Butler*, was proceeding upon the theory or ground that the court was without jurisdiction in the action. Apparently, the dismissal was based, as was the motion for dismissal, upon various grounds other than a want of jurisdiction. This being so, plaintiff's only remedy against erroneous dismissal of the action was the remedy by appeal. The judgment of dismissal stands as a judgment rendered within the exercise of the jurisdiction of the court, and since its validity cannot be tested by a writ of review, neither can the court be required by writ of mandate to proceed with the action—a proceeding which would be in conflict with its order of dismissal.

The petition is denied.

We concur: HOUSER J.; YORK, J.

82 Cal. App. 361

BROWNING v. RIVER FARMS CO. OF CALIFORNIA. (Civ. 3235.)

District Court of Appeal, Third District, California. April 15, 1927.

1. **Warehousemen** ⚡27—Warehouseman held entitled to charge for resacking wheat when sacks broke (Warehouse Act 1909, §§ 21, 22, 30, 34; § 27, as amended by St. 1919, p. 398, § 1; Civ. Code, §§ 1837, 1856, 1858a).

Warehouseman held entitled to charge for resacking wheat when sacks gave way, in view of provision in receipts issued providing for such charges and Warehouse Act (St. 1909, p. 437) §§ 21, 22, 30, 34, and section 27, as amended by St. 1919, p. 398, § 1, and Civ. Code, §§ 1837, 1856, 1858a.

2. **Warehousemen** ⚡27—Warehouseman held not limited to remedy of selling stored wheat when sacks broke (Warehouse Act 1909, §§ 34, 35).

Warehouseman held not restricted to remedy of selling stored wheat when sacks gave way by Warehouse Act (St. 1909, p. 437), § 34, relative to perishable property, in view of section 35 authorizing warehouseman to resort to other remedies.

3. **Warehousemen** ⚡27—"Perishable property" which warehouseman may sell does not include wheat in perishable sacks (Warehouse Act 1909, § 34).

"Perishable property," within Warehouse Act (St. 1909, p. 437), § 34, authorizing warehouseman to sell it, relates to property subject

to speedily decay, and does not include wheat contained in sacks, since in such case only containers are perishable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Perishable Property.]

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by J. W. Browning against the River Farms Company of California to recover money paid as warehouse charges. Judgment for defendant, and plaintiff appeals. Affirmed.

Seth Millington, of Gridley, for appellant.

Hiram W. Johnson, Jr., and Carl E. Day, both of San Francisco, for respondent.

PLUMMER, J. Action by plaintiff to recover the sum of \$534.90, paid to the defendant on account of warehouse charges alleged to have been unlawfully made by the defendant for and on account of resacking and reconditioning certain lots of grain deposited by the plaintiff with the defendant, and kept by the defendant in a warehouse belonging to it, situate in the county of Yolo. The defendant had judgment, and the plaintiff appeals.

The record shows: That in July, 1921, the plaintiff stored in the defendant's warehouse 1,782 sacks of wheat, and in July, 1922, stored certain other sacks of wheat to the number of 1,424, making an aggregate 4,932 sacks of wheat stored by the plaintiff in defendant's warehouse. The wheat remained in the defendant's warehouse until the latter part of May, 1925; that is, a part of the grain remained stored approximately three years, and the portion stored in 1921 remained approximately four years. In the summer of 1923, two years after the storage of grain in 1921 and about one year after the storage of grain in 1922, many of the sacks broke, and the piles fell down, and a considerable quantity of the wheat spilled out over the floor and driveway of the warehouse. That the defendant, as claimed by it, for the purpose of protecting said grain from wastage, resacked a portion of said wheat, furnishing new sacks where necessary, and sewing up old ones, and repiled the wheat where necessary. The present action involves charges for reconditioning and resacking the stored wheat during the years 1923 and 1924, aggregating the sum of \$534.90. These charges were made by defendant for labor charges and the cost of furnishing sacks. The trial court found, upon what we think is sufficient testimony, that, in order to preserve the wheat from wastage, resacking and repiling were necessary.

Even though resacking and reconditioning for the purpose of preserving the stored grain were necessary, the appellant contends that the defendant had no right to resack the wheat during the years 1923 and 1924 without express authorization on the part of the

plaintiff. It is further contended that the defendant's only remedy was to notify the plaintiff and then sell the wheat, if it were not removed, on the theory that the stored grain was perishable property, as defined by section 34 of the Warehouse Act of the state of California (St. 1909, p. 443). The court found the storing of the wheat, as we have above stated; that the defendant issued warehouse receipts therefor; that the receipts upon their face provided that all resacking charges should be paid by the owner; that the printed and approved tariffs allowed to be charged by the defendant by the Railroad Commission of the state of California were on file with the Railroad Commission and posted in said warehouse of the defendant; that at the time of the acceptance of the wheat by the defendant it was contained in good storage grain bags, that said wheat was allowed to remain by the plaintiff in the warehouse building of the defendant from the time it was stored, partly in 1921 and partly in 1922, until the latter part of May, 1925, that during the summer of 1923, many of the sacks in which said wheat was contained broke, and the piles fell down, and the wheat spilled out over the floor of the defendant's warehouse; that the wheat was stored in sacks and not in bulk, and that, in order to preserve said wheat from wastage, it was necessary to resack the wheat, repair the grain sacks where possible, and repile the same, and that the work and labor performed by the defendant and the materials furnished were necessary for the preservation of the stored wheat; that in 1924 it became necessary to resack a further portion of said wheat; that all the work and labor performed by the defendant and materials furnished in order to preserve said wheat and prevent damage to other grain stored in defendant's warehouse was in the exercise of reasonable care in regard to said wheat; that the work which became necessary to protect said wheat from wastage was not on account of any failure of the defendant to use or exercise proper care in the preservation thereof; that it was due to the extreme length of time in which said wheat was permitted to remain on storage. The record shows that it is unusual for grain to remain stored in warehouses until the receipt of grain from crops of ensuing years; that the usual course is for all the grain to be removed from a warehouse before a new crop comes in, and in most instances the grain is removed before taxes may become assessable thereon in the following month of March.

As stated herein, all the receipts issued by the defendant governing the several lots of grain contained upon the face thereof this statement: "All storage and resacking charges must be paid before delivery of grain," etc.

The necessity for the resacking of the grain having been found by the court, and also that such resacking became necessary without failure on the part of the defendant, and

such finding being sufficiently supported, the legality of the charges therefor need only be determined.

The Warehouse Act of 1909 (Stats. 1909, p. 437, amended 1919, p. 398, and 1923, p. 676) contains, among other sections, the following:

Section 21:

"A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

Section 22:

"Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited."

Section 27 of the same act (amended by St. 1919, p. 398, § 1) further provides as follows (section 27):

"Subject to the provisions of section 30, a warehouseman shall have a lien on goods deposited by the owner or by the legal possessor of the property or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods," etc.

Section 30 requires the receipt to state upon its face the charges which will be claimed against the property.

Section 34 specifies that:

"If goods are of a perishable nature, or by keeping, will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, * * * to remove the goods * * * from the warehouse," etc., and upon failure to do so, the warehouseman may proceed to sell the same.

Section 1837 of the Civil Code, relating to the deposit of goods for keeping, reads:

"If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable, and retain the proceeds as a deposit, giving immediate notice of his proceedings to the depositor."

And section 1858a, Civil Code, specifies further:

"No warehouseman, wharfinger, or other person must sell or incumber, ship, transfer, or remove beyond his immediate control any property for which a receipt has been given, without the consent in writing of the person holding such receipt plainly indorsed thereon in ink."

The record shows that it was necessary to keep the grain stored by the plaintiff in the defendant's warehouse properly sacked in

order that it might not be wasted or commingled with other property, that grain stored in warehouses is stored in sacks, and that grain stored by each depositor is separately piled so as to be readily distinguishable.

By sections 21 and 22 of the Warehouse Act, which we have quoted, the warehouseman is made liable for any injury to stored property occasioned by his failure to exercise such care in regard thereto as a reasonably careful owner would exercise in relation to similar property, and that it is necessary for the warehouseman to keep the stored goods separate where a receipt has been issued therefor, so as to permit at all times of identification and redelivery of the stored property, and section 27 gives the warehouseman a lien for all lawful charges for storage and preservation of the goods.

In 40 Cyc. p. 450, the text-writer thus states the rule in relation to charges such as we are here considering. It is there said:

"A contract with a warehouseman may contain an express provision as to the charges and expenses which the bailor is to pay, in which case the contract will govern as to the amount, the items, and the time of payment. In the absence of a special contract, where goods are received by a warehouseman for storage in the usual course of business, there is an implied contract on the part of the bailor to pay the customary charges for storage and expenses, or such reasonable charges as warehousemen of like capacity and facility are entitled to; and this is true even though the warehouseman does not know the identity of the owner until possession is demanded. The warehouseman is entitled to reimbursement of such sums as the customs and usages of trade and commerce require him to expend in order to conserve and protect the property."

[1] In the instant case, the receipts issued, which constitute the contract, binding the warehouseman to redeliver the property to the person entitled thereto, there is written into and a part of the receipt a provision relating to the necessary charges for resacking stored grain. The court also found the existence of a custom relating to such charges, but we think the receipts issued in this case by the warehouseman, and accepted and held for nearly four years by the plaintiff, containing a provision relative to the resacking of the grain in question, justified the court in coming to the conclusion that it was within the understanding of the contracting parties that the costs and expenses of resacking the grain in question necessary for its preservation should be borne by the owner of the grain. It was certainly not within the contemplation of the parties that the grain should remain in the warehouse for such an unusual period of time without any care or attention or without resacking, when necessary to preserve the identity of the stored wheat and to keep it ready for redelivery upon demand. Section 1856, Civil Code, is applicable here. That section reads:

"A depositary for hire has a lien for storage charges and for advances and insurance incurred at the request of the bailor, and for money necessarily expended in and about the care, preservation and keeping of the property stored. * * *"

It will be observed that the foregoing section covers two classes of obligations: (1) Advances and insurance incurred at the request of the bailor, which would appear to cover money advances to the bailor upon the security of the property stored; and, secondly, without any request on the part of the bailor, the depositary has a lien for money necessarily expended in and about the care, preservation, and keeping of the property stored. These are obligations resting upon the depositor of goods, the first of which, advances and insurance at his request, the other class, such charges as the bailee or warehouseman necessarily incurs in the preservation of the property. The general rule as to expenses in the preservation of property is thus stated in 6 Corpus Juris, 1131:

"Reimbursement for actual disbursements and necessary and useful expenses incurred in preserving the property bailed, or in fulfilling the objects of the bailment, may be recovered either by a gratuitous bailee or by a bailee where the bailment is for the benefit of both parties."

Likewise, in 27 R. C. L. 1007, it is said:

"The doctrine is firmly settled that every bailee for hire including, of course, a warehouseman who by his labor and skill has imparted an additional value to the goods intrusted to him, has a lien upon the property for his reasonable charges."

A somewhat similar case is found in *Bacon v. Fourth National Bank* (City Ct.) 9 N. Y. S. 435, where it is held that in an emergency a depositary has the implied authority to incur expenses on behalf of the owner for the preservation of the property, and that an agent has the duty of taking such steps as are reasonably necessary for the protection of his principal's property and for its preservation, and that, having made the outlays for that purpose, he is entitled to reimbursement.

It is further stated the reason for the rule is that a request on the part of the principal is inferred, where the advances are made in the regular course of business, or even on the spur of some pressing urgency not provided for by any rule, since the employer may fairly be taken to have authorized the employee to make the expenditure that a prudent man would conceive necessary for the safeguarding of his interests.

There is some testimony to the effect that some of the grain in question had been infested with weevil, and under such circumstances the law would certainly authorize the warehouseman to take such steps as were reasonably necessary in the resacking and repiling of the grain, to prevent other grain

belonging to other people, stored in the same warehouse, from becoming infested.

Our attention has been called to the opinions and orders of the Railroad Commission relative to the charges allowed to be made by warehousemen. In some of the cases, resacking charges have been provided for in the traffic schedule, and in other cases resacking charges have been allowed in addition to the regular tariff charge fixed for the particular warehouse in question, but we find nothing in any of the cases cited or in any of the rules and regulations of the Railroad Commission called to our attention affecting in any way the judgment entered by the trial court in this case.

[2, 3] It is further argued on the part of the appellant that the grain in question comes under the terms and provisions of section 34 of the Warehouse Act relating to perishable property, and that the defendant's only remedy was to proceed to sell the stored wheat. Section 35 of the same act, however, expressly states that the remedy for enforcing a lien provided for in the act does not preclude warehousemen from resorting to other remedies allowed by law. However, the term "perishable property," though a relative term as used in the act, relates to property subject to speedy decay, or, as we find in the law dictionaries as perishable property, "goods which decay and lose their value, if not speedily put to their intended use."

In the instant case it was and is a question of perishable containers and not of perishable property. There is nothing in the record indicating deterioration on the part of the grain. Wastage has a different meaning from deterioration. A perfectly good article of merchandise may be wasted, while other articles of merchandise are of such a nature that, unless speedily consumed, they deteriorate. As an instance we might state, grains do not speedily deteriorate, even though they may be wasted; vegetables and fruits will speedily deteriorate and become valueless.

We do not think the case of *Chesapeake & Ohio R. R. Co. v. Saulsbury*, 126 Ky. 179, 103 S. W. 254, 12 L. R. A. (N. S.) 431, wherein it was held that corn is perishable freight within the terms of the Kentucky statute, relative to the sale of unclaimed property, applicable to the circumstances here presented. The definition given in the case of *Illinois Central Railroad Company v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83, holding that corn was not perishable property, is the one we think applicable. It was there said:

"Perishable property, in the commercial sense, is that which, from its nature, decays in a short space of time, without reference to the care it receives. Of that character, are many varieties of fruits," etc.

In *Newman v. Kane*, 9 Nev. 234, "Perishable property" was defined as that "which is necessarily subject to immediate decay, and does not apply to property like hay, which

could with ordinary or reasonable care * * * be preserved."

The property stored by the plaintiff with the defendant could be and was preserved for a period of four years, and all that it required was the ordinary and usual care to prevent wastage, in order that it might be ready for redelivery upon demand by the owner of the warehouse receipts, upon presentation thereof.

The court further found that the defendant notified the plaintiff of the condition of the grain and the necessity for resacking, by two letters, one dated January 29, 1924, and one dated June 6, 1924, and that plaintiff took no action in relation thereto.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

82 Cal. App. 422

PEOPLE v. CLAWSON. (Cr. 1366.)★

District Court of Appeal, First District, Division 2. California. April 19, 1927.

Hearing Denied by Supreme Court June 16, 1927.

1. Rape $\S$ 20—Information charging crime of rape charged "public offense," though faulty in attempt to plead statutory elements thereof (Pen. Code, $\S$ 261).

Information charging commission "of the crime of rape" charged a "public offense," though faulty in attempt to plead some of facts made elements of such crime by Pen. Code, $\S$ 261.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Offense.]

2. Criminal law $\S$ 1186(4)—Trial amendment of information for rape, by adding "with force and violence" overcoming resistance, held properly permitted, in absence of prejudice to defendant (Pen. Code, $\S$ 1008; Const. art. 6, $\S$ 4½).

Where rape case was tried on theory that information properly pleaded force and violence and resistance, and all evidence thereof was received without objection by defendant, who was given free rein in presenting defense of consent, court properly permitted trial amendment, adding words, "and with force and violence," and allegation of resistance overcome thereby, in absence of prejudice to defendant, in view of Pen. Code, $\S$ 1008, and Const. art. 6, $\S$ 4½.

3. Criminal law $\S$ 1186(4)—Trial amendment of information to conform to proof is permissible, when not prejudicial to defendant's substantial rights (Pen. Code, $\S$ 1008; Const. art. 6, $\S$ 4½).

Pen. Code, $\S$ 1008, which is in accord with Const. art. 6, $\S$ 4½, and rule that mere technical errors, not affecting party's substantial rights, shall not be employed to defeat justice, permits trial amendment to conform to proof

when possible without prejudice to defendant's substantial rights.

4. Criminal law $\S$ 589(1)—Denial of continuance to enable defendant to plead to good amended information held not prejudicial.

Denial of continuance to enable defendant to plead to amended information conforming to every technical requirement of pleading held not prejudicial as denying him constitutional right to plead, as continuance could not have benefited him, and he could plead forthwith on filing of indictment.

5. Criminal law $\S$ 589(1)—Granting continuance to allow demurrer to confessedly good information is discretionary.

Granting of continuance to allow defendant to present a futile demurrer to a confessedly good information is within trial court's discretion.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Raymond W. Clawson was convicted of rape, and he appeals. Affirmed.

R. P. Henshall, C. M. Booth, and G. B. Harris, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

NOURSE, J. The defendant was tried before a jury on an information charging rape. From the judgment following the verdict of guilty and from the order denying his motion for a new trial he has appealed on a typewritten record. The grounds of appeal are that the information was improperly amended during the course of the trial, and that the defendant's motion for a continuance to enable him to plead to the amended information was improperly denied.

In the original information the district attorney charged the defendant "of the crime of rape committed as follows: * * * The said Raymond W. Clawson * * * did * * * willfully, unlawfully, feloniously ravish and carnally know * * * without the consent and against the will of said ———." During the course of the trial, after the prosecution had rested and the cross-examination of the defendant was about completed, the court granted the state leave to add the words "and with force and violence" after the word "feloniously," and also the allegation that the prosecutrix resisted and her resistance was overcome by force and violence on the part of the defendant. Objection was made to this amendment by the defendant, and, when the amendment was allowed, the defendant asked that he be arraigned on the amended information, and that he be granted a continuance to enable him to plead thereto. The objection was overruled upon the ground that the entire case had been heard upon the theory that

force and violence was properly pleaded, that the amendment was made merely to conform to the proof, and that the facts proved disclosed that the defendant was not prejudiced by the amendment.

[1-3] Appellant premises his attack on the judgment upon the claim that the original information failed to charge any public offense, and that the court, therefore, had no jurisdiction of either the person or the subject-matter. With this we cannot agree. It charged the commission of the crime of rape. It attempted to plead some of the facts which are made elements of that crime by section 261 of the Penal Code, and in this respect, it is conceded, the pleading was faulty. If the question had been raised by special demurrer to the information, there can be no doubt that an amendment would have been properly allowed in the form here made. Here the whole cause was tried on the theory that the information properly pleaded force and violence on the part of the prosecutrix. All the evidence tending to prove these issues was received without objection from the appellant, and he had been given free rein in the presentation of his defense—that the act was committed with the consent of the prosecutrix and without force or resistance. Section 1008 of the Penal Code permits an amendment to be made to an information after the defendant has pleaded “in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant.” This section is in accord with section 4½ of article 6 of the Constitution and with the rule of the later decisions that mere technical errors in either pleading or procedure, which do not in any way affect the substantial rights of the parties, are not to be employed to defeat justice, and it would seem to be the clear purpose of the section to permit an amendment of this character to conform to the proof, when that can be done without prejudice to the substantial rights of the defendant. Here the appellant has not suggested how, under any possible conception of the record, he was in any way prejudiced by the amendment.

[4, 5] The objection is also made that the trial court erred in denying appellant a continuance to enable him to plead to the amended information. But here again there is no suggestion of prejudice. The amended information conforms to every technical requirement of pleading, and it is apparent that if a continuance had been granted, it could not have possibly resulted in any benefit to the appellant. The whole argument on this point is that appellant was denied his constitutional right to “plead,” but the way was open for him to plead forthwith on the filing of the indictment. The granting of a continuance to allow him to present a fu-

tile demurrer to a confessedly good information was within the discretion of the trial court, and we think that court properly exercised its discretion when it denied the request.

The appellant had a fair and impartial trial; in fact the learned trial judge displayed to the defense unusual consideration and patience. The verdict of the jury was based upon clear and convincing proof, which is not questioned on this appeal. We have carefully examined the entire record, including the evidence, and are satisfied that there has been no miscarriage of justice.

At the time of the oral argument, the presiding justice, deeming himself disqualified under section 170a, Code of Civil Procedure, withdrew from participation in the cause, and the parties thereupon stipulated that any justice or judge who might be assigned to this department prior to the determination hereof might participate therein.

Judgment and order are affirmed.

We concur: STURTEVANT, J.; BARTLETT, Presiding Justice pro tem.

82 Cal. App. 289

PEOPLE, by STATE DEPARTMENT OF
PUBLIC WORKS, v. MARBLEHEAD
LAND CO. et al. (Civ. 4997.) ★

District Court of Appeal, Second District, Division 2, California. April 12, 1927.

Rehearing Denied May 12, 1927.

Hearing Denied by Supreme Court June 9, 1927.

1. Eminent domain ~~§~~ 191(3)—Complaint held not demurrable for failure to allege that proposed right of way, sought to be condemned, was located in manner most compatible with greatest public good and least private injury (Const. art. 16, § 2; Code Civ. Proc. §§ 1241, subd. 2, 1242, 1244).

In proceeding for condemnation of land for road, necessary to completion of system contemplated by Const. art. 16, § 2, complaint held not demurrable for failure to allege that proposed right of way was located in manner most compatible with greatest public good and least private injury, as required by Code Civ. Proc. § 1242, where it contained elements prescribed by section 1244, in view of section 1241, subd. 2, since choice of land by state or agents must be presumed lawful.

2. Eminent domain ~~§~~ 196—Statutory amendment making highway commission's resolutions conclusive evidence of location of road most compatible with greatest public good held applicable at trial, though complaint was filed before enactment (St. 1925, p. 384).

1925 amendment to eminent domain statute (St. 1925, p. 384), providing that resolution of highway commission is conclusive evidence that improvement is located in manner most compatible with greatest public good and least private injury, held applicable at trial of case, though complaint was filed before it was enacted, since it concerns evidentiary effect of resolutions.

3. Eminent domain ⚡223—In condemnation proceeding for road, findings on matters required by statute held not objectionable as outside pleadings (Code Civ. Proc. § 1248).

In proceeding to condemn land for road, findings on matters, required by Code Civ. Proc. § 1248, to be ascertained, and on which legal testimony was introduced, held not objectionable as outside issues raised by pleadings.

4. Eminent domain ⚡202(1)—Evidence of market value is admissible as basis for determining compensation in condemnation proceeding.

Basis for recovery of compensation in proceeding for condemnation of land for road is market value of land to be taken, and any relevant and material evidence of such value is admissible.

5. Eminent domain ⚡138—Where part of land is condemned for road, owner may have compensation for damages to residue.

When only part of tract of land is condemned for road purposes, just compensation that Constitution guarantees to owner includes not only value of part taken, but also damages accruing to residue from improvement.

6. Eminent domain ⚡136—Owner of condemned land may recover difference between market value of entire tract before taking and of residue after taking.

Owner of land condemned for road purposes is entitled to recover difference between market value of entire tract before taking and market value of what is left after taking.

7. Eminent domain ⚡124—Market value of land condemned is not enhanced by existence of railroad's easement, where railroad had not attempted to retain right of way by any construction (Civ. Code, § 468).

Where railroad had not attempted to retain right of way by construction, as provided in Civ. Code, § 468, it is proper in proceeding to condemn land for road to conclude that, as matter of law, market value of land had not been enhanced by existence of railroad's easement, since damages must be estimated with reference to use and condition of land at time of condemnation.

8. Eminent domain ⚡223—Findings in condemnation proceeding are not invalid for including unnecessary points.

Validity of findings in proceeding for condemnation of land for road is not subject to attack on ground that they include points exceeding bounds of necessary findings on issues presented, since immaterial matters will be treated as surplusage and disregarded.

9. Eminent domain ⚡223—Court's findings on conflicting evidence in condemnation proceeding are conclusive.

Where evidence in proceeding for condemnation of land for road was conflicting, court's findings will not be disturbed, since all intentments are resolved in favor of its decision on fact questions, if supported by any substantial evidence.

10. Evidence ⚡543(3)—Resident of county for 40 years, engaged in real estate business for 14 years, held qualified to testify to market value of land condemned.

In proceeding for condemnation of land for road, resident of county for 40 years, engaged in real estate business for 14 years, who had viewed defendant's property during week of trial and testified that he knew market value of similar property in county, held qualified to testify as to market value.

11. Evidence ⚡543(3)—Civil engineer who had appraised estates within county held qualified to testify to market value of land condemned.

In proceeding for condemnation of land for road, civil engineer who had appraised estates in county held qualified to testify as to market value.

12. Evidence ⚡543(3)—Resident of county for 45 years, who had dealt in real estate for 6 or 7 years, held qualified to testify to market value of land condemned.

In proceeding to condemn land for road, resident of county for 45 years, who had dealt in real estate for 6 or 7 years and had farmed within county for 25 years, held competent to testify to market value of land condemned.

13. Evidence ⚡543(3)—Banker and farmer residing within county for 52 years held qualified to testify to market value of land condemned.

In proceeding to condemn land for road, resident of county for 52 years, who was banker and farmer, loaned money on ranch property, and had been appointed commissioner to partition 22,000-acre ranch, held qualified to testify to market value of land condemned.

14. Evidence ⚡543(3)—Witnesses called to show market value of lands condemned are sufficiently qualified by showing knowledge and experience regarding lands in neighborhood.

Witnesses called in condemnation proceeding to show fair market value of land need not be experts in severe sense of term, but if they show knowledge and experience regarding lands in neighborhood it is sufficient to qualify them.

15. Eminent domain ⚡202(4)—In condemnation proceeding, evidence of value of lands for particular purposes, such as subdivision, held inadmissible.

In proceeding to condemn land for road, evidence of value of lands in terms of money for particular purposes, such as subdivision, is inadmissible, since market value is ultimate fact to be established and people are not bound to accept owner's theory that lands were suitable for subdivision.

16. Evidence ⚡158(16)—Testimony of president of state highway commission that funds in highway fund were sufficient to pave highway, sought to be condemned, held admissible against objection that budget was best evidence.

In proceeding for condemnation of land for road, president of state highway commission may testify that funds in third state highway fund were sufficient to pave highway, sought to be condemned, as against objection that budget

was best evidence, since it cannot be said, as matter of law, that witness' personal knowledge of funds under his control was less authentic than book records of third person made at witness' instance.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action in eminent domain by the People, by the Department of Public Works of the State of California, against the Marblehead Land Company and another, to condemn certain lands for highway purposes. From judgment awarding damages, defendants appeal. Affirmed.

Wm. J. Clark and Richard Hartley, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for respondent.

CRAIG, J. The plaintiff and respondent instituted this proceeding in eminent domain for the purpose of acquiring certain lands in the county of Ventura, alleged in its complaint as being necessary to the completion of a system of state highways contemplated by legislative acts of 1909 and 1915, and by section 2, article 16, of the Constitution of the state of California, adopted July 1, 1919.

The constitutional provision last mentioned directed the preparation of 40,000 suitable state bonds in the denomination of \$1,000 each, bearing interest at the rate of 4½ per cent. per annum, payable semiannually, and that they be signed, sold, and paid as provided in said act of 1915, and created funds therein designated as the "third state" highway, interest, revolving, and sinking funds. It was also provided, in part, that:

"The moneys in said 'third state highway fund' shall be used by the state department of engineering for the acquisition of rights of way for and the acquisition, construction and improvement of uncompleted portions of the system of state highways prescribed by the act of the Legislature approved May 22, 1909, known as the 'State Highway Act,' and the act of the Legislature approved May 20, 1915, and known as the 'State Highway Act of 1915,' and certain extensions thereof described in said last-named act, and also for the acquisition of the rights of way for and the acquisition, construction and improvement of the following additional highways as state highways: Barstow to Needles; Oxnard to San Juan Capistrano,"

—and 29 other sections of the intended highway system.

"Said additional highways to be located on the most direct and practical routes; provided, however, that twenty million dollars of the moneys in said 'third state highway fund,' or so much of said twenty million dollars as shall be necessary, shall be used for the completion of all of the system of state highways contemplated and provided for in said 'State Highway Act'

and in said 'State Highway Act of 1915,' and the extensions thereof specified in said last-named act."

The plaintiff alleged that at a meeting held at Sacramento on November 24, 1922, "the California highway commission, acting for and on behalf of the department of public works of the state of California and the state of California, all of its members being present, a majority of the members of said California highway commission passed and adopted a resolution," set forth in the complaint in *hæc verba*, and which recited, among other things: That whereas said board had theretofore been authorized by the provisions of the Constitution, quoted above, to acquire rights of way for and to acquire, construct, and improve a state highway between Oxnard, in the county of Ventura, and San Juan Capistrano, in the county of Orange; and whereas said department deemed it necessary to proceed with the acquisition of title to strips or parcels of land necessary for such purposes; that said strips or parcels were necessary for such use; that public interest and necessity required such acquisition of the same for public use as rights of way for said state highway purposes; that the use of the lands hereinbefore described as and for rights of way for state highway purposes is a more necessary public use thereof than the use thereof or any part thereof for rights of way for railroad purposes; that, therefore, it be resolved that pursuant to such authority the strips or parcels of land specified were adopted as parts and units in and of the final survey line and location for said state highway, and declared:

"That such acquisition by the state of California of each, every, and all of said described strips or parcels of land as rights of way for integral portions of said state highway is necessary, and that such acquisition, in the manner provided by law, of said rights of way be and the same is hereby declared necessary."

And said resolution authorized the Attorney General to take all necessary steps to condemn the same. It was further alleged that "all facts, matters and things stated in said resolution of said California highway commission were and are true, and there is and at the time of passing and adopting said resolution there was sufficient money in the third state highway fund * * * available to pay for the right of way sought to be acquired by this action"; that bonds to the amount of \$24,000,000 had been sold, and the proceeds thereof paid into the state treasury to the credit of said fund.

The portion of the real property here involved, as described in the resolution and complaint, consists of a strip 80 feet in width, 40 feet each side of a center line extending from a point in the westerly line of lot 3, section 27, township 1 south, range 20

west, San Bernardino base and meridian, in Ventura county, to a point on the boundary line between the counties of Ventura and Los Angeles, and is described by metes and bounds, and alleged to be "a part of a single tract of land."

The resolution embraced other lands, lying in Los Angeles county, which were also declared by the highway commission to be necessary integrals of the same highway. It was followed, however, by allegations of the complaint that public interest and necessity required the construction and improvement of a highway upon the lands in Ventura county, therein specifically described, and the plaintiff prayed that the use to which *said land* was sought to be taken be declared a public use authorized by law, and its taking necessary to such use.

The defendants demurred generally to the complaint, and also upon asserted grounds of ambiguity and uncertainty in that it could not be ascertained therefrom whether the plaintiff was seeking to condemn the right of way described as lying in Los Angeles county, or that described as being within the boundaries of Ventura county. The demurrer was overruled, and the defendants jointly answered, admitting ownership in the defendant Marblehead Land Company of all the lands through which ran the strip sought to be condemned, subject to an alleged easement of the defendant railway company, *which said lands*, they averred, consisted of a narrow strip from $\frac{1}{2}$ to $1\frac{1}{2}$ miles in width; and the other material allegations of the complaint were denied.

For a special affirmative defense the defendants alleged that all of the property described in the complaint was owned by the defendant Marblehead Land Company, subject to certain easements and leasehold interests; that the county of Los Angeles had caused to be condemned a right of way for county highway purposes through the ranch property heretofore mentioned, lying in said county, had declared on October 15, 1921, that it was open to the public, and that the same ever since had been used for such purposes, "although the legality of said condemnation is now being contested by the former owners of said property." It was further alleged by the defendants that the proposed state highway through Ventura county would not connect with the new Los Angeles county road, and would therefore have no outlet to the south unless continued through defendants' Los Angeles county property, parallel to the Los Angeles county road; that proceedings similar to the instant suit were then pending in Los Angeles county for condemnation of lands of the defendants for a right of way continuing the state road, which suit would be contested. The defendants urged, therefore, by their answer, and at the trial, that the state right of way here-

in sought to be taken, paralleling the county highway, and for the same purposes, would not constitute a public necessity; and, further, that it was unnecessary to establish such state right of way through Ventura county, unless it should ultimately be determined that the continuation of the state highway through Los Angeles county was a necessity.

A second and further special defense was interposed by the defendant Hueneme, Malibu & Port Los Angeles Railway, on whose behalf it was alleged that the railway company was the owner of an easement 200 feet wide for railroad purposes, "paralleling in a general way the contour of the land along the Pacific Ocean, on which a right of way is located," and which had been conveyed to it for the ultimate purpose of extending a railroad with lateral connections to the city and county of San Francisco; that "said corporation has expended along said entire right of way a sum in excess of \$350,000; that a portion of the land sought to be condemned for state highway purposes herein has already been appropriated to a public use, for railroad right of way," which latter use was more necessary to the public than that to which the plaintiff proposed to devote the property; that such railroad right of way was the only feasible route for a competing line; and that if condemned for state highway purposes it would be impossible to construct a railroad thereon, and would work irreparable injury to said defendant.

The defendant land company prayed judgment in the sum of \$150,000, as the value of its property described in the complaint, and \$200,000 as damages to adjoining property by the severance; and the defendant railway company prayed judgment for \$350,000, alleged value of its property sought to be taken, and for \$500,000, as severance damages.

The case was tried before the superior court without a jury, and findings of fact, conclusions of law, and an interlocutory decree were made and entered allowing the first-named defendant \$3,000 for its lands condemned, and \$1,000 as severance damages; and awarding the defendant railway company \$500 as the value of lands taken from it, together with \$500 as severance damages.

The innumerable objections interposed by appellants to the initiatory proceedings, the complaint, the evidence, and the sufficiency thereof, to rulings below, and to the findings, conclusions of law, and judgment, necessitate the foregoing somewhat extended detail of the status of the record before us.

[1] It is first contended that the demurrer should have been sustained, for the reason that the complaint did not allege that the proposed right of way was located "in

the manner which will be most compatible with the greatest public good and the least private injury," as required by section 1242 of the Code of Civil Procedure, that a right of way shall be located. Section 1244 of the same Code specifically provides what the complaint in an eminent domain proceeding must contain, as follows:

"The location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding,"

—and that the land shall be described. The complaint here involved contained these statutory elements, and we think it was therefore sufficient. But appellants insist that the quoted limitation as to public good and private injury is a jurisdictional fact, which must be pleaded in cases other than those instituted by municipal corporations. Section 1241, subdivision 2, of the Code of Civil Procedure provides as follows:

"* * * When the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor; and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury. * * *

Prior to 1925 the statutes creating the California highway commission, and prescribing its powers and duties, did not contain the provision declaring such resolutions of that body to be conclusive, and appellants argue that it was intentionally omitted, for the reason that the highway commission is not a legislative body of a county, city and county, or incorporated city or town, and that its resolutions are not conclusive.

We do not deem it necessary to the validity or conclusiveness of a resolution of the highway commission that it be characterized as a legislative body. The most direct route, and that compatible with the greatest public good and the least private injury, is necessarily determined by the exercise of discretionary powers, and, as said in *City of Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604, exercising as they do a public function, the choice of land made by the state or its agents, in the absence of clear and convincing evidence to the contrary, must be presumed correct and lawful. The highway commission in laying out a right of way pur-

sues similar methods and performs like duties to those of a municipal council or board which demand the exercise of sound discretion.

"That the highway commission is vested with broad general powers over state highways and the expenditures of money provided therefor must be conceded. By the department of engineering law it is given 'full possession and control' over all state highways and 'all expenditures by the state for highway purposes * * * shall be under the full charge of the department.'" *California Highway Com. v. Riley*, 192 Cal. 97, 108, 218 P. 579, 584.

At any rate, in 1925 the statutes were amended by adding the following provision:

"Said resolution shall be conclusive evidence; (a) Of the public necessity of such proposed improvement;

"(b) That such property is necessary therefor; and

"(c) That such proposed public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury." St. 1925, p. 384.

This provision was applicable at the date of the trial of this case, but as a pleading the complaint was sufficient in this regard as complying with section 1244 of the Code of Civil Procedure. In advancing their argument, appellants confuse an evidentiary issue with one of pleading. If, for the sake of argument, it be conceded that prior to 1925 the resolution of the California highway commission would not have been conclusive to prove the matters in question, this would not even tend to show that such facts must have been pleaded, especially since the subject of the requirements of the complaint in this character of action is fully covered by section 1244.

[2] Since the provisions of section 1241 concern the evidentiary effect of the resolutions, provisions contained in the amendment enacted in 1925 making it similar in that regard to section 1241, subdivision 2, of the Code of Civil Procedure, concerning the evidentiary effect of resolutions of the highway commission, are applicable at the time of the trial to all cases, regardless of the date when the resolutions were adopted.

[3] The trial court rendered its findings of fact in 19 separately numbered paragraphs. The italicized portions of 6 of such paragraphs, therein numbered IX, X, XV, XVII, and XVIII, the parts of which are material to this proceeding being quoted below, are attacked by appellants upon the ground that they are "outside the issues raised by the pleadings," and are "unsupported by any of the allegations of the complaint."

In paragraph IX the court found:

"That the defendant Marblehead Land Company, a Delaware corporation, is the owner in fee of the land sought to be taken, and that the

defendant Hueneme, Malibu & Port Los Angeles Railway, a corporation, has an easement over certain portions thereof, for right of way purposes for a railroad running thereon, but in that behalf the court finds that the defendant *Hueneme, Malibu and Port Los Angeles Railway*, a corporation, did not within two years after the filing of its original articles of incorporation, or at any other time, begin the construction of its railroad or any portion thereof, upon said property, nor has ever put in operation any portion of its road at least 5 miles or otherwise, upon said property, nor has said corporation ever operated any railroad or railroads for the running thereon of any passenger or mixed or other trains for the carriage of the public or baggage or freight, or for any other purpose whatsoever."

In paragraph X:

"The court further finds that the public use to which said property is to be applied by the plaintiff is a more necessary public use than that to which it has already or heretofore been appropriated, and that the proposed public improvement is located for the taking of the said lands in the manner which will be most compatible with the greatest public good and the least private injury."

Paragraph XV:

"The court further finds that, having made an inspection of said property by stipulation of counsel, said property lies along the shore of the ocean and is situated at the extreme southerly point of Ventura county adjacent to the Los Angeles county line, and distant 48 miles from Pershing Square in Los Angeles, and over 28 miles from the nearest settlement, which is at Los Flores at the eastern end of the Malibu ranch, and accessible thence over a very different road. That the property is only 17 miles distant from Oxnard, but there is no road whatever connecting the land with any part of Ventura county except through Los Angeles county."

Paragraph XVI:

"The court further finds, upon said inspection, that at the western end of said land the mountains come quite close to the shore line and the mesa portion widens out generally toward the east. That the hill portion is quite precipitous and barren and the mesa portion is somewhat broken and cut with gullies. That the land is at present without water and without any apparent practicable source of water, other than about one miner's inch in Sycamore canyon."

Paragraph XVII:

"The court further finds that the only present use being made of said land is for grazing purposes, although at one time the mesa portion of the land had been farmed to barley and beans."

Paragraph XVIII:

"The court further finds that the Hueneme, Malibu & Port Los Angeles Railway is a corporation, all of whose stock is owned by the same persons owning the stock of the defendant Marblehead Land Company, and in about the same proportion. That the said Hueneme, Malibu & Port Los Angeles Railway holds a title to right

of way over the property which overlaps the proposed right of way of the highway for a distance of about 3,500 feet, but that no railway was ever constructed on said land and that no railway is now in operation by said company."

Section 1248 of the Code of Civil Procedure provides that:

"The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

"1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

"2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

"3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

"6. If the removal or relocation of structures or improvements is sought, the cost of such removal or relocation and the damages, if any, which will accrue by reason thereof. * * *

Paragraph X of the findings, as we have seen, contains elements required by the Constitution, and which by virtue of the resolution above mentioned are conclusively presumed. A review of the record also discloses that the facts stated in the other 5 paragraphs, to which exception is taken, are upon matters required by section 1248 of the Code of Civil Procedure to be ascertained, and upon which legal testimony was introduced by the parties.

[4-6] Although the asserted objectionable facts contained in paragraphs XV, XVI, and XVII were not set forth by any allegation in the complaint, they constitute integral parts of the foundation upon which compensation was apparently based, and embrace subjects properly considered in arriving at the reasonable market value of the property. It has repeatedly been held that the basis for recovery of compensation in such cases being the market value of the land to be taken, any relevant and material evidence of such value is admissible (*Southern Pacific Co. v. San Francisco Savings Union*, 146 Cal. 290, 79 P. 961, 70 L. R. A. 221, 106 Am.

St. Rep. 36, 2 Ann. Cas. 962; *Oakland v. Pacific Coast Lumber Co.*, 171 Cal. 392, 153 P. 705; *Oakland v. Adams*, 37 Cal. App. 614, 174 P. 947, and that, when only part of a tract is taken, the just compensation which the Constitution guarantees to the owner includes not only the value of the part taken, but also the damages accruing to the residue from the improvement (*Colusa, etc., R. Co. v. Leonard*, 176 Cal. 109, 167 P. 878; *Muller v. Southern Pacific R. Co.*, 83 Cal. 240, 23 P. 265; *Southern Pacific R. Co. v. Hart*, 3 Cal. App. 11, 84 P. 218); that the owner is entitled to recover the difference between the market value of the entire tract before the taking, and the market value of what is left after the taking (*McDougald v. Southern Pacific R. Co.*, 162 Cal. 1, 120 P. 766; *Sacramento Southern R. Co. v. Heilbron*, 156 Cal. 408, 104 P. 979; *San Francisco, etc., R. Co. v. Caldwell*, 31 Cal. 367).

[7] Section 468 of the Civil Code provides that a railroad corporation may, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year complete and put in operation at least 5 miles of road, until completed; that a failure to comply with these requirements works a forfeiture of the right of way and a reversion of title to the original owners. Hence, proof by the plaintiff and findings by the trial court that, although the servient and dominant estates in the tract known as the Malibu ranch were apparently distinct, yet in fact that both had been owned by the same persons, and that the latter estate had been forfeited, that the land was practically arid, distant from any settlement, and difficult of approach, were obviously indispensable factors in determining a fair market value. Since the defendant railroad company had not attempted to retain its right of way by the slightest advance toward the construction of a transportation line, it would not be improper to conclude that, in fact, and as a matter of law, for the purposes of the principal question in issue, the market value of the land had not been enhanced by the existence of the alleged easement. Owing to the merger of interests it is not impossible that a railroad might yet have been built, but damages in eminent domain must be estimated with reference to the use and condition of the land at the time, as well as uses to which it is adapted, and evidence as to what the owner intended to do with the land cannot be considered. *Los Angeles v. Kerckhoff-Cuzner, etc., Co.*, 15 Cal. App. 676, 115 P. 654.

[8] If, as contended by the appellants, the findings include points which may be said to exceed the bounds of necessary findings upon the issues presented, their validity is not subject to attack upon that ground, since immaterial matters will be treated as surplusage, and disregarded. *Sussman v. San*

Luis Obispo County, 126 Cal. 536, 59 P. 24; *Costa v. Silva*, 127 Cal. 351, 59 P. 695; *Neale v. Head*, 133 Cal. 42, 65 P. 131, 576.

Appellants advance the argument that certain specified conclusions of law "rest upon immaterial findings of fact," apparently relying upon the assumption that the findings heretofore discussed should have been omitted by the trial court. The findings of fact, as we have observed, must be sustained, and a discussion of this point would therefore necessarily result in but mere repetition.

It is next objected that the findings of fact reciting the proper and valid passage of the resolution by the highway commission, the sale of the bonds, proper survey, selection of route, that the proposed route is more necessary than that to which the property had theretofore been appropriated, and that "all matters, facts, and things stated in the resolution of said California highway commission are true," were not supported by the evidence.

[9] What has already been said, we think, disposes of this question. The findings mentioned establish elements which the Code of Civil Procedure (section 1248) requires must appear, and the record discloses that they are supported by evidence of witnesses, or by presumptions which are expressly by statute pronounced conclusive. Although portions of such evidence are criticized by appellants as assertedly inconsistent, improbable, or contradicted by other evidence of greater weight, these are not grounds for reversal since the trial court had the witnesses before it, and all intendments are resolved in favor of its decision upon questions of fact, if, as here, it is supported by any substantial evidence. *Lindley v. Blumberg*, 7 Cal. App. 140, 93 P. 894.

[10-14] The appellants strenuously urge that it appears from the record that the people's witnesses, called to testify as to market values, had no knowledge of conditions or the fair market price of the lands in controversy, and that hence no foundation was laid for such evidence, and the superior court erred in admitting it over their objections. It appears that the plaintiff's witness Gabbert had resided in Ventura county for a period of 40 years, had engaged in the real estate business for 14 years, had sold ranch property and subdivided beach property, in said county; that he had viewed the defendants' property during the week of the trial, and he testified that he knew the market value of similar property in Ventura county; the witness Petit, a civil engineer in Ventura county, had appraised estates there and in Santa Barbara county, and while he had subdivided, he based his opinion upon the agricultural value and uses of the land; witness Eastwood testified that he had resided in Ventura county for a period of 45 years, had dealt in real estate during the

past 6 or 7 years, and that for 25 years prior to such occupation he had farmed lands in Ventura county; the witness Donlon swore that he had resided in Ventura county during the past 52 years, that he was a banker, farmer, and owned some cattle; that he owned several ranches, and loaned money on ranch property, and also had been appointed commissioner to partition a ranch consisting of 22,000 acres.

These witnesses, concededly, were familiar with values in Ventura county, which adjoins Los Angeles county on the north, along the Pacific coast; they averred that some of the lands sought to be condemned were similar to those which they had owned and sold, and their estimates ranged from \$15 to \$250 an acre, according to location, soil, proximity to the coast, etc. It has been held that witnesses called to show fair market values of lands in such cases need not be experts in the severe sense of the term, but if they show knowledge and experience regarding lands in the neighborhood, it is sufficient to qualify them (*City of Santa Ana v. Harlin*, 99 Cal. 538, 34 P. 224; *San Diego L. & T. Co. v. Neale*, 78 Cal. 63, 20 P. 372, 3 L. R. A. 83); and that all that is necessary is to show that the witness has some peculiar means of forming an intelligent judgment beyond that which is presumed to be possessed by men generally as to values (*Spring Valley W. W. Co. v. Drinkhouse*, 92 Cal. 528, 28 P. 681); such as a banker who has resided in the neighborhood (*Vallejo, etc., R. Co. v. Home Savings Bank*, 24 Cal. App. 166, 140 P. 974), or supervisors who had acted upon a petition to erect a public improvement (*Siskiyou County v. Gamlich*, 110 Cal. 94, 42 P. 468). We think the plaintiff's witnesses brought themselves within the bounds announced by the decisions of this state.

Appellants seek to strengthen their argument in this respect with the contention that Ventura county contains small country towns, whereas Los Angeles city is a rapidly advancing metropolis; that the appellants' witnesses were extensive subdividers in the latter city, and were versed in the subdivision of lands suitable for use therein, while those who testified for the plaintiff were devoid of such experience. It is urgently insisted that the theory of the defendants was that the land sought to be taken was available for subdivision purposes, that their witnesses knew the value of the land in view of its adaptability therefor, and did not attempt to qualify as agricultural experts or know the value of land for farming purposes.

[15] While availability of the property for any particular purposes may be shown, its market value is the ultimate fact sought to be established, and the people were not bound to accept the defendants' theory that the lands were suitable for subdivision, far

less to admit that if adapted to that purpose the value therefor was the true measure of their market value. Further, our Supreme Court has held, as heretofore observed by this court in *Los Angeles High School Dist. v. Hyatt* (Cal. App.) 249 P. 221, that evidence of the value of lands in terms of money for particular purposes, such as for subdivision, is inadmissible. *Sacramento, etc., R. Co. v. Heilbron*, 156 Cal. 408, 104 P. 979. The market value of the lands in suit may have appeared to the trial court as no higher than that of any ranch lands of a similar character along the Pacific coast, in adjoining or nearby counties, and we think from the record before us that its rulings were proper, in the respects to which exception was taken by appellants.

[16] It is contended that the trial court erred in permitting plaintiff's witness Darlington to testify, over objections of the defendants, that the funds in the third state highway fund were sufficient to pave the highway sought to be established, and they assert in support of this proposition that the budget was the best evidence as to such fact. It appeared, however, that this witness was president of the state highway commission, and he was asked on direct examination as to his personal knowledge of the amount. It cannot be said, as a matter of law, that the witness' personal knowledge of funds under his control was less authentic or weighty than book records of the same fact, made by a third person, at the instance of the witness. Appellants' assertion that the witness "could not know" the amount is not supported by the record.

The remaining alleged grounds for reversal consist of objections by the defendants to the admission of the resolution of the highway commission, which, it is claimed, was irrelevant and immaterial, and to the testimony of certain witnesses as to the amount of funds available, as to the value of lands sought to be condemned, and as to the effect of taking the right of way upon the value of surrounding properties. The plaintiff's witnesses apparently qualified to the satisfaction of the trial court, as experienced real estate dealers and engineers, and there was substantial evidence of their qualifications. The witnesses did not agree upon such matters, but it is elementary that, since the trial court heard them and viewed the property, it does not lie with an appellate tribunal to say, as a matter of law, that error was committed below in arriving at conclusions as to facts upon which the evidence was conflicting.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

STATE BOARD OF CHIROPRACTIC EXAMINERS et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY. (S. F. 12339.)

Supreme Court of California. April 22, 1927.

1. Certiorari 35—Superior court has constitutional jurisdiction in certiorari (Const. art. 6, § 5).

Under Const. art. 6, § 5, superior court has constitutional jurisdiction in certiorari.

2. Physicians and surgeons 11(3)—Proceeding before board of chiropractic examiners revoking license of chiropractor may be reviewed by superior court on certiorari (St. 1923, p. lxxxviii, § 10; Code Civ. Proc. §§ 1067, 1068).

Proceedings authorized by St. 1923, p. lxxxviii, § 10, before board of chiropractic examiners, in which license of chiropractor to practice chiropractic was revoked, could be reviewed by superior court on certiorari under Code Civ. Proc. §§ 1067, 1068.

In Bank.

Application by State Board of Chiropractic Examiners and others for writ of prohibition to be directed to the Superior Court of Los Angeles County, Hartley Shaw, Judge, to arrest further proceedings on application for writ of review pending before said court. Writ denied.

Frank V. Kington, of San Francisco, for petitioners.

Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for respondent.

PER CURIAM. The purpose of this petition for a writ of prohibition is to arrest further proceedings in the respondent superior court in the matter of the application of one Charles Henry Wood for a writ of review pending in said court. The petitioners are the members of and constitute the California state board of chiropractic examiners, functioning pursuant to an initiative statute adopted at the general election on November 7, 1922 (Stats. 1923, p. lxxxviii).

In June, 1926, a proceeding authorized by section 10 of said act was commenced before said board to revoke a license to practice chiropractic theretofore issued to said Charles Henry Wood, and which resulted in the revocation of said license. Thereafter Wood filed in the respondent court a petition for a writ of review to annul the order of the board revoking his license. The writ was issued, and respondents therein, petitioners here, were directed to certify to the court the transcript of the record in the matter of the revocation of said license. The present proceeding was then instituted to prohibit the respondent superior court from carrying forward the cer-

tiorari proceedings pending therein. The petitioners herein base their application on the ground that the board of chiropractic examiners does not exercise judicial functions under the statute creating it, and that therefore certiorari under sections 1067 and 1068 of the Code of Civil Procedure will not lie to review the action of that board.

[1, 2] The respondent superior court has constitutional jurisdiction in certiorari. Const. § 5, art. 6. It may err in the exercise of its jurisdiction but an appeal will lie from its determination. No special circumstances appear herein which would seem to justify the writ of prohibition. This is especially true since it has been repeatedly held that boards, such as the petitioner board, empowered to revoke licenses previously granted, may have their decisions subjected to revision by way of certiorari. In *Suckow v. Alderson*, 182 Cal. 247, at page 250, 187 P. 965, 966, this court said that:

"It is now well established in this state that tribunals such as the board of medical examiners or other boards empowered to revoke licenses which they have previously granted, for cause defined by the law, are not courts in the strict sense; they are not exercising 'the judicial power of the state' as that phrase is used in the Constitution conferring judicial power upon courts, and that statutes creating such boards and conferring upon them such powers are constitutional. (Citing cases.) It is also settled that where a board has exercised quasi-judicial power of the nature of that here in question, its decisions are subject to revision by way of certiorari."

See, also, *Brecheen v. Riley*, 187 Cal. 121, 200 P. 1042; *Anderson v. Board of Dental Examiners*, 27 Cal. App. 336, 149 P. 1006; *Dyment v. Board of Medical Examiners*, 57 Cal. App. 260, 207 P. 409. We see no good reason for departing from the rule laid down in the foregoing cases.

The writ is denied, and the proceeding is dismissed.

201 Cal. 105

ROWE v. McELROY. (L. A. 8879.)

Supreme Court of California. April 21, 1927.

1. Appeal and error ⇨901—Where respondent concedes that one half of interest was improperly included, and appellant does not show specific error, trial court's finding as to other half will be accepted.

Where on appeal, in action for partnership accounting, respondent consented to deduction of one half interest charged in judgment, court may accept finding of trial court as to amount of other half, where appellant claiming amount was less failed to point out specific error.

2. Appeal and error ⇨1140(3)—Where plaintiff before appeal remits amounts improperly included, judgment otherwise correct will be affirmed, with directions to enter partial satisfaction.

If plaintiff before taking of appeal by defendant remits amounts improperly included in judgment, and requests clerk to credit amount thereon as of date of entry, judgment if otherwise correct will be affirmed, with directions to enter partial satisfaction.

3. Appeal and error ⇨1140(3)—Judgment will not be reversed for excessive recovery on proper remittitur filed.

Where only error complained of in judgment is that amount of recovery is excessive, and respondent confesses error and consents to modification, judgment will be modified without reversal.

In Bank.

Appeal from Superior Court, Santa Barbara County; T. A. Norton, Judge.

Action by Emanuel S. Rowe against W. C. McElroy, doing business under the name of the Western Motor Transfer Company. Judgment for plaintiff, and defendant appeals. Modified, and as modified affirmed.

S. J. Bingham, of Santa Barbara, for appellant.

Mygatt, Robertson & Crawford, of Santa Barbara, for respondent.

WASTE, C. J. This action was instituted to recover one-half of the proceeds of certain partnership assets collected by the defendant subsequent to the dissolution of a partnership between the parties hereto. The cause was tried before the court without a jury, and judgment entered for the plaintiff in the sum of \$4,150.74 and costs. The defendant appealed, contending that two items of \$588.13 and \$443.93, respectively, incorporated in and forming a part of the judgment, were improperly allowed, and that the findings of fact and conclusions of law declaring these respective amounts to be due from the appellant are unsupported by the evidence.

[1] As the appellant's brief was on file, and it appearing that no brief had been filed on behalf of the respondent, although the time for filing such brief under the rules of this court had long since expired, the appeal of the defendant was placed upon a special calendar of this court upon an order to the respondent to show cause why the judgment should not be reversed, or such order be made as might be met in the premises. In response to the order to show cause the respondent appeared and filed a waiver and remission of a portion of the judgment, in which he admits that the sums above indicated were improperly allowed and included in the judgment. He concedes that the item

of \$588.13, representing one-half of the amount of an alleged escrow deposit, should be entirely eliminated, and that the sum of \$221.96, being one-half of the item of \$443.93 allowed for interest on the entire net amount of accounts collected by the defendant, be also deducted from the amount of the judgment. As to the first item, there can be no dispute. Both parties agree as to the amount. Of the second, the appellant merely says one-half of the "interest * * * would figure less than the sum of \$200." A point thus presented on appeal is entitled to little or no consideration by this court. As the trial court found that interest on the various amounts set forth in the findings, from the dates collected, would total \$443.93, we accept one-half of that sum, as admitted by the respondent, to be the proper and further amount to be deducted from the judgment, thereby limiting the recovery by the plaintiff to the sum of \$3,340.65.

[2, 3] Had the respondent, as plaintiff in the court below, and before the taking of the appeal by the defendant, remitted these amounts from the judgment, and requested the clerk to credit their total amount upon the judgment as of the date of its entry, this court would have affirmed the judgment, with directions to the trial court to cause a partial satisfaction thereof to be entered. *Craig v. Dowie*, 4 Cal. App. 176, 179, 87 P. 250. As, however, the only error in the judgment complained of is that the amount of the recovery is excessive, and as the error is confessed by the respondent, who consents to a modification, it is not necessary that the judgment be reversed or that the parties be subjected to further delay or expense. 2 Cal. Jur. 984, par. 582.

The judgment is modified by reducing the amount of the recovery by plaintiff from \$4,150.74 to \$3,340.65 and costs of suit, such modified judgment to bear interest at the legal rate from the date of the original entry; appellant to recover costs of appeal.

We concur: SHENK, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

82 Cal. App. 434

CALIFORNIA BEAN GROWERS' ASS'N v. WILLIAMS. (Civ. 3034.)

District Court of Appeal, Third District, California. April 19, 1927.

1. Agriculture ⚡6—Testimony of actual overhead charges of marketing held admissible in co-operative association's action for excess advances.

Where contract between grower and co-operative association provided that grower should pay actual costs or overhead charges of

marketing, testimony as to such charges is admissible in action by association to recover excess of advances made over and above receipts of crop marketed for defendant.

2. Agriculture ⚡6—Testimony of sale of beans and prices received held admissible in co-operative association's action for excess advances to grower.

Where contract between co-operative association and grower provided that beans were to be sold at reasonable prices obtainable in open market, testimony as to sale of beans and prices received therefor, and that prices were reasonable, held admissible in association's action against grower to recover excess of advances over and above receipts of crop marketed.

3. Agriculture ⚡6—Contract for advances by co-operative association, deductible from receipts from crop, necessarily implied that grower would reimburse association for advances.

Contract between co-operative association and grower expressly providing for advances to grower, and specifying that such advances might be deducted from receipts on sale of crop, necessarily implies that grower would reimburse association for all such advances.

4. Account stated ⚡18(2)—Where pleadings established pre-existing indebtedness between parties, account is admissible as stated account.

Where pleadings in action by co-operative association to recover excess advances from grower established pre-existing indebtedness between parties, account is admissible in evidence as stated account.

5. Account stated ⚡19(2)—Accounting rendered after expiration of contract between co-operative association and grower held "final accounting" as bearing on admissibility of stated account.

Where life of contract between co-operative association and grower had expired at time accounting was rendered by association, such accounting was final as bearing on its admissibility as stated account in association's action to recover excess advances.

6. Account stated ⚡6(2)—Debtor's consent to account required to make it "stated account" may be implied, from unreasonable delay in objecting thereto.

Although, in order to make account a "stated account," it is essential that the debtor consent thereto, such consent may be implied, where debtor after receipt of account waits an unreasonable time before making objection thereto.

[Ed. Note.—For other definitions, see Words and Phrases, Stated Accounts.]

7. Account stated ⚡19(2)—Original book in which entries were made need not be produced to render account stated admissible.

Account stated being new account, original book in which entries were made need not be first produced in order to render account admissible.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by the California Bean Growers' Association against E. C. Williams. From a judgment of nonsuit, plaintiff appeals. Reversed.

E. L. Hayes and T. R. Meyer, both of San Francisco, for appellant.

A. H. Hewitt and Lloyd E. Hewitt, both of Yuba City, for respondent.

PLUMMER, J. Action by plaintiff to recover excess of advances made by the plaintiff to the defendant over and above the receipts of the defendant's crop of beans marketed by the plaintiff for the defendant. Judgment of nonsuit was entered in the trial court, and from this judgment the plaintiff appeals.

In this opinion, the word "association" will be used to designate the plaintiff and appellant.

The association is a farmers' co-operative association doing business on a nonprofit basis. Its purpose is to market beans of member growers. The association operated under standard form of contract, known as the "bean crop contract," and was executed by the association and the defendant covering beans to be grown by the defendant and delivered to the plaintiff during the years 1918, 1919, and 1920. The action does not involve any beans grown or delivered during the year 1918, nor does it appear that any beans were grown by the defendant and delivered to the plaintiff during the year 1918. One count in the action was for damages for failure of the defendant to deliver beans to the association during the year 1920, but the answer of the defendant sets forth that no beans were grown by the defendant during the year 1920. The count in the plaintiff's complaint relating to the 1920 alleged crop of beans was upon information and belief and was abandoned upon the trial. The action involves only the crop of 1919.

This appeal is based upon rulings made by the trial court excluding proffered testimony, but before making a statement thereof and considering the same, we will set forth certain portions of the agreement entered into between the association and the defendant. Section 2 of the agreement authorizes the association to purchase bags, sacks, and twine and other necessary materials for the use and account of growers, and the grower authorizes the association to pay on his account all actual costs of freight, cartage, loading, cleaning, warehousing, insurance, selling, and any other proper charge not specified, and, in addition, authorizes the association to deduct and retain an association charge not in excess of \$1 per ton. Section 3 appoints the association as the agent of the grower to fix a reasonable price at which his beans may be sold, and below which none

should be sold, to act for the grower in negotiating loans on his crop at his request, to process or clean or store any and all of his beans, and to sell the same on his account, and to pay to the grower the net proceeds, less all costs and deductions herein provided.

Section 5 specifies that the grower is to harvest, pick, and prepare his beans for shipment and to warehouse them at the nearest convenient shipping point as delivery to the association for marketing for his account in a public warehouse and deliver warehouse receipts to the association. The association agrees to advance the grower, or to secure for him as an advancement, such amount as may be deemed proper, based upon general market crop conditions, such advance to be repaid the association out of the sale of the beans.

Subdivision b of section 6 authorizes the association to reclean any and all beans at the expense of the grower; section 8 is to the effect that the association agrees to sell and market the beans at the reasonable and fair prices obtainable by the association "in open market or elsewhere, subject always to the conditions of supply and demand, competitive offers, and governmental rules and authority."

Section 9 specified that the association shall market and sell the beans of the grower, mingled with beans of like variety and grade delivered by other growers at the reasonable and fair value thereof, and the grower agrees that his beans shall be so handled and that the returns therefrom, less brokerage and all other costs and charges and the association charge as set forth in paragraph 2, shall be paid to him on a proportionate basis out of the amounts received by the association during the season from the sale of said beans, etc.

The complaint is in four counts, three only of which need be mentioned, the fourth having been abandoned. The first count is based upon an account stated. The third count alleges a book account. The second cause of action alleges that the association agreed to receive beans as the defendant's agent, to process, clean, and store the beans for his account, and to pay for his account all charges arising from the handling and selling of beans, and after deduction of the charges and association charge not to exceed \$1, to return to the defendant the net amount received from the sale of his beans.

It is alleged in the complaint and admitted in the answer that the association advanced to the defendant, on account of his bean crop of the year 1919, the sum of \$343.21. The complaint further sets forth that the beans received from the defendant were sold for the sum of \$106.57; that the total charges, including the association charge against said beans, amounted to \$77.34, leaving a net sum of \$29.23, which defendant

was entitled to receive under the contract. The amount received on the sale of the beans, added to the charges paid by the association deducted from the advances made by the association for and on behalf of defendant, left a balance owing to the association by the defendant of the sum of \$314.18. It is for the recovery of this sum that the action is prosecuted.

On the 9th day of February, 1922, the association executed and delivered to the defendant an account showing the advances made by the association for and on behalf of the defendant, all charges and expenses incurred by the association in connection with processing, marketing, etc., of the defendant's crop, the amount received from the sale thereof and the balance due the association. This statement of account, omitting the portions which do not change the character thereof, is as follows:

"California Bean Growers' Association, 120 Battery Street, San Francisco, California.

"Name, E. C. Williams

"Address, Rt. #1, Gridley, California.

1919 Season.

To cash advanced for your account:							
Cash	\$343	41					
Freight and drayage.....	30	50					
Insurance	75						
Handling and weighing.....	11	43					
Cleaning and drying.....	25	86					
Fumigating							
Sacks							
Ass'n charge 12,650 lbs. at \$1 ton....	6	32					
Storage on screenings.....	2	48					
Net damaged sale, 9,889 lbs. at \$1.-							
06411					\$105	23	
					315	52	
					\$420	75	\$420 75
Balance due association.....	\$315	52					
Sale screenings 817 No. C1644.....	1	34					
					\$314	18"	

This statement of account delivered by the association to the defendant remained in his possession for over two years, and, so far as the record discloses, no objection was ever made to the association concerning the same, nor was the accuracy thereof ever questioned by the defendant until the filing of his answer herein. This statement of account was excluded by the trial court, and such ruling is assigned as error.

The plaintiff also sought to prove the different items of expense making up the account and constituting the actual costs of cleaning and processing the defendant's beans and the actual costs paid for freight.

The court excluded testimony as to the actual costs of the items set forth, and in so doing stated its views as follows:

"I will hold that, under those provisions of the contract, this man would pay his proportion of the cleaning of all the beans you had for that year and any other expenses that was

had in the processing of the beans for the market and marketing them; that you could not keep a separate account with him for processing his particular lot."

This ruling was also assigned as error. The plaintiff also sought to introduce testimony as to the manner in which it sold the defendant's beans and the amount received therefor. Testimony to this effect was excluded by the court on the ground that the plaintiff must first show the market value of the beans in question, and that it sold them for the market value.

[1] As we have shown, section 2 of the contract authorized the association to pay on account of any grower the actual costs of freight, cartage, loading, cleaning, and warehousing his beans. The beans were to be harvested, picked, and prepared for shipment by the grower and by him placed in the warehouse nearest a convenient common shipping point. The agreement does not provide for pooling freight charges, cleaning charges, etc., of the bean grower by the respective growers. This, for the evident reason that one lot of beans may be produced at a long distance from a warehouse and the freight and drayage charges much greater than in other instances. Likewise, with regard to the cleaning charges, some beans are clean and some are foul and the expenses, or, as said in the agreement, the actual costs of cleaning beans grown by different growers under different conditions might vary to such an extent that it would be inequitable to charge one grower whose crop was clean and whose drayage and freight charges were light with the cost and expenses of cleaning a crop grown by a grower that was foul and whose freight and drayage charges, by reason of distance, might be much greater. The overhead charges of marketing, insurance, etc., were pooled, because these charges were burdens upon all the beans handled and might very well be proportionally charged against the different growers, but whatever the reason for the drawing of the contract, the contract provides for the grower paying the actual costs, and therefore testimony as to such actual costs should have been admitted, irrespective of whether the contract should or should not have so provided.

[2] Again, the contract provides that the beans were to be sold at the reasonable and fair prices obtainable by the association in the open markets or elsewhere, etc., which clearly admitted testimony as to where the beans were sold and as to the prices received therefor, and that the prices were reasonable and fair prices for the kind of beans being marketed, and if the beans were not sold for the full market value then prevailing for the class of beans marketed, it might be that the association would be chargeable for having sold the beans for less than the market value. This, however, constitutes no

reason for excluding testimony as to the sum realized on the sale of the defendant's beans and testimony as to where they were sold and the conditions under which they were sold. It might be further stated that the beans handled by the association for the defendant were damaged beans and were classed as third grade. Whether there was or was not a market or any market value for third grade beans does not appear.

[3] Finally, did the court err in excluding the account rendered by the association to the defendant and sued upon as a stated account? The contract expressly provided for advances and specified that such advance might be deducted from the receipts on sale of the beans, which necessarily implies that the grower would reimburse the association for all such advances. In *re Joseph P. Murphy Co.'s Estate*, 214 Pa. 258, 63 A. 745. The principle involved in that case and in this is almost identical, although a co-operative association was not involved. That a co-operative association may recover for advances is also supported by *Cal. Raisin Growers' Association v. Abbott*, 160 Cal. 601, 117 P. 767; *Sugar Loaf O. G. Ass'n v. Skewes*, 47 Cal. App. 470, 190 P. 1076. In the *Cal. Raisin Growers' Association v. Abbott*, supra, in an equitable action for an accounting by all the parties, advances made to some of the growers were allowed to be recovered in order that a just proportion of the assets of the association might be distributed to other growers. In the *Sugar Loaf O. G. Ass'n v. Skewes*, the association was allowed to recover for the picking and packing, hauling, washing, and shipping of the defendant's oranges.

[4, 5] As a reason why the account should not be admitted in testimony as a stated account, the respondent suggests first that the parties seeking to prove an account stated must first show a pre-existing indebtedness between the parties. The pleadings in this case established that fact. The plaintiff alleged an advance which constituted in every legal sense a loan of \$343.41 and the answer of the defendant admits the same. The transcript also shows that during the course of the trial the advance by the association was admitted by the defendant. As a second reason why the account should be excluded, it is argued that the accounting was not a final accounting or intended to be a final settlement. The record shows that the life of the contract had expired when the accounting was rendered, that there were no other transactions taken or had between the association and the defendant, other than as related to the defendant's crop of beans for the year 1919. The defendant's answer excludes the idea that any of the beans were involved, in that it set forth that the defendant grew no beans during the year 1920. The account purports on its face to include all

the beans handled by the association for the year grown during the cropping season of 1919. The agreement, in one of the subdivisions of section 9, provides for the storage season ending on April 1st of the year succeeding that in which the beans are placed on storage contemplating annual settlements.

The whole record shows that no other beans were involved. Relying upon the case of *Coffee v. Williams*, 103 Cal. 550, 37 P. 504, it is argued that the account rendered is only a memorandum and is not a final settlement. The case of *Coffee v. Williams*, supra, is readily distinguishable from the case at bar. In the case of *Coffee v. Williams* there was no attempt made to balance the account and show the amount due, and, as stated by counsel for appellant herein, such balance as might have been struck in that case would have been different from the amount claimed in the action. It was, as stated by the court, a memorandum of transactions up to and including the date of the account. As stated by the court in the *Williams Case*, the account should show that it was intended as a final settlement up to date. In the present case, the account rendered does show the amount due and owing from the defendant to the association at the time of its rendition, the balance was struck, and the amount due stated and is exactly the amount sued, for in the instant case. All the items set forth in the account rendered by the association indicated how the charges were incurred, and for what purpose the expenditures were made. In the *Williams Case*, as just stated, no balance was struck. Here the balance has been struck and the amount alleged to be due from the defendant to the association plainly stated.

Respondent also relies upon the case of *Beltaire v. Rosenberg*, 129 Cal. 164, 61 P. 916. A reference to that case, however, shows no applicability to the circumstances with which we are dealing. The correspondence between the parties in the *Beltaire Case* shows that the account lacked the essence of finality and was not agreed to by the defendant either directly or by implication. The case of *Bennett v. Potter*, 180 Cal. 736, 183 P. 156, is not decisive of any question here involved. The *Bennett Case* is authority to the effect that a written contract cannot be altered by oral statement of account.

[6] In the case at bar, as we have said, there were no objections raised by the defendant to the account rendered by the association, and, while it is held that the defendant must consent to the account in order to make it a stated account, it is now well settled that such consent may be implied, where the defendant, after the receipt of the account, waits for an unreasonable time before making or without making any objection thereto. As stated in 1 California Jurisprudence, page 197, § 54:

"An acknowledgment need not be made in express words, but may be implied from any act or statement which necessarily and directly admits or presupposes the existence of the debt, and the obligation to pay it. Accordingly, if the account be sent to the debtor, and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated."

To the same effect is 1 C. J. page 691, § 276, where the authorities are cited to this statement of the law:

"Where an account is rendered by one person to another, the retention of the same by the latter beyond a reasonable time without objection is evidence of his assent to the correctness of the account, and, accordingly, is evidence of an account stated."

In *Mayberry v. Cook*, 121 Cal. 588, 54 P. 95, it is held, quoting from the syllabus:

"The agreement between the parties to an account stated, that all the items therein are true, need not be express, but may be implied from circumstances, such as the sending of the account from one to the other, who makes no objection thereto within a reasonable time."

See, also, *Atkinson v. Golden Gate Tile Co.*, 21 Cal. App. 168, 131 P. 107. In *Schneider v. Oakman Con. Min. Co.*, 38 Cal. App. 338, 176 P. 177, the court, in considering when an account rendered becomes an account stated, said:

"When an account is rendered to a debtor it becomes his duty to make seasonable objections thereto, if any he has, and if he does not do so the account becomes an account stated and the foundation of an independent cause of action, which arises thereon whenever a reasonable time has elapsed without any objection being made thereto. It has been held that under certain circumstances failure to object for six months after the receipt of an account by the debtor is unreasonable" (citing cases).

And in *Crane v. Stansbury*, 173 Cal. 631, 161 P. 7, and *Atkinson v. Golden Gate Tile Co.*, 21 Cal. App. 170, 131 P. 107:

"A space of 25 days which elapsed after rendition of the account without objection thereto being made on the part of the debtor established the account as an account stated."

[7] The objection that the relationship of the parties was such that the account rendered could not become a stated account, as held by the trial court, has been distinctly overruled in the recent case of *Cal. Bean Growers' Ass'n v. Rindge Land & Nav. Co.*, 248 P. 658, where the Supreme Court held that an account very similar to the one with which we are dealing constituted an account stated, and the fact that the relationship of principal and agent existed between the parties did not change the rule as to the ac-

count becoming a stated account, under the conditions which we have heretofore set forth. The holding had in the last case cited clearly establishes the admissibility of the testimony excluded by the trial court. The account stated being a new account, the original book in which the entries were made were not required to be first produced. *Gardner v. Watson*, 170 Cal. 570, 574, 150 P. 994; *Hendy v. March*, 75 Cal. 566, 17 P. 702; *Coffee v. Williams*, 103 Cal. 550, 556, 37 P. 504.

Avoiding any expression of opinion as to the conclusions that should be drawn by the trial court upon the facts involved herein upon a retrial of this case, it is sufficient to say that the evidence erroneously excluded, if admitted, would have been sufficient to establish a prima facie case, and necessitates a reversal of the judgment herein.

The judgment of the trial court is reversed.

We concur: FINCH, P. J.; HART, J.

82 Cal. App. 215

McMANUS v. ARNOLD TAXI CORPORATION et al. (Civ. 5291.)

District Court of Appeal, First District, Division 1, California. April 7, 1927.

1. Municipal corporations ☞706(5)—Finding that driver of automobile backing was negligent in running over boy held justified (Motor Vehicle Act, § 12, and § 20[a], as amended by St. 1919, p. 215, § 12).

In action for injuries to a five year old boy run over while crossing street by automobile backing down grade to intersection on left side of street, evidence held to justify finding that driver was negligent, pedestrian not being required to anticipate that automobile which has just passed him will be backed, in view of Motor Vehicle Act, § 12 (St. 1915, p. 405), and section 20(a), as amended by St. 1919, p. 215, § 12.

2. Municipal corporations ☞706(6)—That driver and wife looked while backing automobile, without seeing boy, held not to establish freedom from negligence as matter of law (Motor Vehicle Act, § 12, and § 20[a], as amended by St. 1919, p. 215, § 12).

That automobile driver and his wife looked to rear before starting to back automobile on left side of street in order to make turn at intersection, and that driver continued to look while backing, and that neither saw five year old boy until both wheels of car passed over him, did not establish as matter of law that driver exercised due care so as to relieve them from liability; question of exercise of ordinary care being one of fact to be determined from all circumstances of case, in view of Motor Vehicle Act, § 12 (St. 1915, p. 405), and section 20(a), as amended by St. 1919, p. 215, § 12.

3. Damages ⚖️128—Award of damages cannot be set aside as "excessive," unless so grossly disproportionate as to show passion or prejudice.

It is only when an award of damages is so grossly disproportionate as to shock the sense of justice and indicate that verdict was result of passion or prejudice that court can set it aside as "excessive."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Excessive.]

4. Damages ⚖️132(4)—\$11,102.80 for injuries permanently impairing health of five year old boy, necessitating two major operations, held not excessive.

Award of \$11,102.80 to five year old boy run over by defendants' automobile for severe and painful injuries, necessitating two major abdominal operations for rupture, removal of appendix, and treatment of large abscess, requiring two months' hospital treatment, and permanently injuring his health, held not excessive.

5. Infants ⚖️50—Medical expenses incurred by father for five year old son, run over by automobile, held not enforceable against child nor his estate (Civ. Code, §§ 34, 35).

Under Civ. Code, §§ 34, 35, where parent, who incurred obligations for medical and hospital expenses furnished to his five year old son, run over by defendants' automobile, paid part of such expenses, obligation to pay balance was not legally enforceable against son personally nor against his estate, because he was not under guardianship.

6. Damages ⚖️43—Right of five year old boy, run over by automobile, to recover medical expenses held subject to defense of parents' contributory negligence, and, defense having been eliminated on demurrer, boy was not entitled to recover therefor.

Right of five year old boy, suing for injuries sustained when he was run over by defendant's automobile, to recover for medical and hospital expenses, was subject to defense of parents' contributory negligence in permitting child to be in place of danger, and, such defense having been eliminated from answer on demurrer, and defendant thereby deprived of right to defend against such claim, such expenses could not be recovered by child as element of damages under doctrine of waiver or emancipation.

7. Trial ⚖️396(1)—Finding on issue of parents' contributory negligence held ineffective, where defense eliminated on demurrer.

Trial court's finding on issue of contributory negligence of parents of five year old boy run over by defendants' automobile was of no force or effect, where such defense was eliminated from answer on demurrer.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Vincent McManus, an infant, by W. J. McManus, his guardian ad litem, against the Arnold Taxi Corporation, L. A.

Arnold, and another. Judgment for plaintiff, and last-named defendant appeals. Affirmed as modified.

Joe Crider, Jr., and John C. Miles, both of Los Angeles, for appellant.

Swaffield & Swaffield, of Long Beach, for respondent.

KNIGHT, J. Plaintiff, by his father as guardian ad litem, sued the above-named defendants to recover damages for personal injuries sustained by him as a result of being run over by an automobile driven by defendant L. A. Arnold. The action was tried before the court sitting without a jury, and judgment was rendered against the defendant Arnold alone, from which judgment he has appealed.

Section 20 (a) of the Motor Vehicle Act in force at the time of the accident read in part as follows:

"The driver or operator of any vehicle in or upon any public highway shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians * * * and wherever practicable shall travel on the right hand side of such highway. * * * On all occasions the driver or operator of any vehicle in or upon any public highway shall travel upon the right half of such highway unless the road ahead on the left hand side is clear and unobstructed for at least one hundred yards ahead and in all cases while crossing an intersecting highway,"

—and section 12 of said act required that every person operating a motor vehicle shall sound a "bell, gong, horn, whistle, or other device whenever necessary as a warning of danger, but not at other times, or for any other purpose." Stats. 1919, p. 215, and Stats. 1915, p. 405. The complaint herein alleged, and the trial court found, that respondent's injuries were caused by the "careless, negligent, and reckless operation of said automobile," and as grounds of appeal appellant urges, first, that the evidence is insufficient to sustain said finding.

[1] The essential facts appearing in the record in support of the finding are as follows: Respondent was five years old at the time he was injured. The accident occurred about noon on September 2, 1921, on Orange avenue, in a sparsely settled neighborhood just outside of the city limits of the city of Long Beach. Orange avenue runs north and south, and is intersected by Augusta street, which runs east and west. The entire width of Orange avenue at the scene of the accident was 40 feet, a strip about 20 feet wide in the center thereof being laid with an oiled macadam, which was in an uneven condition; and on each side of said avenue there was a row of trees, those on the east side being about 18 or 20 feet apart, and measuring from 15 to 24 inches in diameter,

the branches of some of them extending to within 5 feet of the ground.

Appellant, accompanied by his wife, who was sitting in the front seat of the automobile with him, was visiting the locality mentioned for the purpose of viewing a burning oil well located at Signal Hill, some distance away. He was driving a Cadillac touring car with a left-hand drive, and was traveling north on the east side of Orange avenue. Upon reaching a point on said avenue about 40 feet beyond the northerly line of said intersecting street, he stopped the automobile, allowing the engine to run; but, the view of the burning well from that point being somewhat obscured by the trees, he concluded to obtain a better view by going east on Augusta street. Instead of proceeding forward and turning around to reach his objective, he disengaged the clutch of the automobile, and, with the engine still running, allowed the automobile to coast backward, down grade, on the east side of Orange avenue; his purpose being to roll backward on Orange avenue across the intersection far enough to allow him to turn east on Augusta street. While attempting to execute this maneuver, and after coasting about half way to the corner, the rear left fender of his automobile struck respondent on the shoulder, knocking him down, and both wheels on the left side of the automobile passed over his abdomen, with the result that he was severely injured.

As to the boy's movements immediately preceding the accident, his mother testified on cross-examination by counsel for appellant that, while on the way to the hospital in appellant's automobile, the boy told her that he saw appellant's automobile as it passed up Orange avenue; that he was standing "by the trees," and, when the automobile stopped up the street, "a distance away from him," he thought the people in it were going to get out of the machine and enter the adjacent property where his family usually bought milk, and that consequently he would be able to run across the street; but that, while attempting to do so, the machine "backed on," him, knocking him down. With reference to the question as to whether respondent was visible from the street at the time appellant's automobile passed up Orange avenue, Robert Drum, 12 years old, testified that immediately before the accident he was standing near the opposite (northwest) corner of said streets fixing his "coaster"; that, as appellant's automobile went up Orange avenue, he saw respondent between the trees and close to the curb, throwing dirt in the air; that, as he proceeded down the street on his "coaster," his attention was again directed to the automobile by hearing appellant's wife "holler: 'Stop, you are running over something,'" and, looking around immediately, he saw the

front wheel of appellant's automobile, which was then backing "fast" downward, toward the Augusta street intersection, passing over respondent's body. Drum's testimony as to the outcry made by appellant's wife was corroborated by certain admissions which respondent's witnesses claim appellant and his wife made to that effect shortly after the accident happened, and that appellant furthermore stated that "all amends and everything" in his power would be done for the child, "and that all expenses and everything" would be taken care of by him. Other evidence was adduced on behalf of respondent showing that no warning of any kind was sounded by appellant before he started to back the machine nor while it was proceeding backward, and that the engine thereof ran quietly.

We are of the opinion that the foregoing evidence was sufficient to justify the conclusion reached by the trial court that appellant was not operating said automobile in a careful manner with due regard for the safety and convenience of pedestrians; and that therefore the finding upon the question of negligence must be sustained under those authorities holding in substance that, where one passing several feet back of a standing automobile is injured by reason of the sudden backing of the machine, without warning, an inference that the driver is negligent is justified (*Lee v. Independent Dairy*, 127 Wash. 622, 221 P. 309; *Glinco v. Wimer*, 88 W. Va. 508, 107 S. E. 198; *Oliver v. Weaver*, 72 Colo. 540, 212 P. 978; *Enstrom v. Neumoegen* [Sup.] 126 N. Y. S. 660; *Suddarth v. Kirkland* [Mo. App.] 220 S. W. 699; *Wirth v. Burns Bros.*, 229 N. Y. 148, 128 N. E. 111; *Huddy on Automobiles* [7th Ed.] § 528; *Berry on Automobiles* [4th Ed.] § 413), and that such person need not anticipate that an automobile which has just passed him will be backed just after passing (*Westervelt v. Schwabacher*, 104 Wash. 418, 176 P. 545).

Appellant testified that before he started to back his automobile he looked to the rear on the left (west) side, and, while the car was rolling backward, raised in his seat, kept his hands on the wheel, and looked to the rear over his right shoulder and through the glass in the rear curtain of the automobile; and his wife testified that about the time the automobile came to a stop beyond the intersection, and before it started backward, she looked to the rear on the right-hand side, but did not continue her observation in that direction during its retrograde movement; and both testified that they were unaware of the boy's presence until after both wheels of the automobile had passed over him. Appellant contends that the foregoing testimony was sufficient to establish as a matter of law that he exercised due care in backing said automobile (*Sheldon v. James*, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493;

Hahn v. Graham Co., 148 La. 55, 86 So. 651), and that, since neither the single act of backing a motor vehicle on the public highway nor the mere fact of driving on the left-hand side thereof constitutes negligence per se (Sheldon v. James, supra; Hagenah v. Bidwell, 46 Cal. App. 560, 189 P. 799), he cannot be held responsible for the accident.

[2] The testimony relied upon, however, was given in support of specific allegations of the same import made in paragraph 1 of the second separate defense pleaded in the answer, which the trial court expressly found were not true. It would therefore appear that the trial court did not accept as true the testimony alluded to. But, even assuming in the face of the findings that it did, the facts testified to would not necessarily establish as a matter of law that appellant exercised due care so as to relieve him of liability, because the question of the exercise of ordinary care, being one of fact, must be determined from all the conditions and circumstances surrounding each case (Noonan v. Leavitt, 238 Mass. 481, 131 N. E. 297; Duggan v. Forderer [Cal. App.] 249 P. 533), and therefore the ultimate question of fact remained for the trial court to determine whether the attempt by appellant, after proceeding up the street and stopping, to back his automobile across said intersection, on the wrong side of the street, without warning, for the purpose of turning into and proceeding easterly along said intersecting street, instead of pursuing a forward course, turning around and traveling on the right-hand side of the street, as ordinarily would be done, was an act of carelessness. If it was not, then the further question of fact arose as to whether the execution of such maneuver was attended by the exercise of ordinary care, and with due regard for the safety of pedestrians using the street. Both of these questions of fact were resolved against appellant, and we are satisfied that upon both propositions the trial court's conclusions are supported by the authorities hereinabove cited.

The facts of the instant case are materially different from those of Sheldon v. James, supra, and Hahn v. Graham Co., supra, upon which appellant strongly relies. In the former the driver was in the act of backing his automobile into a parking space next to the curb on the right-hand side of one of the congested streets of San Francisco, and in doing so struck an adult pedestrian who attempted to cross the street from the opposite side, in the middle of the block, by pursuing a long diagonal. He did not observe the backing automobile, although, while it was being backed up grade, as the opinion states, it made "an extremely loud and raucous noise sufficient to attract the attention of people upon the opposite side of the street, and such as should have attract-

ed the attention of the plaintiff before he put himself in a place of danger." The court said:

"If, then, under these circumstances, he did not look, the jury was justified in concluding that he was negligent in not having looked."

In the other case, Hahn v. Graham Co., supra, the driver of a truck went upon an unpaved street, which was in bad condition, and, becoming stalled, "was forced to back his truck to the street behind him." While backing slowly a child four years old jumped across an open ditch on the side of the road, and, according to the testimony of the only witness who saw the accident, "ran into the front wheel of the truck," and was injured. It is apparent from the facts stated that neither case is in point.

[3, 4] Damages were awarded in the sum of \$11,102.80, and appellant contends that the amount is excessive. The evidence shows, beyond question, that the boy sustained very severe injuries; that as a result of them he endured excruciating pain and suffering; and that his health is doubtless permanently impaired. Two major surgical operations were performed upon him. Upon opening the abdominal cavity the first time it was found that the pyloric end of the stomach had been ruptured for about 2½ inches, so that the food contents had been spilled in the peritoneal cavity. The appendix was "ballooned out," like it had been put to a considerable stretch, necessitating its removal. His condition became gradually worse, and about a week afterwards the abdominal cavity was again opened. A large abscess was found extending as high as the diaphragm, in behind the liver, the abscess containing about a quart of pus. His treatment in the hospital extended over a period of two months, during most of which time the affected intestinal parts were drained with large tubes inserted in both sides, and extending clear around to the back of the abdominal cavity. Although at the time of the trial of the action respondent was able to run about and play with other children, the medical testimony shows that his injuries have resulted in weakening the abdominal wall so that he will likely suffer in the future from hernia and adhesions; and, notwithstanding that the rupture of the stomach has apparently healed, his intestinal absorption and digestion will probably be limited to a certain degree. "It is only when the award is so grossly disproportionate as to shock the sense of justice and indicate that the verdict was the result of passion or prejudice, that the court can set it aside as excessive." Averdieck v. Varris, 63 Cal. App. 495, 218 P. 786; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 P. 1019; Martin v. Shea, 182 Cal. 130, 187 P. 23. Under the foregoing rule it

cannot be fairly said that the award herein is excessive.

Evidence was admitted over appellant's objection establishing the amount of medical fees and the cost of hospitalization and medical supplies incurred in the treatment of respondent's injuries, the total amount of which, the findings show, was included in the award of damages. Part of the cost of the medical supplies, amounting to approximately \$100, was paid by respondent's father, but the balance remained unpaid at the time of the trial. Bearing in mind that the action was not brought by the parent, but was brought by the child to recover damages for the injuries personal to the latter, appellant contends that the child may not recover the expenses paid or incurred by his parent, even though the same were paid or incurred on behalf of his child, for the reason that the parent and not the child is primarily liable therefor; and that therefore the inclusion of the amount of those expenses in the award of damages was erroneous.

In *Durkee v. Central Pacific Railroad Co.*, 56 Cal. 388, 38 Am. Rep. 59, which was an action for damages brought by the parent wherein he sought to include in the measure of damages the element of pain and suffering experienced by his son, the court said:

"When the action is brought by the parent, loss of service, medical attendance, expenses of nursing, and the like are matters to be considered by the jury, and in such cases compensation is the rule. * * * But when the action is brought on behalf of the child, there are other separate and distinct elements of damage. The child recovers, not for loss of time or service or medical attendance or expenses of curing, but for the injury personal to himself, such as pain and suffering, both physical and mental, disfigurement," etc.

[5, 6] The foregoing statement of the law is in complete harmony with the decisions of other jurisdictions, which hold generally that, where the injured child is living with, and is being supported by, the parents, thereby legally entitling them to its custody and the benefit of its services, and consequently charging them primarily with responsibility for its maintenance including the payment of any expenses reasonably and necessarily incurred in the treatment of injuries tortiously inflicted upon the child, for the recovery of which expenses they are given a right of action against the tort-feasor, said expenses do not constitute an element of damage accruing to the child which it may recover in an action brought in its own name and for its own benefit. See *Sedgwick on Damages*, § 226f, and 4 *Sutherland on Damages*, § 1250, and cases cited therein; also *Chicago & A. R. Co. v. Lammert*, 12 Ill. App. 408; *Butler v. Metropolitan Street R. Co.*, 117 Mo. App. 354, 93 S. W. 877; *Tucker v. Buffalo Cotton Mills*, 76 S. C. 539, 57 S. E. 626, 121

Am. St. Rep. 957; *McCallam v. Hope Natural Gas Co.*, 93 W. Va. 426, 117 S. E. 148. But, as respondent contends, there are certain exceptions to the foregoing rule under which it has been held that the child may recover said expenses, among them being where the child has paid, or is legally bound to pay, the same (*Sutherland on Damages*, § 1250, note 70); or is under guardianship, thereby making his estate legally liable therefor (1 *Sedgwick on Damages*, § 226f; *Stotler v. Chicago & A. Ry. Co.*, 200 Mo. 107, 98 S. W. 509), and in some jurisdictions it has been held that, if the parent appears as guardian ad litem in an action brought by the child, and includes therein as elements of damages loss of wages and the payment of medical expenses, reimbursement for which under the general rule would accrue to him, he is deemed to have waived the right to recover the same in favor of the child; such waiver operating in the nature of an emancipation, and conferring upon the child the right to recover said wages and expenses. *Donald v. City of Ballard*, 34 Wash. 576, 76 P. 80; *Daly v. Everett Pulp & Paper Co.*, 31 Wash. 252, 71 P. 1014; *Abeles v. Bransfield*, 19 Kan. 16; *Chicago Screw Co. v. Weiss*, 203 Ill. 536, 68 N. E. 54; *Central of Georgia Ry. Co. v. McNab*, 150 Ala. 332, 43 So. 222. The evidence in the instant case shows, however, that the parent, and not the child, incurred all of said expenses, and has actually paid some of them; and the obligation to pay the balance is not legally enforceable against the child personally (Civ. Code, §§ 34 and 35), nor against his estate, because he was not under guardianship; and, even though the doctrine of waiver and emancipation as announced in the authorities above cited be accepted as the law of this state, such doctrine cannot fairly be given application in the instant case for the following reasons: The right of the father in any event to recover said expenses would be subject to the defense that he contributed to the child's injuries by negligently permitting it to be and play in a place of danger; and it would follow that the right of the child to recover said expenses in the place of the father would be subject to the same defense. Such defense was pleaded as a "fourth, separate, further and distinct" defense in the original answer, but was eliminated from the case, on demurrer, at the instance of respondent, presumably upon the ground that such defense could not be urged in an action brought and maintained by the child. Appellant being thus deprived of the right to defend against such claim, the amount thereof could not, in our opinion, be afterwards legally allowed to the child as an element of damage under the doctrine of waiver or emancipation.

[7] In concluding this point, it may be stated that, notwithstanding that the fourth separate defense of the original answer re-

lating to the charge of contributory negligence on the part of the parents was omitted from the amended answer, and that the latter pleading contained but three separate defenses, none of which related to the contributory negligence of the parents, the trial court made a finding that "paragraph I of defendants' fourth separate further and distinct answer and defense" was not true. Manifestly, said finding is of no force or effect, because, as stated, there was no fourth defense pleaded in the amended answer.

For the foregoing reasons we conclude that the allowance of said expenses as a part of respondent's damages was erroneous; and it is therefore ordered that the judgment be modified by reducing the amount thereof to the sum of \$9,915.80, the amount stricken therefrom representing the physician's fee of \$750 and the cost of hospitalization and medical supplies amounting to \$437, and, as thus modified, the judgment will stand affirmed.

We concur: TYLER, P. J.; CASHIN, J.

82 Cal. App. 369

NICKELL v. ROSENFELD. (Civ. 5306.)★

District Court of Appeal, First District, Division 1, California. April 16, 1927.

Hearing Denied by Supreme Court June 13, 1927.

1. Trial ⚡260(1), 296(1)—Judgment will not be reversed for giving or refusing of instructions, where jury were fairly instructed on all material points.

It is settled law that no reversal of judgment will be ordered by reason of the giving or refusal of instructions, if record shows the jury were fully and fairly instructed on all material points.

2. Appeal and error ⚡1026—Judgment will not be reversed unless error complained of worked substantial injustice.

Judgment will not be reversed unless error complained of is such as operated to prevent full and fair hearing and thereby worked substantial injustice.

3. Trial ⚡194(16)—Instruction requiring pedestrian struck by automobile to look to left not only on entering, but on crossing, street, held to invade jury's province.

In suit of pedestrian struck by automobile at intersection, instruction that plaintiff's duty of exercising ordinary care was not fully performed by looking to left on stepping into street, but duty in this respect continued during crossing, held error as invading province of jury by taking from them right to determine plaintiff's negligence, and in view of emphasis upon care required of plaintiff by other instructions.

4. Municipal corporations ⚡705(2)—Pedestrian and vehicle driver have equal and reciprocal rights on all parts of highway.

Pedestrian and driver of vehicle have equal and reciprocal rights in use of highway, extend-

ing to all sections thereof, whether at established places of crossing or elsewhere.

5. Municipal Corporations ⚡705(2)—"Rights" of pedestrians and drivers refers to civil, as distinguished from absolute, rights.

The term "rights," as used in reference to pedestrians and drivers, refers to civil rights given and protected by law, whose enjoyment is entirely regulated thereby, as distinguished from rights absolute in the elemental sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right—Rights.]

6. Municipal corporations ⚡705(2)—"Rights" of pedestrian and automobile driver are relative to extent that they are mutually restrictive.

"Rights" of pedestrian and automobile driver are relative to extent that each must so restrict and use his right as to permit the other the full benefit of what is his.

7. Municipal corporations ⚡705(2)—Facts of case determine care required of pedestrians and drivers.

Facts and circumstances of each case control the amount of care required on part of both pedestrians and vehicle drivers.

8. Municipal corporations ⚡705(10)—Pedestrian may proceed across intersection without constant watch in traffic's direction, after proper lookout on leaving curb.

Pedestrian may proceed across intersection without constant watch in direction of traffic, where, before leaving the curb, he looked and saw nothing approaching near by and there was nothing which he might have seen by ordinary faculty of sight.

9. Trial ⚡295(1)—General instruction could not overcome misleading specific instructions, notwithstanding rule that instructions are to be construed together.

Court's misleading direct instruction upon particular facts of the case could not be overcome by one or two correct detached general statements, notwithstanding the rule that instructions are to be construed together, in view of general principle of statutory construction, likewise applicable to instructions, that specific declarations control general language.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action for damages for personal injuries by Elizabeth C. Nickell against Jerome D. Rosenfeld. From a judgment for defendant, and an order denying the motion for a new trial, plaintiff appeals. Judgment and order reversed, and cause remanded.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Kenton A. Miller and W. A. Alderson, both of Los Angeles, for appellant.

Paul Nourse and Culver & Nourse, all of Los Angeles (J. Allen Davis, of Los Angeles, of counsel), for respondent.

PARKER, Justice pro tem. In this action plaintiff sought to recover damages for in-

juries alleged to have been suffered by her when struck by an automobile negligently driven by defendant.

The defendant answered, denying negligence on his part, and affirmatively alleging that the injuries of plaintiff were caused by her own negligence.

A trial by jury was had and a verdict returned in favor of defendant. From the judgment entered pursuant to this verdict plaintiff appeals, and brings here also for review the order of the lower court denying her motion for a new trial.

The entire controversy here revolves about the instructions given to the jury. Appellant calls specific attention to and rests her appeal upon the lower court's action with reference to three instructions, one of which was given and the remaining two requested by appellant and not given.

[1, 2] It is settled law in this state that no reversal of a judgment will be ordered by reason of the lower court's action on the giving or refusal of instructions, if it appears from the record that the jury were fully and fairly instructed on all of the points in the case material thereto. And, further, no reversal of a judgment will be ordered unless the error complained of is such as operated to prevent a full and fair hearing, and thereby worked a substantial injustice to either of the parties.

With these principles in view, it may be well to briefly state the facts of the case as the record before us discloses them and to inquire into the instructions given the jury.

It is admitted that plaintiff was struck by defendant's automobile, driven by defendant, and that plaintiff sustained injuries as a result thereof. Plaintiff, a pedestrian, was crossing Figueroa street, in the city of Los Angeles, at the intersection of that street with Third street. She was going in a westerly direction and was in the usual place for pedestrians, going straight across from the east side to the west side of Figueroa street. Defendant was driving an automobile on Figueroa street going in a northerly direction. The accident occurred in April, 1921, at or about the hour of 9 o'clock p. m. The section surrounding Figueroa and Third streets is closely built up and a busy section of a busy city. Plaintiff had lived in the neighborhood for some years and was familiar with the locality and the conditions surrounding and the traffic thereabouts. Plaintiff testified, and it is not contradicted, that before she attempted to cross the street and before leaving the curb she looked to the left and to the right and saw no cars approaching. She states that she saw a car which from its lights seemed to be about a block away, far enough in her opinion as not to be a hazard to her. Having thus advised herself of the traffic, she started across, and in crossing looked to the left and in front. There is, further, the testimony of plaintiff and other

witnesses that immediately following the accident defendant stated that his lights were not in good order, and for that reason he did not see the plaintiff.

Defendant testified that he was driving northerly on Figueroa street, and that he approached the intersection at a rate of speed not in excess of 15 miles per hour; that when entering the intersection he reduced the speed perceptibly. The first time defendant saw Mrs. Nickell she was on the curb, and he was about 20 feet south of the intersection, and she was then facing south and seemed to be looking directly at him. He had not then entered the intersection. When he did enter, his attention was occupied by the traffic going west on Third street. From his testimony it appears that one auto in the west-going traffic, crossing directly in front of him, compelled his turning to avoid it. Almost immediately in getting himself straightened out again, he was across the intersection, and then again saw the plaintiff Mrs. Nickell within a few feet of him and directly in the path of his machine. His efforts to avoid her proved futile, and the accident happened. Just where it happened is the subject of conflict, but it is not questioned but that she was quite near the center of the street, which street was 60 feet in width. The defendant states that from his first observation of the plaintiff and her position he concluded that she had seen him and was waiting his passing before she would cross.

This résumé of the facts covers the entire case as presented. The determination of the issues was submitted to the jury and the law given by the court.

The trial court instructed the jury fully as to what the claims of the parties were; as to the burden of proof and such other general instructions as are proper in like cases. The trial court fully and properly informed the jury as to the duty devolving upon defendant as the driver of a motor vehicle on the public highway, and as to what acts or omissions on his part would, within the pleadings, impose upon him a liability to plaintiff. However, the trial court laid stress throughout the instructions on the duty of plaintiff, and almost every instruction regarding her right to recover carried with it the admonition as to the consequences of her own lack of ordinary care. The jury was told that the mere fact of the accident raised no presumption of negligence as against defendant, and that if the evidence was as consistent with neglect of duty on the part of plaintiff as it was with neglect of duty or care on the part of defendant, and that both were equally probable under the evidence, the verdict must be for the defendant. The jury was further instructed that, if they believed from the evidence that plaintiff was guilty of negligence which contributed directly or proximately, no matter how slightly it contributed, to the collision complained of, the verdict must be

for the defendant, and this would not be altered by the fact that the jury might believe that defendant was more negligent than plaintiff, if it was shown that but for the concurring and co-operative fault of plaintiff and defendant such collision would not have occurred.

No criticism is offered as to the correctness of any of these instructions, but they are referred to here to the end that the instruction complained of may be better appreciated and its connection with the charge as a whole and its probable effect measured.

Then came the instruction attacked, as follows:

"In crossing Figueroa street, it was the duty of plaintiff in the exercise of ordinary care for her own protection to look to the left and to the right as well as ahead of her, and to particularly direct her attention to her left while she was crossing the easterly side of Figueroa street, and this duty was not fully performed by merely looking to the left as she stepped from the curb to the street, but the duty to exercise ordinary care in this respect was imperative upon her during all the time that she was crossing; and, therefore, if you believe from the evidence that the plaintiff failed to perform this duty, and that her failure so to do was a proximate cause of the accident and the injuries sustained by her, then your verdict must be in favor of the defendant, even though you find from the evidence that the defendant was also guilty of negligence."

[3] At the outset respondent contends that, if it were conceded (and he does not concede) that the court placed too high a duty upon plaintiff in demanding that she look to the right, nevertheless as no question is here involved as to traffic from the right, that part of the instruction must be disregarded. We agree with the respondent in this with the reservation that the placing of too high a duty upon plaintiff might leave the jury generally impressed that the degree of care incumbent upon her for her own protection was far greater than the law required. The particular part of the instruction, then, subject to review, is that part which tells the jury that the duty of the plaintiff to use ordinary care was not fully performed by merely looking to the left as she stepped from the curb to the street, but that she must particularly direct her attention to the left while she was crossing the easterly side of Figueroa street.

Respondent seeks further to sustain the correctness of the instruction by pointing out that what the court told the jury was that the plaintiff's duty was to exercise ordinary care, and this qualified and explained the entire instruction. However, it must be noted that the court first advised the jury as to the duty of plaintiff in the premises, and then used the term "ordinary care," qualified by the words "in this respect."

A review of the authorities gives really little aid in determining the question here

presented. Cases beyond number have been before the courts with a constant variance in facts. The courts have found it impossible to lay down any rule or rules which have the effect of establishing a definite course of action for all parties under all conditions. In the case of *Niosi v. Empire Steam Laundry*, 117 Cal. 257, 49 P. 185, the rule was announced that a foot traveler was negligent who fails to look both ways before crossing a highway where vehicles frequently pass. The doctrine of this case was subsequently affirmed in a later case (*Sheldon v. James*, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493). In the later case of *Burgesser v. Bullocks*, 117 Cal. 257, 49 P. 185, the court reviews all of the cases on the subject of the relative rights and duties of pedestrians and automobile drivers. In commenting upon the *Niosi* Case and the cases following it, the court declares that these cases must be read in the light of the facts involved in each particular case. The court in the *Burgesser* Case, after reciting the facts of *Niosi v. Empire Steam Laundry*, concludes that the rule announced in the latter case meant nothing more than that it was the duty of a pedestrian, who steps from the curb into a narrow street where traffic is heavy, to look in the direction from which such traffic would be likely to come before stepping from the curb. The case cited, *Burgesser v. Bullocks*, is a complete treatise on the case-made law of the subject here before us. And the conclusion reached there is that it is a question of fact for the jury to determine whether the conduct of a pedestrian, under all of the circumstances at the time and place and conditions of traffic, was or was not negligent. Without analyzing each case, the following authorities are helpful in further illustrating the same point: *Evers v. Stratton*, 71 Cal. App. 448, 235 P. 656; *Raymond v. Hill*, 168 Cal. 473, 143 P. 743; *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125; *Haines v. Fewkes*, 190 Cal. 477, 213 P. 490; *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36.

[4] All of the authorities agree on two principles: First, the pedestrian and the driver of a vehicle have equal and reciprocal rights in the use of the highway; and this rule goes so far as to hold that in the absence of statutory or local regulation this right extends to all sections of the highway, whether at established places of crossing or elsewhere thereon.

[5, 6] When we speak of a person having a right, we must necessarily refer to a civil right as distinguished from the elemental idea of rights absolute. We must have in mind a right given and protected by law, and a person's enjoyment thereof is regulated entirely by the law which creates it. If we were to consider these rights as absolute, nothing but chaos could result, and instead of each enjoying the right both would be deprived of its enjoyment. Therefore the rights of pedestrian and auto driver are conceded to be rel-

ative to the extent that each must so restrict and use his right as to permit the other the full benefit of what is his.

[7] The second principle upon which all agree is that the facts and circumstances of each case control the amount of care required on the part of both pedestrians and drivers of vehicles. Nothing approaching a rule can be formulated other than the basic principle of ordinary care under the circumstances.

[8] Applying these principles to the case at bar, we think that the facts before the court did not warrant the instruction, and that the giving thereof was prejudicial to the plaintiff and deprived her of a fair and impartial trial. The instruction took from the jury the right to determine the negligence of plaintiff by particularly specifying just what acts on her part were negligent. By way of illustration, under the instruction the jury were not left to determine whether or not the defendant had good or bad lights, or whether his car was observed by plaintiff, or, in the exercise of ordinary care, could have been observed, and this was an issue in the case. It seems readily apparent that if a pedestrian in crossing a street looks before leaving the curb and sees nothing approaching within any short distance, and there is nothing shown that he or she must have seen by ordinary use of the faculty of sight, then it is eminently proper to proceed without constant watch in the direction of that particular traffic. It is undisputed in the instant case that when plaintiff left the curb to cross Figueroa street, there was likewise auto traffic on Third street crossing Figueroa street, and that plaintiff was proceeding with the traffic rather than against it. The fact that she saw nothing in near approach on Figueroa street, coupled with the fact of traffic crossing as it was, would seem quite sufficient assurance of her safety. The defendant admittedly was dodging through the same traffic at night and in an intersection and almost at the very spot where a prudent person might expect pedestrians. We can concede, perhaps, that a pedestrian who perceives an automobile approaching—or even go as far, for the purpose of illustration, to concede that if the pedestrian, in the exercise of ordinary care, should have seen the approaching auto—would be negligent in leaving a place of safety to rush headlong into danger. But we cannot concede that in an action of this character, when the facts are disputed, a trial court can fix the standard of conduct with reference to specific acts without the jury's determination of the facts.

Upon an analysis of the instruction involved, and considering it with all of the instructions, we feel that the jury were told that even if they found the defendant was driving with totally insufficient lights at nighttime, in a section poorly lighted, and that plaintiff was unable by reason of said defective lights to see defendant's car or to judge

its distance, and after first attempting to ascertain the condition of traffic and the hazards imminent she, in the belief of her security, left the curb at the usual place of crossing, nevertheless as a fact she was negligent in not keeping her attention focused upon the direction whence came the defendant. There can be no question that, under the theory of the case and the conditions surrounding, that if this per se negligence, then it must have been a proximate cause of the accident, and comment on this phase of the instruction is unnecessary.

Construing the instruction as we do, and mindful of the law governing, we conclude that the giving thereof was erroneous and highly prejudicial.

[9] We are not forgetful of the general rules that instructions are to be read together and construed as a whole, but we do not feel that this rule goes so far as to hold that one or two detached general statements are sufficient to overcome the force of a direct instruction based upon the particular facts of the case. Even in the absence of rules of construction, common experience indicates that the specific declaration of a principle controls over general language. In construing statutes, the courts are bound to give heed and attention to specific provisions as against general ones. And upon the same principle we feel, should we incline to the construction of a charge to a jury, without, however, all of the niceties involved in statutory construction. Every trial judge knows from experience that many general instructions are quite puzzling to the average juror, striving to get every word of counsel from the court; but when the court takes up the particular situation involved and bases a charge thereon by applying the facts to the law, instantly the jury becomes directly interested. And then for a reviewing court to intervene and hold that the charge did not mean exactly what it said, but that upon a studious analysis some other meaning could be read into it, would be a long step nearer to doing away with instructions entirely.

Appellant's points with reference to the instructions requested by her and refused need little attention. Conceding that, in point of law, the proffered instructions are correct, yet the instructions given sufficiently covered the subject. The instructions offered and refused were slightly argumentative in phraseology, and stated general observations which were almost of the commonplace and on matters concerning which a general knowledge might be presumed.

This entire field of automobile drivers and pedestrians offers a fertile field for legislative action. It is the purpose of government to protect the lives and property of its citizens; and when the statistics available would indicate that more fatalities occur in daily traffic throughout the year than are occasioned by war, famine, or pestilence it certainly

calls for something more definite than a general rule of ordinary care under the circumstances. While it is not our function to suggest, nevertheless it would seem reasonable that when in many jurisdictions, as a matter of law and almost universally as a matter of fact, the pedestrian is charged with the burden in crossing a street at places other than the intersections, that one place should be a refuge, and the burden there shifted. In the congested areas of larger cities, the difficulty is greatly overcome by constant patrol and mechanical device; and, while awaiting the time when a like condition may be established at every crossing, there should be some definite regulations and some standards established that would clearly outline a course of conduct on the part of travelers of all sorts tending to promote safety.

The judgment and order are reversed and the cause remanded for a new trial.

We concur: TYLER, P. J.; CASHIN, J.

82 Cal. App. 414

PACIFIC EMPLOYER'S INS. CO. v. WOLAND et al. (Civ. 5338.)★

District Court of Appeal, First District, Division 1, California. April 19, 1927.

Hearing Denied by Supreme Court June 16, 1927.

1. Master and servant §417(7)—Annual rate of employee's contribution to dependents held properly fixed.

Employee's contribution to dependents of \$23.40 of \$29, earned from July 20 to July 31, held to justify Industrial Accident Commission in taking such amount, plus same percentage, or \$37.92, of \$47, earned from August 1 to August 15, as monthly amount fixing annual rate of contribution, under Workmen's Compensation Act (St. 1917, p. 831), though \$37 was still due him on latter date.

2. Master and servant §386(1)—Amount due employee, but not devoted to dependents' support at time of death, may be considered in fixing rate of contribution (Workmen's Compensation Act, § 14[b], and § 9[c] [2], as amended by St. 1925, p. 643).

Provisions of Workmen's Compensation Act, § 9(c) (2) (St. 1917, p. 840), as amended by St. 1925, p. 643, and section 14(b), that death benefit of three times annual amount devoted by deceased to support of his dependents shall be determined according to fact at time of injury, held not to preclude consideration of amount due employee, but not so devoted at time of his death in fixing rate of contribution.

3. Master and servant §386(1)—Rate of contribution, not gross amount paid dependents during any period, by deceased employee, is "measure of compensation" (Workmen's Compensation Act).

Rate of deceased employee's contribution to dependents, not gross amount paid them by him in any particular period, is measure of loss by his death, under Workmen's Compensation Act (St. 1917, p. 831).

4. Master and servant §417(7)—Determination of employee's rate of contribution to dependents is for Industrial Commission, whose findings on evidence are not reviewable (Workmen's Compensation Act).

Determination of deceased employee's rate of contribution to his dependents, under Workmen's Compensation Act (St. 1917, p. 831), is within discretion of Industrial Accident Commission, whose findings are not reviewable, if supported by any evidence.

5. Master and servant §386(1)—Employee's purchase of supplies for family automobile held "contribution to dependents" (Workmen's Compensation Act).

Employee's purchase of supplies for automobile necessarily used by his dependents for transportation because of distance of their residence from town, held a contribution to be considered in fixing rate of contribution for purpose of death award, under Workmen's Compensation Act (St. 1917, p. 831).

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Mae Woland and others for compensation for the death of Edward Thatcher, employee, opposed by the Kaiser Paving Company, employer, and the Pacific Employer's Insurance Company, insurance carrier. Compensation awarded by the Industrial Accident Commission, and the insurance carrier brings certiorari. Award affirmed.

W. R. Millington, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review the lawfulness of an award made by the Industrial Accident Commission. The pleading contains the usual recitals to the effect that petitioner is engaged in issuing employer's liability and workmen's compensation insurance, and that it is the insurance carrier for the Kaiser Paving Company. It then alleges that an employee of the insured company met with an accident resulting in death, for which an award was made by the Industrial Accident Commission. It is claimed that in making such award the commission acted in excess of its power or jurisdiction; that the evidence does not justify or support the findings or decision; that it is unreasonable, and unless the same is set aside, petitioner will be compelled to pay the same and thus be deprived of its property without due process of law, there being no appeal from such decision.

It appears from the record that one Edward Thatcher, a minor, of the age of 18 years, was employed by the Kaiser Paving Company of Vallejo, as a time checker. His duties consisted in checking employees' working time, for pay roll records. On August 17,

1925, while riding on the steps of a truck, he was jolted off, the truck running over him, crushing his chest, and causing immediate death. Deceased left surviving him his mother, a half-brother who was a minor, and Henry H. Kinsey and Harriet E. Kinsey, his grandparents, all of whom were partially dependent upon him for support. The commission found that the annual rate of contribution by deceased to their support was the sum of \$735.84, entitling said dependents to a death benefit in the sum of \$2,207.52, payable in weekly installments of \$16.67, beginning as of August 18, 1925. It further found that claimants were entitled to a further award of \$150, burial expenses. The weekly payments were based upon wages of \$4.50 a day for employment of 6 days a week. It was stipulated that the injury arose out of and in the course of employment. It is not disputed that the deceased contributed partially to the support of all the members of his family, except his stepfather, who was the main provider. It is insisted, however, that in fixing the rate of compensation the commission included certain items as contributions which the evidence shows were not in fact such, and should therefore not have been considered in ascertaining the extent of the dependency. Such of the facts as are necessary for a discussion of the issues presented show that one Mae Woland married her present husband in the year 1915. The deceased was a child by a former marriage. A few months prior to his death Henry H. Kinsey and Harriet E. Kinsey, the aged parents of Mrs. Woland, came to live with her. They were without funds and had no means of support. The Wolands were themselves poor, and it was necessary for the son to render such assistance as he was able. About a year prior to his death he was attending part time high school and devoting the remainder of his time to such work as he could procure. He sold papers and at times drove a truck. The mother had purchased a lot outside the city limits of Vallejo, and for a time she and the family lived in a tent on the premises. The tent being inadequate for the family needs, the husband undertook to erect a structure upon the lot. At the time of the death of her son, lack of funds had prevented its completion. The scantlings on the inside were exposed and the outside of the building was unfinished, being covered with tar paper. The family, however, moved into the building, making the best of the situation. They owned some chickens and cows, but derived small benefits therefrom. Considering the distance from the town, it was necessary for them to have some means of transportation in going to and from the city to provide for their various wants, and they owned an automobile which was used for this purpose. Under these circumstances, the deceased started to render such assistance as he could. He succeeded in procuring the employment which resulted in his death.

[1] The commission, in fixing the rate of contribution of his dependents, took the first period of employment from July 20th to July 31st, inclusive, and found the earnings of the employee to be the sum of \$29, exclusive of board and room. Of this sum the employee had drawn \$5 for his own personal use, making no contribution therefrom to any of his dependents. On July 31st he received the balance of \$24, and out of this sum he gave his mother \$12.50 in cash and bought a tire for the automobile costing the sum of \$19.90. For this period, then, if the cost of the tire be included, he contributed the sum of \$23.40, which is 80.69 per cent. of the total amount earned. The balance of the \$5.60 he retained for his own personal use. In the next period of employment from August 1st to August 15th, inclusive, he earned \$47 net above board and room. During this period, on August 8th, he drew advance wages of \$10. Out of this sum he gave his mother \$7.50 in cash, and he purchased oil and gas for the automobile amounting to the sum of \$4.90. On August 15th he had \$37 balance in wages coming to him at the end of the day's work. On the following day he requested payment of this sum from his employer, expressing his intention of taking it to his mother. His request was refused, and he was informed that the company had concluded to make payments thereafter on the regular pay days only, which were fixed on the 5th and 20th of each month. He thereupon left the office for his home, and on his arrival he informed his mother of his effort to procure the money and the refusal of the company to pay. The following day he met his death in the manner above indicated. The commission, in fixing the rate of his contributions, concluded it was reasonable to assume, notwithstanding the evidence that the deceased intended to contribute the entire balance of \$37 due him to his mother, that he would need for his own personal use a portion thereof. It found that, as it was established that deceased had contributed 80.69 per cent. of his wages from the first period of his employment, it would be reasonable to assume that his contributions would be limited to this percentage. For this reason the commission took 80.69 per cent. of his total earnings of \$47 for the second period of employment, which amounts to \$37.92, to which was added \$23.40, the amount contributed from the first period, making \$61.32 as the total monthly amount contributed as fixing the annual rate.

[2] It is petitioner's contention that the amount expended by the deceased for oil, gasoline, and the tire should not have been considered by the commission in fixing the annual rate or the extent of contribution. It likewise contends that the commission erred in taking into consideration the amount of wages due deceased and remaining unpaid, and which were not received by the mother until after the death of the employee. Under

this contention, it is claimed that an intention to contribute can form no basis in fixing an annual rate of contribution; that the evidence should be confined solely to the actual money so devoted. This contention requires a construction of the provisions of the Workmen's Compensation Act relating to the subject. These provisions are to be found in section 9 (c) (2), chapter 586, Stats. 1917, as amended in 1925 (Stats. 1925, p. 643). They read as follows:

"In case the deceased employee leaves no person wholly dependent upon him for support, but one or more persons partially dependent therefor, the said dependents shall be allowed the reasonable expenses of his burial, not to exceed one hundred fifty dollars, and, in addition thereto, a death benefit which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent," etc.

Section 14 (b) provides that the question of entire or partial dependency and the question as to what constitutes dependents, together with the extent of dependency, shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee. Our attention is directed to the language of the statute, which provides "that the death benefit amounting to three times the annual amount devoted by the deceased to the support," etc., and dependency "shall be determined in accordance with the fact at the time of the injury," and it is urged that, as the amount due the employee at the time of his death had not been so devoted at such time, it should not have been considered by the commission in fixing the rate. We do not consider there is any merit in this contention. The narrow construction contended for would, if adopted, in many cases defeat the plain intent of the law.

[3] In *Spreckels v. Industrial Accident Comm.*, 186 Cal. 256, 199 P. 8, it is said that the whole theory of the Compensation Act as to death causes is that the dependents of the employee shall be compensated for the loss of the support they were receiving from him at the time of the injury; that this necessarily means that the death benefit must be computed at the rate of contribution at that time. It is the rate which is the measure of the loss, not the gross amount which the deceased has happened to pay through any past year, or through any other period of time. It is there further said that the rate of contribution at the time of the injury is by no means determined by the contributions made during the last month of the employee's life. There may have been no contributions in the last month. The employee may have been contributing in quarterly installments, and the last month may not have happened to be a month of payment. But there would, nevertheless, be a rate of contribution existing as of the date of the injury. It is the rate that the commission must determine from all the facts in the

case. See, also, *Great Western Power Co. v. Industrial Accident Comm.*, 196 Cal. 593, 238 P. 662. In *Hartford Accident & Indemnity Co. v. Industrial Accident Comm.*, 197 Cal. 17, 239 P. 330, the following language is used:

"The evidence, however, is open to the inference that except for the death of her brother, the condition of dependency of the claimant might have continued indefinitely."

These cases seem to indicate that the commission has power to accept and take into consideration the "intent" of the employee in fixing the rate. Decisions are not wanting upon the subject. In *Freeman's Case*, 233 Mass. 287, 123 N. E. 845, the question presented for determination was that of dependency. There it appeared that a boy 16 years of age, having a partially dependent mother, was killed during the period of his last employment. He had worked but two days prior to the accident which resulted in his death. Upon leaving his home in search of employment, he had promised his mother that he would send her all his earnings except the portion needed for his actual necessities. As he was killed before his first pay day, he had sent none home. The commission made a finding based upon his wages, and it was held that, while a simple expression of purpose to contribute to support, unaccompanied by any actual contribution, without reasonable opportunity, would not constitute a finding of partial dependency, still the commission having found that deceased made previous contributions out of his employment, such evidence was sufficient to support the conclusion that deceased was sincere in his promise. To the same effect is *Gregory v. Standard Oil*, 151 La. 228, 91 So. 717. In this case claim was made for benefits under an act providing for compensation to those actually dependent "at the time of injury or death." The quoted phrase was held not to be limited to the very moment of the death of the employee, but to cover a reasonable period prior thereto, as well as a reasonable expectation of assistance during the continuance of the employee's life. As here, deceased was a minor son who had contributed to the support of his mother. He had left home to seek new employment and had promised his mother that he would send to her a stated amount each month. The court, in upholding the award, held that the reputation which the son had earned as attested by his neighbors, and exemplified in his devotion to his parents, and the faithful discharge of his filial duty, gave his parents every reason to expect the redemption of his promise, which could be considered by the board in determining the amount of the award. To the same effect is *Illinois Steel Co. v. Ind. Comm.*, 308 Ill. 466, 139 N. E. 921, and *Tintic Milling Co. v. Ind. Comm.*, 60 Utah, 261, 207 P. 1114. In the case last cited it is said that the question is not whether contributions are made at regular intervals,

but whether they were made for the purpose of continued support; whether at the time of the injury resulting in the death of the contributor the facts indicate that the contributions would have continued had the death of the employee not occurred.

[4] The determination of questions of this character is wisely left to the discretion of the commission, and its findings are not reviewable where there is any evidence to support them. See, also, *Pittsburg, C., C. & St. L. Ry. Co. v. Collard's Adm.*, 170 Ky. 239, 185 S. W. 1108, L. R. A. 1918E, 273; *Ex parte Woodward Iron Co.*, 211 Ala. 111, 99 So. 649.

[5] The statutes which the courts were considering in the cases cited were in all respects similar to ours. We conclude upon the subject that all the facts and circumstances, together with the reasonable inferences to be drawn therefrom, were sufficient to justify the commission in its conclusion as to the extent of the contributions made by the deceased to his dependents. We are of the further opinion that the purchase by the deceased of the supplies for the automobile, considering the uses to which the machine was put, was as much a contribution as though the cost of the same had been given directly to the mother and by her expended for the necessary articles. The amount was devoted to the use of the dependents.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

82 Cal. App. 313

MEYER v. MEYER. (Civ. 4834.)

District Court of Appeal, Second District, Division 1, California. April 13, 1927.

1. Divorce ☞184(7)—Trial court is warranted in believing controverted evidence sustaining findings in divorce case.

In suit for divorce, the trial court is warranted in believing any evidence which would sustain the findings, however strongly controverted.

2. Divorce ☞133(1)—Evidence of wife's desertion held sufficient in husband's divorce suit, where her only return for year was subterfuge to obtain divorce expenses.

In husband's suit for divorce, evidence that wife deserted him held sufficient to support decree in his favor, where after repeated threats she left him and her only offer within a year to return was after nine months and as subterfuge to obtain expenses and attorney's fees.

3. Divorce ☞37(7)—Wife's desertion of husband held without his consent, notwithstanding he aided her removal under threats of bodily injury.

Finding that wife deserted husband without his consent held proper, notwithstanding he as-

sisted her in removing her belongings and said that it was "up to her," under evidence that wife threatened him with bodily injury for refusal to assist.

4. Divorce ☞49(6)—Innocent husband or wife need not accept reconciliation proffered after cause of action for desertion has accrued.

The law does not require an innocent husband or wife to accept a reconciliation proffered by the other after a cause of action has accrued for desertion.

5. Divorce ☞127(4)—Corroborative evidence other than parties' testimony of wife's removal and absence held sufficient in husband's suit for divorce (Civ. Code, § 130).

In husband's suit for divorce on ground of desertion, evidence held sufficiently corroborated by testimony other than that of the parties as required by Civ. Code, § 130, to sustain decree in his favor, where wife deposited money in separate bank account just before separation, arranged to remove effects from homestead and to occupy other property, and remained absent for more than one year.

6. Husband and wife ☞252—Husband's possessory right under desert claim initiated before marriage is separate property, though perfected after marriage with community funds.

Possessory right in land under a desert claim initiated by husband before marriage is his separate property, even though perfected after marriage and with the use in part of community funds.

7. Husband and wife ☞252—Husband's possessory right under homestead claim made after marriage to land held under desert claim before marriage is separate property (U. S. Comp. St. § 4532).

Right of husband, who changed a desert claim initiated before marriage to a homestead claim on the same land after marriage, is possessory right, neither devisable nor descendible, and is his separate property, in view of Rev. St. U. S. § 2291 (U. S. Comp. St. § 4532), providing that on death of entryman of public lands, his widow may be substituted to his rights.

8. Divorce ☞286—District Court of Appeal would not disturb judgment on findings of trial court on conflicting evidence as to community character of property.

The District Court of Appeal would not disturb the judgment founded on findings of the trial court in a divorce suit upon conflicting evidence as to the character of property other than the homestead, whether community or separate.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Suit for divorce on the ground of desertion by John A. Meyer against Estella S. Meyer. Judgment for plaintiff, and defendant appeals. Affirmed.

F. E. Davis and H. Y. Gibson, both of Los Angeles (L. E. Dadmun, of Los Angeles, of counsel), for appellants.

Joseph Scott and Leo B. Ward, both of Los Angeles, for respondent.

HOUSER, J. In a suit for divorce on the ground of desertion, judgment was rendered in favor of plaintiff, and defendant appeals therefrom.

Among other things, the trial court found that all the allegations contained in plaintiff's complaint were true, as were all the allegations of the answer of plaintiff to defendant's cross-complaint; that certain property, known as the Monrovia property, was community property of the parties; and that certain other property, known as the homestead, was the separate property of plaintiff—all of which findings are attacked generally by appellant on the ground that they are not supported by the evidence.

[1] The gravamen of the first specification by appellant is that no sufficient evidence was adduced at the trial upon which the desertion by defendant of plaintiff could be predicated. However strongly it may have been controverted, it is well established that the trial court was warranted in believing any substantial evidence introduced at the hearing which would sustain the findings against which the criticism of appellant is directed.

[2] It appears that at divers times before an actual separation of the parties occurred, defendant had made statements to several different persons, including plaintiff, to the effect: That she would not live on the homestead, which was the home selected by the husband in which the parties were to reside. That "she never wanted to live in the valley (the home of the parties). * * * She said she wouldn't live there, that is, wouldn't come back there to live," although the house in which they resided was better than the average home in its locality. That after repeated threats on the part of defendant to leave plaintiff, she finally did so, taking with her all her belongings and all the furniture and furnishings in the home of the parties, with the exception of a couch, bedding, and pillows, three chairs, kitchen table, cooking utensils, an oil stove, and "enough to camp with." That although plaintiff suggested to defendant that she return to plaintiff's place of abode, defendant at no time attempted in good faith to do so; the evidence in that regard being that plaintiff said to defendant, "Better move up their again if it is too hard for you down there." And that the only time within one year from the time of the separation of the parties that defendant offered to return to plaintiff was after she had been away from plaintiff for more than nine months, and then only as a subterfuge and at a time ten days after an announcement had been made by the judge of the trial court on the hearing of a motion in an action for separate maintenance brought by defendant against plaintiff, to the effect that if defendant expected any support from plaintiff she would be required to return

to the home which he had provided for her. In that connection it also satisfactorily appeared that the defendant's offer to return to plaintiff was made solely with the idea of saving expenses and attorney's fees, and which offer to plaintiff was accompanied by the threat that if such offer were not accepted, plaintiff would be immediately served with an order to show cause why he should not be punished for contempt of court in failing to obey certain orders of the court in the action for separate maintenance.

[3] While some evidence was introduced which tended to show that the separation of the parties was by their mutual consent, in that plaintiff helped defendant to remove her belongings and the furniture and furnishings in the homestead to the house at Monrovia, it also appears that when defendant told plaintiff that she was going to leave, plaintiff told defendant "it was up to her," and that plaintiff protested against taking defendant to Monrovia, but she insisted that he do so "or she would scatter his (plaintiff's) brains against the wall." Prior to that time "she (defendant) made the statement, said I (plaintiff) had to do what she said or she would put me out of commission while I was asleep." We are therefore of the opinion that the finding by the trial court that "defendant willfully and without just cause deserted and abandoned the plaintiff, against his will and without his consent," is supported by the evidence.

[4] As a part of appellant's contention that the desertion of plaintiff by defendant was not sufficiently established by the evidence, it is pointed out that at a date which was more than one year after defendant left plaintiff, she returned to the place where plaintiff was living and requested of him that he take her back and that they resume living together as husband and wife. But in a case of desertion the law does not require that after the cause of action has accrued the innocent party be compelled to accept a proffered reconciliation. It was so held in the early case of *Benkert v. Benkert*, 32 Cal. 467, 471, where it is said:

"The counsel for the defendant urge that she repented her act 'prior to the desertion culminating or his gaining a right under the statute.' She manifested no intention of returning until long after the period of two years of willful desertion had elapsed. Her repentance did not obliterate the offense. If it had been accepted and acted on by the plaintiff, by receiving her and renewing the cohabitation, it would be regarded as a condonation. But he may, after the lapse of the statutory period, refuse to accept the offer. Bishop, § 530, in speaking of the offer to return, says that if it is made in good faith within the period prescribed by the statute to complete the offense, it will bar the suit. 'But after the time has expired and the right of action has fully accrued, the injured party is not obliged to accept such an offer: it comes too late.'"

To the same effect, see *McMullin v. McMullin*, 123 Cal. 653, 654, 56 P. 554; *McMullin v. McMullin*, 140 Cal. 112, 117, 73 P. 808; *Howard v. Howard*, 134 Cal. 346, 349, 66 P. 367; *Vosburg v. Vosburg*, 136 Cal. 195, 204, 68 P. 694; *Kusel v. Kusel*, 147 Cal. 52, 54, 81 P. 297; *Kenniston v. Kenniston*, 6 Cal. App. 657, 92 P. 1037; *Walker v. Walker*, 14 Cal. App. 487, 492, 112 P. 479; *Anderson v. Anderson*, 68 Cal. App. 218, 222, 228 P. 715.

[5] It is next urged by appellant that there was no evidence which either circumstantially or directly corroborated the testimony given by plaintiff on "a considerable number of material facts." While section 130 of the Civil Code provides in part that no divorce may be granted "upon the uncorroborated statement, admission, or testimony of the parties," and which section in the opinion by the Supreme Court on petition for hearing therein in the case of *Lemberger v. Lemberger*, 55 Cal. App. 231, 203 P. 786, is construed as meaning that there must be evidence in support of the cause of action, "in addition to the evidence of either or both of the parties to the action, and that the testimony of one party cannot be taken in corroboration of that of the other for the purpose of proving a cause of divorce," from the evidence in the instant case it is clear that the findings made by the judge of the trial court depended not alone on the evidence given by the parties to the action, but were founded upon facts and circumstances adduced from sources independent of either of such parties. Aside from admissions made by defendant to various witnesses, both before as well as after the separation of the parties, that she would not live in the homestead, evidence was introduced to the effect that for many years the parties kept a joint bank account in which was deposited not only the separate funds, but the individual earnings of each of the parties; that a short time before plaintiff and defendant separated, a sale of turkeys and other personal property on the homestead was made for several hundred dollars, which money was paid to defendant, and instead of depositing such funds in the joint bank account of the parties, as theretofore had been their practice, defendant deposited the same in the bank in her own name; that defendant made all arrangements for moving her personal effects and the household furniture and furnishings from the homestead without first informing plaintiff of her intention in the premises other than, as testified by plaintiff, that defendant had frequently threatened to leave him and get a divorce; that in making such removal defendant left with plaintiff such furniture and furnishings only as would barely enable him to "camp out"; that shortly thereafter defendant instituted an action against plaintiff for separate maintenance; that before removing from the homestead, without acquainting plaintiff of her intention so to do, defendant

notified tenants in the Monrovia house to vacate same in order that she might occupy it; that defendant absented herself from the homestead for a period of more than one year, with the exception that after nine months had elapsed from the time of her departure from the homestead defendant returned there to solely for the purpose of collecting money which by a court order (made in the suit for separate maintenance) plaintiff had been directed to pay to defendant, and at the same time to threaten plaintiff with proceedings in contempt of court should he fail to make such payment.

As hereinbefore indicated, we think the corroboration on the "considerable number of material facts" to which the attention of this court has been directed by appellant was sufficient to satisfy the terms of the statute to which reference has been had.

[6] It is finally contended by appellant that the finding by the trial court that the homestead was the separate property of plaintiff and that the Monrovia property was the community property of the parties, was "against the law and contrary to the evidence." With reference to such specification of error, the evidence showed that in 1912, which was before the marriage of the parties, plaintiff filed a desert claim; that although the claim was attacked, in 1917 it was allowed; in 1918, which was after the marriage of the parties, plaintiff changed his application on the same property from a desert claim to a homestead claim and which at the time of the trial had not been perfected.

That a title to land of the character of that here involved, which was initiated by one before his marriage, is his separate property, even though the title was perfected after marriage and with the use in part of community funds, is laid down in principle in the following cases, to wit: *Lake v. Lake*, 52 Cal. 428; *Harris v. Harris*, 71 Cal. 314, 12 P. 274; *Morgan v. Lones*, 80 Cal. 317, 22 P. 253; *In re Lamb*, 95 Cal. 397, 30 P. 568; *Estate of Boody*, 119 Cal. 402, 51 P. 634; *Estate of Pepper*, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092; *Minium v. Minium*, 53 Cal. App. 55, 199 P. 1104. It is therefore indisputable that had plaintiff retained the possessory right acquired by him under the desert claim, such right as he had would have been his separate property.

[7] Section 2291 of the Revised Statutes of the United States (U. S. Comp. St. § 4532), in effect provides in part that on the death of the entryman of public lands his widow may be substituted to such rights as the entryman possessed before his death; and the case of *McCune v. Essig* (C. C. A.) 122 F. 588, is authority to the point that until the claim has been perfected, the claimant has nothing other than a possessory right, which is neither devisable nor descendible; from which it would seem to follow that the interest of the claimant herein, until the issuance of a patent to

the property from the United States government, was purely personal to himself, and consequently that no other person, whether his wife, his children, or others, had any interest whatsoever in the claim.

In the case of *Barbet v. Langlois*, 5 La. Ann. 212, it appeared that before Langlois was married he was the owner of a tract of land which fronted on a bayou. After his marriage he purchased from the United States, by virtue of his right of preference as a "front" proprietor, the lands lying to the rear of the property then owned by him. It was held that because of the fact that before his marriage he was possessed of the right of acquisition of the lands lying to the rear of his estate, such property, although purchased after his marriage, was his separate property. The following is the syllabus in the case with reference thereto:

"Under the Code of 1808, where the right to acquire property existed before a marriage although it may not have been acquired until after, the property does not enter into the community. But if paid for out of community funds, the price must be reimbursed to the community."

And the doctrine there announced was affirmed in the similar case entitled *Succession of Morgan*, 12 La. Ann. 153.

In the case of *Minium v. Minium*, 53 Cal. App. 55, 199 P. 1104, the authorities are reviewed, and it is held that a homestead is in the nature of a gift from the United States government; that therefore under the provisions of sections 162 and 163 of the Civil Code, a homestead would be separate property; and the fact that a wife may have advanced money to her husband for the purpose of assisting him to procure a homestead would not affect the title or the character of the property.

Another case, which in its facts resembles the instant case, is that of *Morgan v. Lones*, 80 Cal. 317, 22 P. 253. The syllabus therein, which sufficiently indicates the facts, is as follows:

"The occupant of lands for whose benefit the town-site acts were passed has an equitable interest in the lands. And if such occupant is an unmarried woman and marries, such interest is her separate property. And this is so, although the patent from the government to the municipal authorities has not issued. The property does not become community property from the fact that the husband advanced the funds necessary to get a conveyance from the municipal authorities."

Plaintiff's rights in the homestead are purely possessory and personal to himself. On complying with certain onerous and somewhat burdensome conditions, including much labor and a very considerable expense, to be done and incurred respectively after the interlocutory decree of divorce was granted between the parties to the action, plaintiff might eventually become entitled to a patent to the land

from the United States government. But such result would follow only from a compliance on the part of plaintiff personally with such conditions. His divorced wife could not be substituted in his place; nor could plaintiff be compelled to live on the property or otherwise perform the conditions necessary to a ripening of his title thereto. Those things were such that he might do at his option. From a financial standpoint, or from considerations of his good health, he might conclude that other lines of endeavor would be more profitable, and so abandon whatever rights that theretofore had accrued to him. Defendant's "interest" was wholly intangible and evanescent; in fact, as in law, it had no existence. We are therefore led to the conclusion that no error was committed by the trial court in its ruling that the possessory and personal right of plaintiff in and to the property in question and known as the homestead was his separate property.

[8] As to the character of the *Monrovia* property, the evidence was hopelessly in conflict. Plaintiff testified that the initial payment thereon of \$20 was made by him from money which he had earned during the married life of the parties; that in addition thereto, he earned money amounting to several hundred dollars, which was deposited by defendant in the joint bank account of plaintiff and defendant, and which money was used in making subsequent payments on the property in question. The price of the property was \$1,675, of which at the time of the trial all had been paid with the exception of \$400. Defendant testified that it was her separate funds which were used in paying for the property, and gave details concerning the use and disposition of moneys which, according to her statement, she owned at the time of the marriage and traced a considerable portion thereof into the *Monrovia* property. However, defendant's testimony was severely attacked, if not impeached, by several witnesses whose opportunities for knowing defendant's financial condition at all times in question were very good; from which fact the force and effect of defendant's testimony must have been much weakened, if not altogether destroyed. At any rate, the judge of the trial court, in the proper exercise of his functions, chose to rely upon the evidence adduced by plaintiff, rather than that presented by defendant in that regard, with the result that the finding and conclusion of law were made that the property belonged to the community of the parties. We find ample evidence justifying such conclusion of the trial court, and in such circumstances the rule is invariable that a judgment founded on such findings cannot be disturbed by this court.

No prejudicial error appearing, the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

82 Cal. App. 444

KIRKPATRICK v. FAIRBANKS, MORSE & CO. (Civ. 4661.)

District Court of Appeal, Second District, Division 1, California. April 19, 1927.

1. Sales ⚡434—Complaint for damages against seller of irrigation machinery, defectively installed and unsuitable for work contemplated, alleging buyer's performance, held sufficient, without express allegation of payment.

In action by buyer of gasoline engine upon contract, providing title should remain in seller until payment, against seller for damages resulting from negligence in installation, the allegation that plaintiff performed all covenants of contract required of him to be performed held sufficient against contention that petition did not plead payment of purchase price.

2. Sales ⚡434—Buyer's suit against seller for improper installation of irrigation machinery held to plead special damages with certainty.

In buyer's suit for damages from seller's alleged failure properly to install engine and pump for irrigation, special damages held adequately pleaded by complaint alleging acreage and value of crops lost for want of water in specific months and expense of preparing and reseeded land and removing defective installation.

3. Sales ⚡442(5)—Damages for loss of crops by failure of irrigation machinery to do work contemplated are recoverable under statute (Civ. Code, § 3314).

Damages for loss of crops by failure of irrigation machinery to do work contemplated are recoverable under Civ. Code, § 3314, providing that detriment caused by breach of warranty of personal property includes loss incurred in effort to use it.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action for damages for breach of contract by C. A. Kirkpatrick against Fairbanks, Morse & Co., a corporation. From a judgment of dismissal after sustaining a demurrer, plaintiff appeals. Reversed.

S. N. Bachtell, of Los Angeles, and Paul B. Bachtell and N. B. Bachtell, both of Lancaster, for appellant.

Stutsman & Stutsman, of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Plaintiff appeals from a judgment of dismissal after demurrer had been sustained to plaintiff's fourth amended complaint with leave to amend, and plaintiff had failed to amend his complaint. The demurrer was both general and special.

It is alleged in the complaint that the parties entered into a certain contract on the 25th day of March, 1922, wherein the defendant agreed to furnish plaintiff an oil engine, together with appliances and equipment

specified in said contract, and to furnish a competent erector for installing the said engine and appliances, and to cause the same to be properly installed on a foundation in a workmanlike manner; that a copy of the contract was attached to the complaint and made a part thereof. The contract was in the form of a proposal signed by the defendant and accepted by the plaintiff, wherein the defendant proposed to furnish and deliver an oil engine, a pump outfit, and certain equipment. The contract contained the following language:

"You are to furnish necessary cement and gravel for foundation. We furnish competent erector for installation and to give operator necessary instructions on operation of engine."

The terms of payment were, payment of the purchase price 30 days from date of contract after shipment; title to remain in defendant until final payment was made. The complaint further alleged that defendant did install said engine on the premises of plaintiff; "that, pursuant to the terms of said contract, the said defendant was to build and construct, on said premises, in a good and workmanlike manner, a cement foundation on which said engine was properly to be installed; that said engine and appliances were to be installed in such manner as to operate one certain pump of the defendant for the purpose of raising water from the well or wells of plaintiff to the surface for the irrigation of plaintiff's land and crops, all of which the defendant well knew;" that the erector furnished by the defendant was not a competent erector, and that defendant failed, neglected, and refused to install said engine and appliances in a good and workmanlike manner; that said engine and appliances were installed in a negligent and unworkmanlike manner, in that the engine was anchored to the foundation in such manner that would not enable said engine to be aligned with the pump so as to pump water for the irrigation of plaintiff's premises; that the engine was so installed that the stud bolts of the cylinder head pitted against the anchor bolts, thereby weakening the stud bolts and tending to warp alignment of the piston in the cylinder, to the great damage of the engine; that the exhaust drum was so suspended from the cylinder head that the weight of the drum and the exhaust of the engine would strain the cylinder; that by reason of the misalignment it was impossible for the belt connecting the engine and pump to operate the pump; that the engine as installed was worthless to plaintiff as a means of operating the pump. The complaint stated:

"That the said defendant well knew that the said engine was installed for the purpose of operating the pump attached to the well or wells of the plaintiff on the premises aforesaid, and

thereby raising water from said well or wells to the surface, for irrigation purposes, which said water, when so raised to the surface by the joint operation of said engine and said pump, was to be distributed by means of irrigation ditches to the growing crops and trees and land of the plaintiff; that said defendant well knew that said plaintiff wholly depended upon said engine for the operation of said pump in raising water as aforesaid for the irrigation of said premises, and that, unless said engine was installed in a good, efficient, and workmanlike manner so that it would properly function in connection with said pump for the production of water from said well or wells as aforesaid, the plaintiff would be without water for the irrigation of his crops, and land, and that without water from said well or wells the crops and trees of plaintiff would not mature and would die out."

It is further alleged that at the time of said installation plaintiff had upon his premises 25 acres of growing alfalfa, 15 acres of land plowed, bedded, and ready to be seeded to alfalfa, and wholly depended upon the production of water for irrigation; that the wells of the plaintiff had more than sufficient water therein to irrigate said land, and said pump, if properly installed, would have produced far in excess of sufficient water to irrigate said crops; that plaintiff performed all the covenants of said contract required of him to be performed; that, as a result of defendant's failure to perform the contract, plaintiff was deprived of the use of said wells and from irrigating his alfalfa during the months of May, June, and July, 1922, and thereafter; that the alfalfa died; that plaintiff was damaged by the loss of these crops of alfalfa in May, June, and July in the sum of \$1,680, and by the loss of two crops in August and September, 1922, in the sum of \$1,120, and the cost of reseedling said alfalfa land in the sum of \$1,250, in the loss of work in preparing said 15 acres of land for seeding, in the sum of \$750, the loss of the use of said land for any purpose whatsoever, in the sum of \$500, and in the cost of destroying and removing said cement foundation, in the sum of \$150—all in the total sum of \$5,450.

[1] The respondent takes the position that it must be assumed that the purchase price had not been fully paid by the plaintiff, and that therefore no action can be maintained by plaintiff on any warranties of defendant; plaintiff not having acquired title. But the plaintiff alleges full performance as to the covenants and conditions of the contract on the part of plaintiff.

[2, 3] Respondent asserts that plaintiff is confined in his recovery to special damages, and that these are not pleaded with sufficient certainty. This is a suit for damages arising out of the alleged failure of defendant properly to install an engine and pump to be used for irrigation purposes. It will

readily be seen from the above statement of the allegations of the complaint that the special damages are pleaded with great certainty, item by item. Such damages were held recoverable in the following cases, where the allegations of the complaint and the facts proven were similar to those alleged in the present case; *Lichtenthaler v. Samson Iron Works*, 32 Cal. App. 220, 162 P. 441; *Cohn v. Bessemer G. E. Co.*, 44 Cal. App. 85, 186 P. 200. In the present case it is pleaded with great particularity that defendant well knew that the pump and engine were installed for the purpose of irrigating plaintiff's land and the growing crops and trees thereon. The cases above cited not only sustain the sufficiency of the complaint as to special damages, but hold that damages for loss of crops by failure of irrigation machinery may be recovered under section 3314 of the Civil Code. We have examined all the grounds of special demurrer, but will not discuss them in detail, for the reason that they are disposed of by the foregoing.

The judgment of dismissal is reversed.

We concur: CONREY, P. J.; HOUSER, J.

82 Cal. App. 431
MERCHANTS' FINANCE CO. v. ACOSTA BROS. et al. (Civ. 4230.) ★

District Court of Appeal, Second District, Division 2, California. April 19, 1927.

Hearing Denied by Supreme Court June 16, 1927.

1. Sales $\S$ 358(1)—Testimony that tractor did not have power to pull disc held inadmissible in action for purchase price, where it was not warranted for a particular purpose (Civ. Code, $\S\S$ 1769-1771).

In action to recover purchase price of tractor, testimony that tractor did not have sufficient power to pull disc for which it was proposed to use it, and was for that reason unmerchantable, held inadmissible where tractor was not manufactured under order for a particular purpose, Civ. Code, $\S\S$ 1769-1771, relative to implied warranty, being inapplicable.

2. Evidence $\S$ 400(6)—Oral testimony relative to warranty of tractor held inadmissible, where contract was reduced to writing.

Oral testimony of express warranty that tractor was fit for purpose of pulling certain disc held inadmissible in action for purchase price, where contract was thereafter reduced to writing and all oral negotiations merged in written contract.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Merchants' Finance Company against Acosta Bros., a partnership, and S. M. Acosta and another, individually and as copartners doing business under the firm

name of Acosta Bros. Judgment for plaintiff, and defendants appeal. Affirmed.

R. T. Quinn, of Los Angeles, for appellants.

I. Henry Harris, of Los Angeles, for respondent.

THOMPSON, J. This appeal is from a judgment recovered by plaintiff as assignee of a contract for the purchase by defendants of a tractor, in the amount of the unpaid purchase price, to wit, \$865 and interest and \$100 attorney's fees as provided for in the written agreement.

The defendants alleged in their answer that at the time of their purchase the property was inaccessible to them; that the seller knew that they desired it for the purpose of pulling a six-foot double disc; that the tractor did not have sufficient power to pull such a disc, and was for that reason not sound or merchantable; that when they attempted to use it to pull that size disc it broke. At the trial the defendants introduced certain testimony to the effect that some time before the sale they told Mr. Johnson, the seller, that they wanted the tractor for the purpose of pulling a six-foot double disc. On motion of plaintiff, this testimony was stricken out on the ground "that the oral warranty cannot be introduced in a written contract." It is of this ruling of the court that appellants complain.

[1] The implied warranty declared by section 1771 of the Civil Code, having application to the present case, reads as follows:

"One who sells or agrees to sell merchandise, inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable."

There is a finding by the court, supported by substantial testimony, that " * * * the said tractor was in all respects sound and merchantable." Appellants' counsel in his brief refers to the implied warranty provided for in section 1769 of the Civil Code as follows:

"One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein."

He fails, however, to allege such a warranty, and, furthermore, there is no proof that the seller was the manufacturer. In so far as proof of knowledge on the part of plaintiff's assignor that defendants desired the tractor for the purpose of pulling a particular sized disc is concerned, such testimony would only be relevant under the theory that the implied warranty, specified in section 1770 of the Civil Code, attached to the tractor in question. That section reads:

"One who manufactures an article, under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose."

It has no bearing here. As is said in *Remsberg v. Hackett Mfg. Co.*, 174 Cal. 799, 164 P. 792:

" * * * The contract was not such as to bring the case within the purview of section 1770. The article was not manufactured for the plaintiff under an order for a particular purpose. It was not manufactured under order at all."

[2] And, of course, in so far as an express oral warranty that the tractor was fit for the purpose of pulling a six-foot double disc is concerned, such testimony would be inadmissible on the ground that the contract was thereafter reduced to writing, and all oral negotiations were merged in the written contract. *Remsberg v. Hackett Mfg. Co.*, supra, and *Williams v. Bullock Tractor Co.*, 186 Cal. 32, 198 P. 780.

The testimony was inadmissible, and the motion was properly granted.

Judgment affirmed.

We concur: WORKS, P. J.; JOHNSON, Justice pro tem.

82 Cal. App. 379

PARK v. WALSH. (Civ. 5848.)

District Court of Appeal, First District, Division 1, California. April 16, 1927.

1. Mandamus ⇨29—Where defendant died before judgment in foreign suit, plaintiff whose claim was rejected could not require representative by mandamus to appear (Civil Practice Act N. Y. §§ 84, 478; Code Civ. Proc. §§ 1085, 1086, 1880, subd. 3).

Where sole defendant in action brought in state of New York died before entry of judgment, making decision void against deceased, and subject to be continued against his representatives under Civil Practice Act N. Y. §§ 84, 478, executor could not be required by writ of mandate under Code Civ. Proc. §§ 1085, 1086, to enter appearance in foreign jurisdiction and litigate claim which had been rejected, though claimant would be subjected to additional expense in bringing action in California, and would be disqualified from testifying to material matters under section 1880, subd. 3, action being on contract.

2. Mandamus ⇨29—Executor, not bound to defend litigation of testator in foreign jurisdiction, was under no such duty as trustee and legatee (Code Civ. Proc. §§ 1085, 1086).

Where executor was under no duty to appear in foreign jurisdiction and litigate suit in which testator had been defendant, having died prior to entry of judgment, no duty arose to make appearance by virtue of executor's being also trustee and residuary legatee under will; executor not being subject to mandamus under Code Civ. Proc. §§ 1085, 1086.

Application by Thomas M. Park for writ of mandamus to be directed to James E. Walsh, individually and as executor of and trustee under the last will and testament of Richard Varick Dey, deceased. Writ denied.

Horatio Alling and Sooy & Heywood, all of San Francisco, for petitioner.

Garret W. McEnerney, of San Francisco, for respondent.

CASHIN, J. A petition for a writ of mandate directing James E. Walsh, as the residuary legatee and as executor and trustee under the last will and testament of Richard Varick Dey, deceased, to execute for transmission to the clerk of the Supreme Court of New York in and for the city of New York an instrument sufficient to constitute an appearance by him as defendant in an action filed therein against the deceased in his lifetime.

The deceased, a resident of the state of California, died in the state of New York on October 21, 1925, leaving estate in the former, but none in the latter, state. On November 27, 1925, after proceedings had, his last will and testament was duly admitted to probate in the superior court of California in and for the city and county of San Francisco, following which letters testamentary thereon were issued to respondent, Walsh, who is now the qualified and acting executor thereof.

By the provisions of the will, the estate was devised and bequeathed to respondent as trustee for the uses and purposes therein named; he being also a residuary legatee thereunder. The action mentioned, which was brought by petitioner against Dey as the sole defendant for the recovery of damages for an alleged breach of contract, was tried and submitted before the latter's death, and has not been decided. It is admitted that the statutes of New York provide that "a judgment (shall not be entered) against a party who dies before a verdict, report or decision is actually rendered against him. In that case, the verdict, report or decision is void" (section 478, Civil Practice Act of New York); and, by section 84 of the same act, that "in case of the death of a sole plaintiff or sole defendant, if the cause of action survives or continues, the court, upon a motion, must allow or compel the action to be continued by or against his representative or successor in interest."

As grounds for his application, petitioner alleges that, the deceased having left no estate therein, no ancillary administration can be had in New York; that the court in which the action is pending is without power to enforce the appearance by respondent, but, should such appearance be entered, is authorized by law to render and enter its judgment; that the claim on which the action was brought was on April 15, 1926, filed with

the executor named, and by him rejected on February 1, 1927; that, in the event his appearance be not made in the action mentioned, petitioner will be compelled to bring action thereon in the state of California; that large sums have been expended by petitioner in the trial of the pending action, and additional expense will be necessary in the event of a retrial in California; that at the trial already had petitioner testified to matters material to the issues in the case concerning which upon a retrial in California he would, by the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure of the state of California, be prevented from testifying.

It is contended by petitioner that the statutes of New York impose the duty upon a foreign executor to submit to the jurisdiction of its courts in order that actions there pending, in which jurisdiction was acquired of the person of his testator, may be continued against the executor, and that this duty may be enforced by mandate, citing *Hobbs v. Tom Reed Gold Mining Co.*, 164 Cal. 497, 129 P. 781, 43 L. R. A. (N. S.) 1112, and *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 P. 126, 130.

It was held in the cases cited that under the facts shown a duty created by the laws of another state may be enforced by mandate; but it clearly appears from the following decisions of the courts of New York that its statutes which are there considered remove the disabilities of foreign executors without terminating their immunities, and that no valid enactment of that state has sought to impose upon such executors the duty of submitting to the jurisdiction of its courts: *Helme v. Buckelew*, 229 N. Y. 363, 128 N. E. 216; *Hill v. Guaranty Trust Co.*, 198 App. Div. 591, 190 N. Y. S. 653; *McMaster v. Gould*, 240 N. Y. 379, 148 N. E. 556, 40 A. L. R. 792.

[1] A writ of mandate may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, and must be issued in all cases where there is not a plain, speedy, and adequate remedy at law. Sections 1085, 1086, Code Civ. Proc. While it is the duty of the executor to preserve the estate and protect the funds in his hands against simulated or unlawful claims (*Estate of Joseph Spanier*, 120 Cal. 698, 53 P. 357), no duty is enjoined upon him by law to litigate a rejected claim in a foreign jurisdiction, nor is such duty created by the fact that the claimant will otherwise be subjected to additional expense, or precluded by statute, unless the disqualification created thereby be waived (*Kinley v. Largent*, 187 Cal. 71, 200 P. 937) from testifying in support of the claim.

[2] We find no merit in the further contention that, being a trustee and residuary legatee under the will, it is respondent's duty

to permit the action to be revived against him as the successor in interest of the deceased.

The view is expressed in *Richards v. Blaisdell*, 12 Cal. App. 101, 106 P. 732, that a judgment entered in a foreign jurisdiction, establishing a claim against an executor appointed, and the administration of the estate of whose testator is pending, in California would not operate as an estoppel or be admissible in evidence in the latter state. This question, however, need not be here considered, as we are satisfied that respondent, as executor, trustee, or as residuary legatee under the will, is under no duty enjoined by law to do the acts sought to be compelled in this proceeding.

The writ is denied.

We concur: TYLER, P. J.; KNIGHT, J.

82 Cal. App. 474

LELAND v. OLIVER. (Civ. 2943.)

District Court of Appeal, Third District, California. April 21, 1927.

1. Landlord and tenant ⇨326(1)—Tenant may sell crops only for cash under lease requiring him to sell them and pay landlord share of value.

Tenant is entitled to sell crops only for cash under lease providing that he sell all crops and pay as rent one-third of value thereof and not stipulating manner in which sale should be made.

2. Landlord and tenant ⇨331(6)—Landlord, suing tenant for share rent under lease requiring tenant to sell crops, is not under burden to show defendant received payment.

Landlord, suing tenant for value of share of crops under lease providing that tenant sell crops and pay one-third thereof as rent, is not under burden to show that tenant received payment.

3. Landlord and tenant ⇨326(1)—Tenant, under lease requiring him to sell crops and pay share of value as rent, is not "factor."

Tenant, under lease requiring him to market produce and pay landlord one-third the selling price thereof in cash as rental, is not a "factor."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Factor.]

4. Factors ⇨1—Factor is agent in independent calling, employed by another to sell property for compensation.

A factor is an agent who, in pursuit of an independent calling, is employed by another to sell property for him, and occupies position similar to that of a commission merchant or broker engaged in the sale of property for compensation.

5. Landlord and tenant ⇨331(6)—Burden was on tenant to show disposition of crops, in landlord's suit for share of proceeds.

In landlord's suit against tenant for value of share of crop under lease requiring tenant to sell crops and pay one-third as rental, the burden was on tenant to show what he had done with the property.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action for money due on account of sale of crops by Sophie I. Leland against D. H. Oliver. Judgment for plaintiff, and defendant appeals. Affirmed.

Samuel V. Cornell, of Turlock, for appellant.

L. J. Maddux, of Modesto, for respondent.

PLUMMER, J. Plaintiff had judgment in the sum of \$548.07 on account of moneys found due and owing from the defendant, for and on account of sales of certain crops belonging to the plaintiff, made by the defendant, and for damages inflicted by the defendant upon certain property belonging to the plaintiff. These damages amounted only to the sum of \$7.90 and are not involved in this appeal. The defendant appeals.

The record shows that in December, 1921, the plaintiff leased to the defendant a tract of land embracing 173 acres of land to be planted to sweet potatoes during the year 1922; that under the terms and provisions of said lease the defendant was to sell all of the crops produced upon said premises, including the share belonging to the plaintiff, as the rental thereof, and to pay to plaintiff one-third of the value of said crops; that during the year 1922 the defendant raised on said premises a certain crop of sweet potatoes and sold the same for the sum of \$1,005.30, of which the plaintiff's share was and is the sum of \$335.10; that the defendant has not paid said sum of \$335.10 to the plaintiff. The record further shows that during the year 1923, under a lease executed in December, 1922, the plaintiff leased the same premises to the defendant on the same terms and conditions as to rental, to wit: That the defendant was to sell all of the said crops and pay to the plaintiff one-third of the selling value thereof; that defendant raised during said season a certain crop of cantaloupes, and that the value of the plaintiff's share of said cantaloupes was the sum of \$205.07; that the defendant had sold the cantaloupes, but has not paid plaintiff any part of said sum of \$205.07.

The complaint alleges the execution of the two leases, one in December, 1921, and the other in December, 1922, the farming of the lands by the defendant, the terms of the lease, that the defendant was to sell the crops and the plaintiff was to receive one-third of the value thereof, the production of the crops,

and the sale of the same by the defendant, and the amount of the selling price. The complaint does not allege that the defendant has received any money on account of the sales made by him. The action was begun on the 3d day of January, 1924. The defendant filed a general demurrer, worded as follows:

"That said complaint does not, nor does any part thereof, state facts sufficient to constitute a cause of action."

This demurrer was overruled, the defendant filed an answer, and the cause went to trial. The matter was heard entirely upon the testimony of the plaintiff. The defendant, declining to introduce any testimony, moved for a nonsuit. The motion being denied, the cause was submitted and judgment entered for the plaintiff as prayed for.

It is first urged that the complaint does not state a cause of action, in that it contains no allegation that the defendant had received any money on account of the sale of the crops raised upon the leased premises; that it was incumbent upon the plaintiff to allege the production of the crops, the sale of the crops by the defendant, and the receipt of the selling price thereof, before the defendant could be held liable; or, that it must appear in the complaint that the defendant carelessly, negligently, and without due care sold the crops to irresponsible persons, and in such manner failed to receive the value of said crops.

Section 4½ of article 6 of the Constitution applies to the ruling of the court overruling the defendant's demurrer, and, unless the order of the court so doing has resulted in a miscarriage of justice, the defendant is not in a position to complain.

The testimony shows the terms of the lease, which we have herein stated; the raising of the crops and the value thereof; that the defendant was to sell the crops and pay the plaintiff in cash; that the plaintiff never authorized the defendant to sell any of the crops on time. It further appears from the testimony that the defendant sold the sweet potatoes to the California Sweet Potato Association. After selling the crop to the association the defendant gave to the plaintiff an order on the association worded as follows:

"Turlock, Cal., Dec. 18, 1923.

"California Sweet Potato Association: Pay to the order of Mrs. S. I. Leland \$335.10."

This order was presented to the association by Mrs. Leland, payment not made, and the order was given back to the defendant by the plaintiff. The cantaloupes were sold to a man by the name of Cross, and, when demand was made upon the defendant for the plaintiff's share, his answer was that he had not yet received payment from Cross.

[1] There is nothing in the record which indicates that any sale of the crops raised on the leased premises was to be made other

than for cash. The testimony of the plaintiff was to the effect that the terms of the lease were that the defendant was to sell the products and pay the plaintiff one-third of the selling price thereof in cash. It appears to be a part of the terms of the lease that the defendant was to perform this service. In other words, to sell and dispose of the products and turn over to the plaintiff one-third of the value thereof in cash was a part and parcel of the rental value of the premises. There being nothing said to the contrary in the agreement between the parties relative to the manner in which sales were to be made, the implication would follow that the sale should be made only for cash. In *Lindow v. Cohn*, 5 Cal. App. 388, 90 P. 485, it is said:

"In the absence of evidence to the contrary, 'to sell' means to sell for cash, and an agent authorized to sell has no authority to receive other goods in part payment. *Organ Co. v. Starkey*, 59 N. H. 142."

And, again, in the case of *Harland v. Ely*, 68 Cal. 522, 9 P. 947, where the plaintiffs had a mortgage upon a certain crop of wheat grown by the defendant Ely and the terms of the mortgage provided that the wheat should be delivered by Ely to the plaintiffs as mortgagees, and by the mortgagees sold, meant that the mortgagees should sell for cash. The mortgagees in that case, instead of selling for cash, took a check payable 10 days after date. This check was dishonored and the selling price of the wheat lost. The court said:

"But we think the plaintiffs, by their negligence in delivering the wheat, which they had contracted for cash without receiving payment, and in accepting a time check in violation of the usual custom of merchants, took upon themselves the risk of nonpayment, and rendered themselves liable for the sum of money which they ought to have received, and which but for their own carelessness they would have received."

And further:

"It does not appear that the contract of plaintiffs was for a sale on credit, but that upon a sale fairly conducted and in which they were entitled to immediate payment."

[2] In the case at bar, under the terms of the lease, it must be held that the defendant was entitled to make sale only for cash. It is further argued that the burden of proof is upon the plaintiff to show that the defendant has received payment.

In the case of *Dodge v. Hatchett*, 118 Ga. 883, 45 S. E. 667, a case having to do with the burden of proof, involving the same principle which we are here considering, to wit, property sold by an agent, it was held:

"In a suit against such an agent, after the plaintiff has shown the agreement between them creating the agency, that the property was delivered to the agent, and that the same has been sold, the burden is shifted to the defendant to discharge himself by showing that no

such agreement existed, or that the property was never delivered, or that he has fully accounted, or some other reason why he should not be held liable to the plaintiff"—citing *Lee v. Clements*, 48 Ga. 128; *Oliver v. Hammond*, 85 Ga. 329, 11 S. E. 655; *Thomas v. Funkhouser*, 91 Ga. 478, 18 S. E. 312.

And the cause was reversed on account of the error of the trial court in charging that the burden of proof rested upon the plaintiff throughout the entire trial.

In *Labr v. Kraemer*, 91 Minn. 26, 97 N. W. 418, it was held:

"A general showing of the amount of property delivered to the agent and a failure to return or account for it on demand is prima facie sufficient, and shifts the burden upon the agent to make a specific accounting."

In *O'Day v. Annex Realty Co.* (Mo. Sup.) 236 S. W. 22, it is said:

"An agent being bound to account to his principal for all money and property received by virtue of the agency, when the principal has shown the existence of such relation and the receipt of money or property by the agent, the burden of showing a proper disposition thereof rests upon the agent."

See, also, *Herald-Dispatch Co. v. Hostetler*, 130 Ill. App. 179. To the same effect is *Holt-house v. Poling*, 52 Ind. App. 568, 99 N. E. 810.

The same ruling is applied as to the burden of proof in *Farmers' Warehouse Ass'n v. Montgomery*, 92 Minn. 194, 99 N. W. 776, that an agent authorized to sell only for cash is liable, if he sells otherwise. See, also, 2 C. J. 724, § 387, where the rule is stated, citing many authorities:

"An agent to buy or sell property for his principal is bound to use reasonable care and diligence in making the purchase or sale, and will be liable for losses which the principal may sustain by reason of his negligence in this regard, as where, without authority to sell on credit, he sells on credit instead of for cash."

[3, 4] The appellant cites a number of authorities relating to the duties, liabilities, and powers of factors, and argues that the defendant in this case was authorized to sell on credit, and that the burden rests upon the plaintiff to show either the receipt of the money, or that the defendant was negligent in making sales, and that the burden of accounting for the property does not rest upon the defendant. While, under the terms of the lease here involved, the defendant was the agent of the plaintiff to make sale of the produce raised on the leased premises, the defendant was not a factor. As defined in 12 Cal. Jur. 411, a factor is an agent who, in pursuit of an independent calling, is employed by another to sell property for him, etc. A factor occupies the position similar to that of a commission merchant or a broker and is only engaged in the sale of property

for another for a compensation. In the instant case, such is not shown to be the business of the defendant. He was not engaged in anything of that kind. He was simply a lessee under the terms of the lease, requiring him to market the produce and pay to the plaintiff one-third of the selling price thereof in cash, as the rental value of the premises leased to be returned by the defendant to the plaintiff.

[5] Under the authorities cited, we think the trial court did not err in denying the defendant's motion for a nonsuit, and that the burden was cast upon the defendant to show what he had done with the property and why he had not paid over to the plaintiff her share of the proceeds of the sale thereof, and, upon his declining to do so, the trial court was authorized to enter judgment for the plaintiff.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

82 Cal. App. 465

PEOPLE v. FRONK et al. (Cr. 1402.)

District Court of Appeal, Second District, Division 2. California. April 21, 1927.

1. Indictment and information ⇨83—Alleging two persons embezzled money intrusted to one is tantamount to alleging other "aided and abetted" (Pen. Code, § 971).

Alleging that two persons committed embezzlement by felonious conversion of moneys held by one in trust for his principal is tantamount to alleging that one converted the money and the other "aided and abetted" him under Pen. Code, § 971, abolishing distinction between accessories before the fact and principals.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aid and Abet.]

2. Indictment and Information ⇨71—Indictment is sufficient if it advises defendant of facts charged constituting offense.

Indictment is sufficient if it advises the defendant of facts charged and constituting the offense.

3. Embezzlement ⇨24—One may be guilty of embezzlement as accomplice of agent having money in control.

One may be guilty of embezzlement of property not in his care and control, in conjunction with and as accomplice of the agent having the custody.

4. Criminal law ⇨673(4)—Evidence of defendant's confession held not prejudicial to codefendant under instruction limiting it to defendant who made it, in embezzlement case.

Admitting in evidence stenographic transcription of statements to police by one of

two defendants charged with embezzlement *held* not prejudicial to the codefendant, where court told jury the statement could not be considered as affecting him.

5. Criminal law §517(4)—Body of crime of embezzlement, as regards proof warranting admission of extrajudicial admissions, consisted in agency, control, ownership, and conversion of principal's money.

In prosecution for embezzlement against bank manager and customer to whom he issued cashier's checks in exchange for personal checks on other bank, the body of the crime, as regards proof warranting admission of extrajudicial admissions, consisted in the agency, control, ownership, and conversion of the principal's money.

6. Criminal law §517(4)—Evidence to warrant introduction of confessions need not be so conclusive as to warrant conviction.

Testimony to establish corpus delicti sufficiently to warrant introduction of confessions or admissions need not be so conclusive as to warrant conviction.

7. Criminal law §517(4)—Evidence held sufficient proof of conversion by cashier's checks to warrant admission of confession of bank manager, in prosecution for embezzlement.

Testimony of personal relations of bank manager to customer, his want of authority to issue cashier's checks for outside personal checks, issuance and payment thereof in exchange for customer's checks which were dishonored, and of customer's habit of kiting checks, *held* sufficient proof of conversion to warrant introduction of manager's confession.

8. Embezzlement §44(1)—Evidence held sufficient to sustain conviction of bank manager and customer for embezzlement committed by means of cashier's checks.

Evidence that bank manager issued cashier's checks, which were paid, to customer in close personal relationship in exchange for his personal checks on other banks, knowing customer habitually kited checks and that the checks on other banks were dishonored, *held* sufficient to sustain conviction of embezzlement against manager and customer.

9. Criminal law §1159(2)—Appellate court will follow verdict based on substantial evidence.

Where there is substantial evidence on which jury could rest verdict, it is not within the province of appellate tribunal to do other than follow that conclusion.

10. Criminal law §1170(2)—Exclusion of testimony held harmless under other evidence of fact sought to be proved, in prosecution for embezzlement.

In prosecution of bank manager and customer for embezzlement by issuance of cashier's checks, exclusion of answer to question asking witness aggregate amount of cashier's checks sold to the customer *held* harmless to manager, if error, under other evidence showing \$2,000,000 of cashier's checks were sold.

11. Embezzlement §38—Checks deposited in bank held admissible to prove deposit balance fictitious, in embezzlement case.

Where defendant bank manager and customer, charged with embezzlement by means of cashier's checks issued in exchange for personal checks on another bank, attempted to show deposit balance of customer in the drawee bank, checks credited in deposit balance *held* admissible to show the balance was fictitious.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

J. K. Fronk and another were convicted of embezzlement, and they appeal. Affirmed.

W. V. Anderson, of Los Angeles, and C. M. Fickert, of San Francisco, for appellant Fronk.

M. T. Case and William G. Randall, both of Los Angeles, for appellant Landon.

U. S. Webb, Atty. Gen., and John L. Flynn, Dep. Atty. Gen., for the People.

THOMPSON, J. J. K. Fronk and Lloyd Albert Landon were jointly indicted by the grand jury of Los Angeles county, charged in two counts with the larceny of \$12,500 and \$10,300, respectively. They were acquitted by the jury on these two counts. The indictment also charged them in counts 3 and 4 with the embezzlement of the same sums, alleging that the defendant Landon, who was the manager of the Santa Barbara and Western Avenue branch of the Hellman Commercial Trust & Savings Bank, had in his control as agent and bailee of the Hellman Commercial Trust & Savings Bank the moneys heretofore mentioned, and that he and the defendant Fronk did "willfully, unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate" the same to their own use, "and to uses and purposes not in the due and lawful execution of the said trust of the said Lloyd Albert Landon." The jury returned a verdict of guilty on these last two counts, charging embezzlement, and, from the judgments pronounced upon the verdicts and from orders denying their motions for a new trial, the defendants prosecute separate appeals.

[1-3] In the interests of clarity, we will, before reciting further facts, dispose of one point urged by the defendant Fronk, to wit: That counts 3 and 4 do not charge facts constituting an offense committed by him, nor charge him with being an accessory to an offense. His contention may be stated this way: That, inasmuch as the indictment alleges that Landon was the agent having the funds under his control, it was necessary that it charge embezzlement by Landon, and then, if it was sought to hold Fronk as an accessory, to charge that he aided and abetted the defendant Landon in the commission thereof. We do not agree with this assertion by the appellant Fronk. Under our system of plead-

ing the distinction between accessories before the fact and principals is abolished by section 971 of the Penal Code. It is sufficient if the pleading advises the defendant of the facts charged, provided, of course, that the facts so charged do constitute the offense. *People v. Rozelle*, 78 Cal. 84, 90, 20 P. 36; *People v. Schroeder*, 43 Cal. App. 623, 185 P. 507. To have alleged the agency of Landon, his control of the money belonging to his principal and that he converted it to his own use in violation of his trust, and that Fronk, knowing the facts of agency, control, and purposes, aided and abetted Landon in the conversion of the money to his own purposes in violation of the trust, would not have alleged a situation different from that made to appear here. It is alleged that Landon and Fronk committed the felony of embezzlement; that Landon in his capacity as agent had certain moneys under his control for his principal; that he and Fronk "willfully" and "feloniously" converted the moneys to their own use. In substance, the allegations are the same. In fact, in the case of *People v. Rozelle*, supra, relied upon most strongly by the appellant Fronk, the court says:

"The defendant might properly have been charged directly as a principal. In other words, it might have been charged, in direct terms, that he committed the act. Pen. Code, § 971. And this is much the better and safer practice. *People v. Outeveras*, 48 Cal. 19."

See, also, *People v. Groenig*, 57 Cal. App. 495, 501, 207 P. 502. While it may be said that Fronk could not be guilty of the crime of embezzlement of property not intrusted to his care and under his control, if acting alone and independently, yet in conjunction with the person acting as agent and as an accomplice of that agent he could be guilty. The same principle was declared in the case of *People v. Anderson* (Cal. App.) 242 P. 906, where a private citizen claimed he could not have been guilty of the crime of accepting a bribe. The court said:

"It is true that as a private citizen he could not as a principal be guilty of the crime of bribery as defined by the above Code section. But in conjunction with one or more of the officers mentioned in said section of the Code, and as an accomplice of such officer, he could be guilty of the crime as defined by said section 68. Pen. Code, §§ 31 and 971; *People v. Bartol*, 24 Cal. App. 659, 142 P. 510; *People v. Horn*, 25 Cal. App. 583, 144 P. 641; *Bishop v. State*, 118 Ga. 799, 45 S. E. 614."

The testimony in this case shows that Fronk was conducting a legitimate automobile business. As aids to faster expansion he also conducted business under the following names: J. K. Fronk Finance Company, Bureau of Business Standards, and Western Automobile Company. Under his own or one or more of these names he opened accounts in seven different banks in Los Angeles. In

addition to legitimate and regular commercial paper deposited in these banks and for about eight months prior to December, 1925, the defendant Fronk was drawing checks on various banks and depositing those checks in various other banks, taking advantage of the time necessary for the paper to pass through the clearing house, thus building up in the deposit accounts fictitious balances. This very briefly describes the process of "kiting checks" which was the custom which led to the transactions in question. During this time he assiduously cultivated the friendship of the defendant Landon, made him presents of liquor and gave him money aggregating approximately \$1,500; that Fronk, at Landon's request, gave a position to a relative of Landon's wife. It was also testified that the defendant Landon was frequently seen in Fronk's office. Landon testified that the gifts of money were made to him without any agreement or understanding concerning the reason therefor, but that he assumed it was only the lavish hand of the easy spender. Prior to the transactions here complained of, Landon admitted that he knew that Fronk was kiting a considerable number of checks, but says that from conversations had with Fronk he believed Fronk could easily take care of all concealed overdrafts thus created within a few hours if it became necessary. On December 28, 1925, Landon issued to Fronk a cashier's check payable to the Western Automobile Company for the sum of \$12,500, and took in exchange Fronk's personal check for a like sum drawn on the Manchester-Moneta Avenue State Bank, and on December 30, 1925, issued to Fronk two cashier's checks for \$5,000 and \$5,300, made payable to the same payee, and accepted Fronk's personal check drawn on the Santa Monica and Western Avenue branch of the Citizens' Trust & Savings Bank for \$10,300. Many times previously Landon had accepted personal checks of Fronk in payment of cashier's checks and the checks had theretofore been honored; but on this occasion they were not paid by the banks upon which they were drawn, although the first check when first presented to the Manchester-Moneta Avenue State Bank, on December 30th was charged to Fronk's account, but later in the day, on the instruction of the bank examiner, was returned and marked, "Not sufficient funds." It also appeared from the testimony that neither of the banks upon which the checks were drawn had entered into any agreement with Fronk for the extension of credit to him or permitting him to overdraw his accounts. The cashier's checks of \$12,500 and \$5,300 were paid by the Hellman Commercial Trust & Savings Bank.

[4-7] Both appellants complain of the admission in evidence over their objection of a transcription made by the stenographer who took it in shorthand, of answers made by the defendant Landon in response to questions

propounded by a captain of police. So far as the defendant Fronk is concerned, however, the court sustained the objection and told the jury that it could not be considered as affecting the interests of the defendant Fronk, but only as affecting the interests of the defendant who made the statements. The appellant Landon argues that the corpus delicti had not been proved sufficiently to warrant the introduction of extrajudicial admissions. The body of the crime in this case consists of the agency, control of the principal's money in his capacity as agent, that the money belonged to his principal (due proof of these three elements cannot here be questioned), and the conversion of the money to his own use and in violation of his trust. *People v. Schroeder*, supra. With respect to the last element, the testimony establishing the corpus delicti sufficiently to warrant the introduction of confessions or admissions need not be of a conclusive character such as to warrant a conviction. *People v. Rowland*, 12 Cal. App. 6, 106 P. 428; *People v. Frazer* (Cal. App.) 252 P. 633. In the present case it was established without the aid of defendant's statements that he and Fronk were very friendly; that he was receiving money from Fronk; that he had no authority to make loans for the bank or accept personal checks on banks other than his own in return for cashier's checks; that cashier's checks were issued in exchange for personal checks which were not honored; that two of the cashier's checks were paid by Landon's principal to a concern operated by Fronk. There was also testimony that, while it was Landon's duty to report overdrafts to the main bank, the report sent in on December 28th did not disclose the overdraft by Fronk. There was ample testimony establishing Fronk's habit of "kiting checks." We think that this testimony sufficiently proved the last element of the offense to warrant the introduction of admissions or confessions. The inference is justified from the relationship of the defendants and the moneys paid to Landon by Fronk that they were working in conjunction with the object of converting the bank's funds to their own purpose.

[8, 9] Both defendants assert and argue with commendable sincerity that the testimony fails to establish the crime of embezzlement; the appellant Fronk maintaining that at most the facts proved only constitute the offense of issuing checks without sufficient funds, and the appellant Landon claiming that the worst construction possible to be placed upon the acts described the crime of obtaining property by false pretenses. We are of the opinion, however, that appellants overlook the deductions which the jury were entitled to draw from the fact that money and gifts were made to Landon by Fronk, the personal relationship existing between them, and Landon's knowledge that Fronk was issuing worthless paper. It is immaterial what means or processes the defendants adopted

to convert the money intrusted to the care of Landon. The fact that cashier's checks were issued evidencing the bank's obligation to pay, and which were paid, does not differentiate it from a case where the money might be taken directly instead of indirectly. If Landon knew that the checks he accepted were worthless and he intended to and did convert the funds of the bank to their joint use by means of the subterfuge of worthless checks, he is undoubtedly guilty of the offense charged. *Ex parte Hedley*, 31 Cal. 108; *People v. Leonard*, 106 Cal. 302, 39 P. 617. We think the jury were authorized in drawing the inference just mentioned, from the testimony heretofore recited. And, of course, where there is substantial evidence upon which the jury could rest their verdict, it is not within the province of appellate tribunals to do other than follow that conclusion.

[10] The appellant Landon says that he fought continuously for an opportunity to inform the jury of all the business transactions between Landon and Fronk, but he specifies no instances where the court refused him that privilege. We are left without specification except that the Attorney General supplies us with one question asked of a witness, as follows:

"Mr. Wilson, do you know the amount, the aggregate amount of cashier's checks sold to J. K. Fronk through your bank's branch at Santa Barbara and Western avenue during the period of eight months up to the end of December?"

The objection to this was sustained. There may have been many instances of regular transactions. There may possibly have been instances of irregular transactions. We fail to see how the aggregate amount of good and bad, assuming that they were such, could be of any assistance in determining the intent on Landon's part. But, assuming that it was, there was evidence introduced to show that during that period of time, cashier's checks to the extent of about \$2,000,000 were sold. The ruling of the court could not possibly have prejudiced defendant's case.

[11] Counsel for Fronk assigns as error the introduction of certain checks deposited with the Manchester-Moneta Avenue State Bank. The situation presents itself in this wise, that, in order to justify Landon in issuing the cashier's checks, the defense attempted to show a very considerable deposit made in the bank mentioned. The prosecution then offered the checks, together with testimony to show that the balance was fictitious and the checks worthless. We can see no error.

Complaint is made of some of the instructions. We have examined them all and think they correctly applied the law to the facts of the case and fully and fairly advised the jury thereof.

The judgments and orders are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

82 Cal. App. 439

PEOPLE v. JENSEN. (Cr. 1450.)

District Court of Appeal, Second District, Division 2, California. April 22, 1927.

1. Indictment and information $\S$ 161(6)—Permitting amendment to correct clerical error in name of prosecutrix held not prejudicial, in prosecution for assault with intent to rape (Pen. Code, $\S$ 1008).

In prosecution for assault with intent to commit rape, permitting amendment of information to correct clerical error by which name of prosecutrix had been misspelled *held* not prejudicial, under Pen. Code, $\S$ 1008, where defendant knew of identity of individual named.

2. Rape $\S$ 52(1)—Evidence held to sustain conviction for assault on 6 year old girl with intent to commit rape (Pen. Code, $\S\S$ 220, 238).

In prosecution for assault on 6 year old girl with intent to commit rape, under Pen. Code, $\S$ 220, evidence *held* sufficient to sustain conviction; there being no claim that offense, if committed, was merely lewd and lascivious conduct, under Pen. Code, $\S$ 288.

3. Rape $\S$ 59(13)—Instruction that defendant's intent must be judged by circumstances connected with offense held not error (Pen. Code, $\S$ 20).

In prosecution for assault with intent to commit rape, instruction that, in every crime, act and intent, or criminal negligence, must concur, and that intent must be judged by circumstances connected with offense, *held* not error under Pen. Code, $\S$ 20.

4. Criminal law $\S$ 778(6)—In prosecution for assault with intent to rape, instruction that unlawful act is presumed to have been done with unlawful intent, held not error (Code Civ. Proc. $\S$ 1963, subds. 2, 3).

Instruction that unlawful act is presumed to have been done with unlawful intent, and that defendant is presumed to intend ordinary consequences of voluntary act, *held* not error, under Code Civ. Proc. $\S$ 1963, subds. 2, 3, in prosecution for assault with intent to commit rape.

5. Criminal law $\S$ 1172(2)—Instruction that person must be presumed to do what he voluntarily does held not prejudicial, in prosecution for assault with intent to rape.

In prosecution for assault with intent to commit rape, instruction that one must be presumed to do that which he voluntarily and willfully does in fact do *held* not prejudicial.

6. Criminal law $\S$ 822(11)—Where entire charge required proof of intent beyond reasonable doubt, instruction that defendant must be presumed to intend natural consequences of his acts held not prejudicial.

In prosecution for assault with intent to commit rape, instruction that person must be presumed to intend all natural, probable, and usual consequences of his own acts *held* not prejudicial, where entire charge made it clear to jury that question of intent must be proved to jury's satisfaction beyond reasonable doubt.

7. Criminal law $\S$ 786(2)—Instruction on credibility of witnesses held not prejudicial for use of only masculine possessive pronoun in part, though defendant was sole male witness.

In prosecution for assault with intent to commit rape, instruction as to province of jury in determining credibility of witnesses *held* not prejudicial, in that masculine possessive pronoun alone was used in part of instruction, though defendant was sole male witness; masculine pronoun being commonly used in generic sense.

8. Criminal law $\S$ 823(15)—Instruction that jury should find defendant guilty if they believed prosecutrix held not prejudicial, where instruction charged evidence must show guilt beyond reasonable doubt (Const. art. 6, $\S$ 4½).

In prosecution for assault with intent to commit rape, instruction that, while testimony of prosecutrix should be carefully scanned, it was duty of jury to render verdict accordingly if they believed her, *held* not reversible error, under Const. art. 6, $\S$ 4½, in view of language of court in same instruction that testimony of prosecutrix and other evidence must show guilt beyond reasonable doubt.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

James Jensen was convicted of assault with intent to commit rape, and he appeals. Affirmed.

Fred Duffy, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

JOHNSON, Justice pro tem. This is an appeal by defendant from an order denying his motion for a new trial and from a judgment of conviction for an assault with intent to commit rape upon the prosecutrix, Bettie Horton, a child of 6 years.

As originally drawn, the information, through clerical error, gave the name of the prosecutrix as Bettie Norton, instead of Bettie Horton. When the prosecution rested, the defendant, before proceeding with his defense, moved the court for a direction to the jury to find the defendant not guilty upon the ground, among others, that the information charged an assault upon Bettie Norton, while the proof related to Bettie Horton. The motion was denied; and, upon motion of the district attorney, the court ordered an amendment of the information changing the name to Horton. Defendant contends that, the jury having been impaneled to try him upon a charge of assault upon Bettie Norton, he was deprived of the right to a trial by jury of the charge of assault declared by the amended information to have been made on Bettie Horton.

[1] Section 1008 of the Penal Code allows

amendment in the discretion of the court at any time after a defendant's plea, where it can be done without prejudice to the substantial rights of the defendant, provided there is neither a change in the offense charged nor a charge of any offense not shown by the evidence taken at the preliminary examination. In *People v. White*, 47 Cal. App. 400, 190 P. 821, after the jury had been impaneled, but before any evidence was taken, an information naming the prosecutrix as Jennie Carlsen was amended so as to give her correct name, Jennie Larsen; and this was held on appeal to have been a proper exercise of the court's discretion. In the present case the amendment was not made until the People's Case had been presented to the jury and the defendant was called to present his defense. No substantial right of the defendant was prejudiced by the amendment. He was in no way taken by surprise, nor did he request any continuance because of the correction of the clerical error. The only witnesses for the people were the prosecutrix and her grandmother, Mrs. Cates. Defendant had heard their testimony; and his defense, with himself as the sole witness, consisted of an absolute denial. Moreover, there is no pretense that he was not aware from the very beginning of the identity of the individual in question, however named in the information. The ruling made in the *White Case* should therefore govern here. Reference may be made also to *People v. Harrison*, 14 Cal. App. 545, 112 P. 733, and the cases there cited.

[2] Upon the record of the trial it is contended that the verdict lacks support, in that there is insufficient evidence of guilty intent. In cases of this character intent must necessarily be determined largely by reasonable inferences from the facts placed before the jury. The child, who was motherless, lived with her grandmother, Mrs. Cates, at Wrightwood, in San Bernardino county. On July 3, 1926, at about 6 o'clock in the afternoon, defendant, with the permission of Mrs. Cates, took the child for a boat ride on a lake in the vicinity. As the child testified, after crossing the lake, defendant took her into the brushwood and caused her to lie down, lowered her bloomers, and engaged in an attempt to indulge himself sexually, but without actual penetration. The grandmother kept a boarding house at Wrightwood, and when the child reached home Mrs. Cates was busy serving supper to her boarders. She testified that the child came home "whining and crying," and saying she did not want supper, asked to be put to bed. As the child continued to cry, Mrs. Cates went with her to the bedroom, and, undressing the little girl, found her bloomers wet and the skin about the private parts "red as fire * * * and looking like she was ready to bleed, and she had a kind of sticky stuff on her"—which led

Mrs. Cates to think that the child had been "in poison weeds." Upon the grandmother's inquiry, "What caused this?" the child answered, "I can't tell you, I can't tell you now;" but she said further, "I am all sore and raw, I want you to grease me and put powder on me before I go to bed." This the grandmother did, not suspecting at the time that the child had been maltreated. The little girl complained again the next day, and powder was again applied. About five days later something occurred in the town with reference to other children which led Bettie to tell her grandmother the story of her boat ride with defendant, and the grandmother immediately caused defendant's arrest. From such evidence the jury undoubtedly drew the inference that there had been an assault by defendant with intent to commit rape, and that inference is amply justified. It was not merely a case of lewd and lascivious conduct under section 288 of the Penal Code, but a case properly cognizable under section 220.

[3-5] Upon the subject of intent, defendant complains of the following instruction given by the court:

"In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence. This intent must be judged by the circumstances connected with the offense. An unlawful act is presumed to have been done with an unlawful intent. A person is presumed to intend the ordinary consequences of his voluntary act. A person must be presumed, and is presumed, to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own acts."

It is urged that such an instruction does violence to the rule requiring specific intent to be shown. The first sentence, as to the necessity of union of act and intent, is but the quotation of section 20 of the Penal Code, and, as is said in *People v. Rowland*, 12 Cal. App. 6, 24, 106 P. 428, is not only correct as an abstract statement of law, but is given in nearly every criminal case. The next sentence, declaring that intent may be judged from circumstances, accords with the language of the court in *People v. Maciel*, 71 Cal. App. 213, 218, 234 P. 877, 880: "All the circumstances surrounding the act furnish the evidence from which the presence or absence of specific intent may be inferred by the jury." See, also, *People v. Bones*, 35 Cal. App. 429, 435, 170 P. 166. The two following sentences in the instruction are presumptions formulated in subdivisions 2 and 3 of section 1963 of the Code of Civil Procedure. Speaking, in *People v. Dunlop*, 27 Cal. App. 460, 467, 150 P. 389, of an instruction, given in a case of this same character, in language borrowed from subdivision 1 of section 1962, Code of Civil Procedure, "a guilty intent is conclusively presumed from the deliberate commission of an unlawful act," Judge Hart

said that, while he did not favor the instruction, yet, even if not appropriate to the case made by the briefs, the language could not, in view of the instructions as a whole, be held so prejudicial as to require a reversal. The same may be said of that portion of the instruction here which is taken from subdivisions 2 and 3 of section 1963, Code of Civil Procedure. The next succeeding sentence, "A person must be presumed, and is presumed, to do that which he voluntarily and willfully does in fact do," is a form of instruction which in a different sort of case was held proper in *People v. Moxley*, 17 Cal. App. 466, 470, 120 P. 43. As given in that case, and also in this, the clause hardly does more than give expression to a truism—a man does what he does—and could have occasioned no prejudice.

[6] The language in which such an instruction is usually couched is found in *People v. Richardson*, 161 Cal. 552, 564, 120 P. 20, and is there followed by the remaining portion of the instruction to which exception is taken by the defendant here. The *Richardson* Case was a prosecution under section 274 of the Penal Code for furnishing drugs with intent to procure a miscarriage, and, in a case of that class, as in this, specific intent must be proved. The instruction there criticized read as follows:

"A person must be presumed and is presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts, unless there is evidence direct or indirect to controvert this presumption."

In reference to this instruction, the court said:

"It is not disputed that this is a correct exposition of the law in ordinary cases, but it is urged that the latter part of the instruction is not applicable and is misleading where, as in this case, the intent with which an act is done is the gist of the offense. * * * This particular intent being, as said, the gist of the offense, it was incumbent on the people to establish it as a fact by such evidence as would warrant a conclusion to that effect on the part of the jury. *People v. Jones*, 160 Cal. 358, 117 P. 176. But we do not think that the instruction complained of was meant or could have been understood by the jury as requiring or authorizing them to find any such intent in the absence of evidence establishing it to their satisfaction beyond all reasonable doubt. This is clear when we examine the charge as a whole."

So also in *People v. Wilson*, 36 Cal. App. 589, 597, 172 P. 1116, the court said that such an instruction was not to be read alone but in connection with the entire charge, and particularly the portion which advised the jury that it must find beyond a reasonable doubt that defendant committed the acts charged.

In the present case the jury was told in other instructions, in plain terms, that the state was bound to prove that the defendant assaulted the prosecutrix with the intent to have sexual intercourse with her; that intent must be established like any other fact by acts, conduct, and circumstances; that innocence was to be presumed; that the law raised no presumption against defendant, and every material element necessary to constitute the crime must be proved beyond a reasonable doubt; and that, if the element of intent was lacking, the offense had not been proved. The instructions as a whole in this respect did full justice to defendant.

In a case such as the one under review it is not necessary for the evidence to show that the accused intended to gratify lust at all events. The intent is to be gathered from the outward acts of the defendant and the accompanying circumstances, and from those acts and circumstances the jury are to draw rational conclusions as human beings. *People v. Johnson*, 131 Cal. 511, 63 P. 842; *People v. Moore*, 155 Cal. 237, 100 P. 688; *People v. Onessimo*, 65 Cal. App. 341, 224 P. 101. Evidence of the fact of an assault on the prosecutrix is found in her testimony that the defendant caused her to lie down and disarrange her clothing for carnal purposes (*People v. Roach*, 129 Cal. 33, 61 P. 574), and the physical contact which followed, together with the condition of the child which the grandmother subsequently observed, are indications of intended sexual connection (*People v. Fernandez*, 4 Cal. App. 314, 87 P. 1112).

The defense of the accused was not that, if an offense was committed, it was one which is catalogued under section 288 of the Penal Code. His defense was an absolute denial of any tampering whatever. It is quite evident that the jury disbelieved him and placed credence in the testimony adduced by the people. From that testimony the logical and rational conclusion was that the assault had been committed by defendant, and that the intent charged was his true and factual intent. In a corresponding case (*People v. Collins*, 5 Cal. App. 654, 91 P. 158), the conduct of the defendant as described by the prosecutrix, likewise a child of 6 years, was quite similar to that in evidence here, and the court there said:

"We must suppose that his acts were done with the purpose and desire that would ordinarily characterize the acts of an individual of the male sex when such acts were done with one of the female sex."

Our conclusion is therefore that, under the circumstances in evidence and the court's charge as a whole, the instruction assailed did not prejudice defendant.

[7] Exception is taken to another instruction which goes, however, to form rather than substance. In giving the instruction as to the province of the jury in determining the

credibility of witnesses, the court in the earlier part of the instruction used the masculine pronoun instead of pronouns alternatively masculine and feminine; but in the latter portion of the instruction both forms of pronouns were used. In common parlance the masculine pronoun is frequently used generically; and from the instruction, which in the beginning told the jury to consider all the circumstances under which *each witness* testified, the jury undoubtedly understood the language of the court to apply to every witness heard and not to be directed in any part exclusively to the defendant, the sole male witness in the case. The entire instruction is as follows:

"The jurors are the sole judges of all questions of fact, and of the credibility of witnesses. The jurors may believe the whole or any part of the evidence of the witness, and may disbelieve the whole or any part of it, as may be dictated by the exercise of their sound judgments as reasonable men. You should carefully scrutinize all the testimony given, and in doing so consider all the circumstances under which each witness has testified, his degree of intelligence, his manner while on the stand, the relation he bears to the case, and the manner in which he might be affected by a verdict, his apparent desire to confine himself to the truth, or to color his statements, his apparent tenacity or lack of memory, the extent to which he is contradicted or corroborated by other evidence, if at all, and any other considerations that tend to throw light upon the question of his veracity or credibility, and determine the amount of credence to which each witness and each statement is entitled at your hands as reasonable and intelligent men. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, by the character of his or her testimony, or by evidence affecting his or her character for truth, honesty, or integrity, or both, or his or her motives, or by contradictory evidence, and the jury are the exclusive judges of his or her credibility."

It would be hypercritical to say that any miscarriage of justice resulted from the form of this instruction.

[8] The only other instruction attacked is the following portion of an instruction numbered 9 in the clerk's transcript:

"You are instructed that, while it is the law that the testimony of the prosecutrix should be carefully scanned, still this does not mean that such evidence is never sufficient to convict. If you believe the prosecutrix it is your duty to render a verdict accordingly."

An instruction in the same terms was held in *People v. Johnson*, 106 Cal. 289, 39 P. 622, and *People v. Barker*, 137 Cal. 557, 70 P. 617, to furnish cause for reversal. Those cases were decided, however, before the adoption of section 4½ of article 6 of the Constitution. In the same instruction which contained the language above quoted, the court also said to the jury:

"It is sufficient, if you believe from her evidence and all other testimony and circumstances in proof of the case, beyond a reasonable doubt, that the crime charged has been committed."

In view of this curative instruction in close juxtaposition with that assailed, and in view also of the purpose and intent of the constitutional amendment, disparaging reversal for mere technical misdirection while encouraging at the same time the due and orderly administration of justice, we are of the opinion that the case made against defendant is so strong and clear, and the instructions as a whole so fair, that the particular sentence complained of did not result in a miscarriage of justice, and should not occasion a reversal of the judgment of conviction.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

201 Cal. 162

TOBIN GROCERY CO. v. SPRY et al.
(Sac. 4040.)

Supreme Court of California. April 27, 1927.

1. Appeal and error ☞428(2)—Notice of intention to appeal held sufficient where filed on sixteenth day after notice of entry of judgment by copy which omitted indorsement of filing (Code Civ. Proc. § 953a).

Notice to clerk of intention to appeal, requesting transcript, *held* sufficient where filed on the sixteenth day after notice of entry of judgment by copy which did not bear indorsement showing fact of filing in clerk's office, though Code Civ. Proc. § 953a, requires notice of intention to appeal to be filed within 10 days after notice of entry of judgment.

2. Appeal and error ☞629—Trial court's certification of transcript over objection on ground of delay held exercise of statutory power (Code Civ. Proc. § 473).

Trial court's certification of transcript over objection on ground of appellants' delay was an exercise of power to relieve appellants, under Code Civ. Proc. § 473, providing that court may allow amendment or enlarge time to plead.

3. Appeal and error ☞663(1)—Informalities in preparation of record are cured by judge's certification.

Informalities in preparation of typewritten record are cured by the due certification by the judge of the transcript which has been prepared.

4. Appeal and error ☞939—Where transcript is settled within 6 months, it must be assumed that any default was relieved by court or waived by respondent.

Where transcript has been settled within 6 months' period, it must be assumed either that objections were raised in trial court and settlement was equivalent to relief from default, or that respondent waived default by failure to object.

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Tobin Grocery Company against Frank Spry and another. Judgment for plaintiff, and defendants appealed. Plain-

tiff moves to dismiss the appeal or to affirm the judgment. Motion denied.

Samuel V. Cornell, of Turlock, for appellants.

Wm. N. Graybiel, of Turlock, for respondent.

WASTE, C. J. Judgment was entered in this action for the plaintiff, and the defendants appealed. Respondent has made a motion to dismiss the appeal, or for an order affirming judgment, on the ground that the notice of appeal was not filed within 10 days after notice of entry of the judgment; that the trial judge exceeded his powers in granting certain extensions of time to the defendants within which to prepare the transcript; that the transcript was not filed until after the last extension granted had expired. The further ground that the defendants had abandoned the appeal may be summarily dismissed from consideration as it lacks substantial support.

Judgment was rendered, filed, and entered in the court below on September 13, 1926. No proceedings for a new trial were had, and the notice of appeal was served on September 28 and filed September 29 following. The notice of appeal was therefore filed within time. Code Civ. Proc. § 939.

On the 13th day of September, the date on which the judgment was rendered, and after it had been filed with the clerk of the court, counsel for the plaintiff delivered to counsel for the defendants a copy of the judgment, which, however, did not have "attached thereto or indorsed thereon any statement or writing stating in any manner whatever that said judgment had been theretofore filed with the clerk of the court."

[1] On September 29 following, the date on which the notice of appeal was filed, the defendants filed with the clerk of the court a notice stating that they intended to appeal from the judgment, and requesting that a transcript of the testimony offered or taken, the evidence offered or received, and all rulings, instructions, acts, or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Such notice is required by section 953a of the Code of Civil Procedure to be filed within 10 days after notice of entry of the judgment in cases in which no proceedings on motion for a new trial are pending. We are not satisfied, however, that the purported notice of entry of judgment given defendants, in the manner and form we have referred to, was a sufficient notice to start the time running within which it was incumbent upon the defendants to give the notice to the clerk to prepare the transcript. The notice was therefore filed within time.

[2] Within 20 days after notice to prepare

the transcript was filed with the clerk, and on a number of succeeding dates, the judge of the trial court gave to the reporter extensions of time within which to prepare and file the transcript. One extension, granting until December 20, 1926, was given 1 day after the previous extension had expired. No further extensions appear to have been given. The transcript was not certified by the reporter until the 6th day of January, 1927, on which date it was filed with the clerk of the court. Subsequently, plaintiff gave notice that it would, on January 24, ask the court to refuse to certify to the truth and correctness of the transcript for the reason that it was not filed within time. The record is silent as to what transpired when the objections to the certification of the transcript were made, but the transcript was duly certified by the judge on February 14, 1927, less than 6 months after the rendition of the judgment. It does not appear that any formal application for relief was made by the appellants at the time of the certification of the transcript, but there have been brought here copies of the record of the proceedings had in the court below on a motion made "to dismiss the appeal" on the ground of the failure of the defendants to prosecute the appeal. Counsel for the appellants therein made an affidavit, from which it appears that the failure of the phonographic reporter to complete the transcript within the time required may have been, and probably was, the result of a misunderstanding on the part of the reporter as to the intention of the defendants to prosecute the appeal.

[3, 4] In view of the fact that the delay of the appellants in having the transcript prepared was urged upon the trial judge as a reason for denying the certification of the transcript, and the court, notwithstanding the delay and the objection, having certified the transcript, its certification under the circumstances here involved was an exercise of the power to relieve the appellants, under section 473 of the Code of Civil Procedure. *In re Barney*, 191 Cal. 18, 21, 214 P. 853; *Stenzel v. Kronick* (Cal. Sup.) 255 P. 199. Informalities in the preparation of the type-written record are cured by the due certification by the judge of the transcript which has been prepared. *Bell v. Brigance*, 194 Cal. 445, 229 P. 27. Where the transcript has been settled by the trial judge within the 6 months' period, it must be assumed either that the objections to its settlement were raised, as they should have been, in the trial court, and that settlement was the equivalent of relief from default, or that the respondent waived the default by failure to object in the court below. The former seems to be the situation here, as evidenced by the action of the trial judge. *Rubin v. Platt Music Co.* (Cal. App.) 251 P. 243.

The motion to dismiss the appeal or for affirmance of the judgment is denied.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

201 Cal. 116

PEOPLE v. WEITZEL. (Cr. 2962.)

Supreme Court of California. April 22, 1927.

1. Bribery $\Leftrightarrow$ 1(2)—Mere offers by member of common council to cast vote favorably for a consideration held not "agreement to receive bribe," warranting conviction for bribery (Pen. Code, § 165, as amended by St. 1905, p. 650).

Member of common council, who was charged with offering for consideration to vote for purchase of water system and for annexation of another city by election, could not be convicted for bribery under Pen. Code, § 165, as amended by St. 1905, p. 650, providing for punishment of members receiving, or agreeing to receive, bribe, where offers alone were shown without agreement for payment of money thereunder.

2. Statutes $\Leftrightarrow$ 230—It is presumed that Legislature, on amending statute, intended to change law.

Where changes in law have been introduced by amendment, it is presumed the Legislature intended to change existing law in particulars wherein different language was used.

In Bank.

Appeal from Superior Court, San Diego County; Geo. H. Cabaniss, Judge.

The conviction of Harry K. Weitzel of bribery was reversed by the District Court of Appeal, and the Attorney General's petition for hearing in the Supreme Court was granted. Judgment of conviction reversed.

Sample & Harden, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Chester C. Kempley, of San Diego, for the People.

LANGDON, J. The defendant was convicted of bribery under the first and third counts of an indictment, based on section 165 of the Penal Code of the state of California. Upon appeal, the District Court of Appeal, Second Appellate District, Division One thereof, reversed the judgment. A petition for hearing was filed in this court by the Attorney General, which petition was granted.

As stated in the opinion of the District Court of Appeal (249 P. 842), the evidence sufficiently discloses that the defendant, on or about the 20th day of June, 1923, was a duly elected, qualified, and acting member of the common council of the city of San Diego, and that on that day he offered to one Ed Fletcher and Charles F. Stern to cast his

official vote in said common council in favor of the purchase by the city of San Diego of Cuyamaca Water Company, in consideration of the payment to him of the sum of \$100,000. The evidence, introduced under a separate count of the indictment, also is sufficient to prove that on the 23d day of June, 1923, while still a member of the common council, he offered to one Ed Fletcher, in consideration of the payment to him of the sum of \$4,000, to cast his official vote as herein-after stated, as a member of the said common council, in the matter of calling an election for the purpose of submitting to the electors of the city of San Diego the question of the ratification of the annexation to the city of San Diego of the territory formerly known as the city of East San Diego. The evidence in this case does not disclose anything as to the nature of the offer, excepting the fact that the defendant approached Ed Fletcher and Charles F. Stern, and proposed that they pay him the sum of \$100,000 for his vote in the matter charged in the first count of the indictment, and, as to the separate count referred to herein, that he likewise approached Ed Fletcher and proposed to him that he would favor ratification of the annexation of the city of East San Diego to the city of San Diego by way of an election rather than by resolution of the council, if Colonel Fletcher would pay to the defendant the sum of \$4,000 for his services.

[1] As stated by the District Court of Appeal, the only point at issue on the appeal is whether or not such proof establishes the crime of "agreeing to receive" a bribe.

The portion of section 165 Penal Code, applicable here, reads as follows:

"Every person who gives or offers a bribe to any member of any common council * * * with intent to corruptly influence such member in his action on any matter or subject pending before, or which is afterward to be considered by, the body of which he is a member, and every member of any of the bodies mentioned in this section who receives, or agrees to receive any bribe upon any understanding that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter, upon which he may be required to act in his official capacity, is punishable. * * *"

The indictments charge that defendant did willfully, etc., "agree to receive" a bribe.

By an amendment to section 165, Penal Code, passed by the Legislature in 1905, the offense on the part of any person giving or offering a bribe to a member of the common council was not modified, but the latter half of the section, dealing with offenses on the part of members of the common councils, was changed, so that, instead of reading, as formerly, that every member of any such body "who receives or offers to receive any such bribe, is punishable," etc., the statute by such amendment was made to read:

"Every member of any of the bodies mentioned in this section, who receives, or agrees to receive any bribe upon any understanding," etc.

It is argued by defendant that, by the use of the phrase "every member who agrees," the Legislature meant every member who entered into an agreement with another person—that there must have occurred a meeting of the minds of two persons.

[2] Before the amendment of 1905, any member of a common council who offered to receive a bribe was within the statute, and the amendment of the language in the particular noted signifies an intention to change the pre-existing law. In *United States v. Bashaw* (C. C. A.) 50 F. 749, 754, it was said:

"The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."

"Where changes have been introduced by amendment, it is not to be assumed that they were without design; usually an intent to change the law is inferred." In *re Segregation of School District No. 58*, 34 Idaho, 222, 200 P. 138.

In *Rieger v. Harrington*, 102 Or. 603, 613, 203 P. 576, 580, it was said:

"By amending that statute, the Legislature demonstrated an intent to change the pre-existing law, and the presumption must be that it was intended to change the meaning of the statute in all the particulars wherein there is a material change in the language of the amended act."

To the same effect are the following authorities: *Springfield Co. v. Walton*, 95 Mo. App. 526, 69 S. W. 477; *Duff v. Karr*, 91 Mo. App. 16; *Pierce v. County of Solano*, 62 Cal. App. 465, 469, 217 P. 545; *Shearer v. Flannery*, 68 Cal. App. 91, 94, 228 P. 549.

The case of *People v. Coffey*, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704, was one wherein the defendant was prosecuted under the same statute sought to be applied here. Upon appeal the defendant raised the question of whether the person giving the bribe was an accomplice, whose testimony required corroboration under the then existing law. In passing upon that question, it became necessary for the court to determine what acts were required to constitute the offense of bribery under section 165, Penal Code, and the following language was used:

"The charge against this defendant, as we have seen, is under section 165 of the Penal Code. It is not for asking or soliciting a bribe. It is for 'agreeing' to receive and 'receiving' a bribe. The agreement necessarily carries with it the essential concept of a criminal and corrupt bargain. There can be no agreement without a meeting of minds, and a meeting of minds for this base bargain is declared to be a crime. There is nothing in the law to suggest even that in such a crime the two parties stand in any

different position from that occupied by two who agree to fight a duel. In such an agreement the act of the person who contracts to pay the consideration is admittedly base, corrupt, and criminal. Moreover, his conduct is essential to the very existence of the crime of agreeing. How then shall it be said that he is not, within the narrowest or the fullest meaning of the law, an accomplice of the man agreeing to take the bribe? He is an actual participant in the crime, as well as an aider, abettor, advisor, and encourager in its commission, for it is to be remembered that in the case at bar the crime itself is the agreement. An officer may solicit bribes, may ask for bribes, may advertise his willingness to accept bribes. Each one of these acts is a separate, distinct, and recognized crime, but no one of them is the crime of agreeing to take a bribe, which *ex vi termini* requires the guilty co-operation of another. *United States v. Dietrich* [C. C.] 126 F. 664."

In *United States v. Dietrich*, supra, the defendant was indicted for conspiracy under a federal statute. The conduct alleged as constituting conspiracy was an alleged agreement between the defendant, a congressman, and one Fisher, whereby the defendant agreed to receive a bribe from Fisher. The case came up on demurrer to the indictment upon the ground that the co-operation in agreeing to give and receive a bribe was merely the essential co-operation of more than one person required to constitute the crime of bribery by receiving, or agreeing to receive, a bribe, and and that the mere plurality of participants necessary to constitute bribery could not convert the case into one of conspiracy. The court held that co-operation of two persons was essential to constitute an agreement to receive or the receiving of the bribe, using the following language:

"Section 1781 of the Revised Statutes * * * makes it an offense against the United States (1) for a member of Congress or any officer or agent of the government to directly or indirectly take, receive, or agree to receive any money, property, * * * (2) for any person to directly or indirectly offer or agree to give, or give, or bestow any like consideration, * * * (3) for any member of Congress to * * * take, receive, or agree to receive. * * * Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses, defined in section 1781, of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of agreeing, receiving, or giving. In this respect, agreeing to receive a bribe from another and agreeing to give one are unlike soliciting or offering a bribe, because the solicitation or offer may be the act of a single person and may occur without any concurrent act of another."

There is further authority to the same effect in the case of *People v. Squires*, 99 Cal. 327, 33 P. 1092, involving a conviction of the crime of receiving a bribe as a juror. The

conviction was founded upon section 93 of the Penal Code, which enacts:

"Every * * * juror * * * who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or decision * * * shall be influenced thereby, is punishable," etc.

The court said:

"Section 93 of the Penal Code denounces as liable to punishment those who ask for a bribe. To complete the offense it is not necessary that the party approached shall consent to give it. Unless he does so there could be no agreement or understanding. In such case it cannot be charged that such agreement or understanding exists, but only that the accused was ready to agree or enter into an understanding."

The Attorney General relies upon the case of *People v. Fitzpatrick* (Cal. App.) 247 P. 601, and declares it is in conflict with the case of *People v. Coffey*, supra, and with the opinion of the District Court of Appeal in the instant case. In *People v. Fitzpatrick* the court announced that that decision was not inconsistent with *People v. Coffey*, nor with several other California cases presented upon the appeal, and we are in accord with this statement. In the *Fitzpatrick* Case the court was passing upon an instruction proposed by defendant as applicable to the testimony of a feigned accomplice. The situation thus arising is recognized and the rule of the *Fitzpatrick* Case is acknowledged in *People v. Coffey*, at page 448 (119 P. 907) of that decision, where it is said:

"In the charge against this defendant of 'agreeing to receive a bribe' and 'receiving a bribe,' each element, the agreeing and the receiving, necessarily contemplates the criminally corrupt co-operation of another (eliminating from consideration, of course, the feigned accomplice). To this proposition the authorities are so numerous and so uniform that one is rather embarrassed by the wealth than by the dearth of them."

It is apparent from a reading of the two cases under discussion that they are not in conflict, but that, on the contrary, the *Fitzpatrick* Case falls within the exception recognized in *People v. Coffey*, which is not true of the instant case.

Before concluding the discussion of the question, we feel impelled to say that we are impressed with the reasons of public policy urged by the Attorney General in support of an affirmance of this judgment, and because of the importance of those considerations we granted the petition for a hearing in this court after decision by the District Court of Appeal. We regret, however, that we are without power to read into the statute language which would prevent the solicitation of bribes by members of the common council with impunity, since the section of the Penal Code relating to this group of public officers

fails to include the asking or soliciting of bribes by them.

The argument made by the petitioner herein should be convincing if addressed to the Legislature, the department of the government with power to change the present unwholesome situation.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

201 Cal. 79

HARBOR CITY CANNING CO. v. DANT
et al. (S. F. 11459.)★

Supreme Court of California. April 19, 1927.

Rehearing Denied May 19, 1927.

1. Sales ⇨181(12)—Evidence held sufficient to support finding that peach pulp tendered under sale contract was merchantable product.

Evidence held sufficient to show that peach pulp, tendered defendant by plaintiff under contract for sale, was a sound and merchantable product and was fit for the general and ordinary purposes for which peach pulp is used.

2. Sales ⇨153—Where contract called for 10,000 cases peach pulp, and in case of short pack delivery to be prorated, offer to deliver entire order held good offer of performance, though there was short pack.

Where contract for sale of peach pulp called for 10,000 cases, and further provided that in case of short pack so that seller should be unable to make full delivery, delivery should be prorated, offer to deliver the entire amount called for held a valid offer of performance, though there was short pack, since the provision for prorating was for seller's benefit and in the nature of an option to him, and if he chose he might supply deficit by purchase in the open market and supply the full order.

3. Contracts ⇨172—Contract provision for benefit of one party cannot be taken advantage of by other.

A provision inserted in a contract for the benefit of one party cannot be taken advantage of by the other.

4. Sales ⇨71(5)—Provision in contract for peach pulp sale that in case of short pack delivery might be prorated held for seller's benefit.

Provision in contract for sale of peach pulp that in case there was a short pack by reason of which the seller should be unable to make full delivery, that delivery should be prorated, held for seller's protection and not equally for the benefit of the buyer.

5. Sales ⇨181(11)—Evidence held to support seller's tender of buyer's pro rata share of peach pulp under sale contract.

Evidence held to support seller's allegation that its tender of peach pulp under contract of sale was the pro rata share to which buyer was

entitled, under provision that in case of short pack delivery should be prorated.

6. Partnership ⇨219(3)—Where partners were joined with partnership as defendants, judgment against them as individuals held valid (Civ. Code, § 2442; Code Civ. Proc. § 388).

Where the individual partners were joined with a partnership in an action to recover the price of peach pulp sold to the partnership, a judgment against them in their individual capacities, based upon their statutory joint liability under Civ. Code, § 2442, and Code Civ. Proc. § 388, held valid.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Harbor City Canning Company against Charles E. Dant and others as surviving partners of the firm of Christenson, Hanify & Weatherwax, Charles E. Dant and others individually, John L. Reed, as administrator of the estate of John R. Hanify, and Eleanor Louise Christenson, as executrix of the last will of E. A. Christenson. Judgment for plaintiff, and defendants appeal. Affirmed.

Thomas, Beedy & Lanagan and Geo. J. Presley, all of San Francisco, for appellants.

Haven, Athearn, Chandler & Farmer and Philip H. Angell, all of San Francisco, and L. B. Binford and Adams, Adams & Binford, all of Los Angeles, for respondent.

LANGDON, J. This is an appeal by defendants from a judgment against them for damages for breach of a contract for the purchase by them of a large quantity of peach pulp. About many of the facts there is no dispute. On July 9, 1919, the copartnership of Christenson, Hanify & Weatherwax ordered in writing from plaintiff 10,000 cases of peach pulp, described in the contract as "6/10's" (which was elucidated by the testimony as signifying 6 No. 10 cans to each case) at a price of \$7.50 per dozen cans. It was also provided that the peach pulp should be of standard quality 1919 season's pack, and that, in case of short pack or government commandeering, requisition or reservation, delivery should be prorated. The goods were to be shipped as soon as practicable after packing. Plaintiff started to manufacture the pulp with the opening of the peach season in August. On August 19th plaintiff shipped to defendant two cars of peach pulp consisting of 3,684 cases and drew drafts for the amount of the purchase price. On August 21st defendant partnership wrote to plaintiff stating that the drafts had been received and would not be taken up until samples were received. On August 26th defendant partnership telegraphed plaintiff that their buyer had refused to accept the peach

pulp unless uniformity of color was guaranteed, and refused to take up plaintiff's drafts until this matter was adjusted satisfactorily. On September 26th, when the manufacture of peach pulp had been practically completed, defendant partnership rejected the product on the ground that the same was not standard quality 1919 season's pack peach pulp and was not merchantable. The cases of pulp which plaintiff had tendered defendant were then sold by plaintiff for the account of defendant, and in this action plaintiff sought damages.

Defendants' answer alleged that the peach pulp contained improper materials, was unmerchantable; that it was not made of yellow, freestone peaches, as stated on the labels attached to the cans. There was also set up a defense relating to the number of cases tendered under the contract, and consideration will be given to this matter hereinafter.

As to the issues framed regarding the soundness and merchantability of the product and its conformity to the requirements of the contract, the trial court found that: Between the 19th day of August, 1919, and the 2d day of October, 1919, plaintiff offered to perform its contract in accordance with the terms thereof, and between said dates plaintiff offered for delivery and tendered to defendant 8,727 cases of standard quality peach pulp 1919 season's pack, and offered to deliver to defendants the balance of said peach pulp as provided for under the terms of said contract, and said defendants, between the dates named refused to accept delivery of said peach pulp or any part thereof, and on the 26th day of September, 1919, said defendant copartnership, without right, repudiated said contract and refused to accept delivery of and/or pay for said peach pulp, or any thereof, in accordance with the terms of the contract, and so notified plaintiff. Said refusal to accept or to pay for said peach pulp was contrary to the terms of said contract and was without right or just or other lawful excuse. That the peach pulp manufactured for said copartnership and offered for delivery and tendered by plaintiff to said copartnership, as aforesaid, was standard quality 1919 season's pack peach pulp, and said peach pulp was in all respects in compliance with the terms of said contract. Said peach pulp was a sound and merchantable product and was fit for the general and ordinary purposes for which peach pulp is used.

[1] These findings are vigorously attacked by the defendants and appellants, who contend that the evidence does not justify the conclusion reached by the trial court. With this contention we are unable to agree. It is true the defendants produced many credible witnesses whose testimony was in conflict with the findings quoted; but their testimony can be of no force and effect upon

appeal where the trial court has rejected it in favor of testimony offered for the plaintiff which is in accord with the findings. Of the latter class is the testimony of the witness Miller, a graduate chemist, technical director of the United States Food Health Service at Washington for years, and who was, at the time he examined the peach pulp in controversy, a director of the National Canners' Association. His qualifications as an expert were admitted by defendants. It will serve no useful purpose to set forth his testimony here, but the substance of it was that he found the peach pulp "color normal, gravity good," "good quality without anything objectionable about them; that it was standard quality peach pulp of the 1919 peach pack." Supporting the testimony of the witness Miller, we find the testimony of the witness Duffy, a graduate of the University of California in pharmaceutical chemistry and occupying the position of state food and drug inspector for the state board of health. He made an examination of 24 cans taken from different portions of the lot tendered to defendants and found the product merchantable and of standard quality. The director of the state food and drug laboratory an associate professor of nutrition at the University of California testified that he examined samples of the peach pulp and found that it was "very easily standard" quality; that it contained a very small percentage of pits—five one-hundredths of 1 per cent. and only one one-hundredth of 1 per cent. of sand. There is other testimony in the record to the same effect, and it answers appellants' objection to the findings of the trial court.

The second point urged upon the appeal to the effect that no contract was entered into between the parties because there was no meeting of the minds as to the subject-matter thereof has been abandoned by appellants and conceded by them in their closing brief to be without merit.

[2] The third point urged is that there was an excessive tender by plaintiff, and this brings us to a reconsideration of the original contract, pleadings and evidence. The contract called for 10,000 cases of peach pulp, and it was further provided:

"In case of short pack or government commandeering, requisition or reservation, by reason of which seller is unable to make full delivery of any of the goods specified, delivery shall be prorated."

The tender made by plaintiff was of 8,727 cases, and in its complaint it justifies this delivery by the allegation:

"That by reason of the shortage of pack of the peach pulp and of the peach crop in southern California in the year 1919, plaintiff was unable to make full delivery of said 10,000 cases of said peach pulp, and that by reason thereof plaintiff was obliged to prorate its said pack of peach pulp for said season, and that under such

proration the proportion of the 10,000 cases agreed to be sold by the plaintiff to and purchased by the said copartnership * * * was 8,727 cases."

In accordance with this allegation, the trial court found that there was a short pack in the year 1919 and that plaintiff prorated its pack and offered to deliver to defendant copartnership their pro rata share of said pack, to wit, 8,727 cases of peach pulp. It was further found in agreement with the correspondence between the parties appearing in the record that the plaintiff also offered to deliver to defendant the entire amount of peach pulp provided for in the contract prior to the rejection thereof by defendant copartnership. It is further found that the only ground of rejection specified by defendant was that the product was not standard quality 1919 season's pack.

[3, 4] Appellants are contending here that the evidence is not sufficient to sustain the finding that 8,727 cases was the pro rata share of defendants of the short pack. Before considering this contention, it seems pertinent to observe that it is clear from the record and from the finding that plaintiff did offer to deliver the entire amount called for by the contract, which offer was rejected by defendant copartnership, which declined to accept delivery of any amount of the product. It would seem that this was a valid offer of performance under the contract upon the theory that the provision for prorating under certain conditions was one for the benefit of the seller and in the nature of an option to him, and, therefore, if he chose, he might supply the deficit in his own pack by purchase in the open market and comply with the terms of the contract. It was held in the case of *Douglas Fir Exploitation, etc., Co. v. Comyn* (C. C. A.) 279 F. 203, 207, that a provision inserted in a contract for the benefit of one party cannot be taken advantage of by another, and it was suggested that one of the important considerations in determining for whose benefit a provision is inserted in a contract is, for whose protection was the provision put in the contract. Appellants would have us assume that the condition was inserted in the contract for their benefit as well as for the benefit of the seller. This does not seem logical when we consider the circumstances under which the option would arise. If there was a short crop or a short pack in the state, obviously prices would rise, and it would be for the benefit of the seller to be relieved of a part of the delivery and to the detriment of the buyer.

[5] However, it is unnecessary for us to found our conclusion upon this suggested interpretation of the clause in the contract permitting prorating, for we think the findings of the trial court find some support in the evidence. The trial occurred years after 1919, and the only witness who testified

about the amount of the pack in 1919 stated that he did not know, exactly, the amount. At one place in the record he said it was around 9,000 cases, but he could not say exactly. Later he testified that it was less than 9,500. His testimony at a former trial was read into the record by defendants, from which it appeared that in answer to the question as to whether the pack was not 10,000 cases he had replied that he could not say exactly, because he had nothing to do with the office. The records of the cannery had been lost, and it is apparent from the record that the witness was testifying from a hazy, general knowledge and a cloudy recollection only. It appeared that plaintiff was also under contract with a buyer other than defendant to sell 3,000 cases of peach pulp, and plaintiff's witness Misuraca, who prepared the peach pulp, testified positively that the amount of the pack was prorated among the persons who had contracted to purchase it.

Appellants have shifted their position upon this question, which accounts, somewhat, for the unsatisfactory state of the record. In their pleadings and at the trial defendants took the position that plaintiff should have tendered 10,000 cases, and bent their efforts to proving this. Consequently plaintiff's efforts were to bring forward every item and circumstance which would tend to prove the minimum pack and sustain the tender of less than 10,000. Now, on appeal, defendants shift their position and insist the tender was too large, rather than too small. This position was not taken at the trial, and plaintiff had no opportunity to bring forth evidence which would tend to meet this position. Plaintiff alleged that its tender was the pro rata share of defendants, and its witness so testified, and we think, under all the circumstances of this case, the finding to that effect is supported by the evidence.

[6] The only other question involved upon the appeal is as to the form of the judgment. The action was brought against defendants Dant, Tyson, and Fleishacker, as surviving partners of the firm of Christenson, Hanify & Weatherwax, and against the representatives of two deceased partners, and defendants Dant, Tyson, and Fleishacker individually. As to the personal representatives, the action was dismissed because of irregularity in proving the claim against the estates. The judgment was given against Dant, Tyson, and Fleishacker as surviving partners, and against Dant, Tyson and Fleishacker individually. Appellants object to the judgment against them individually.

The Civil Code (section 2442) provides:

"Every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners."

The Code of Civil Procedure (section 388) provides:

"When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

In the case at bar the individual parties named in the judgment were served with process so as to bind their individual property, and all appeared in the action.

In *Maclay Co. v. Meads*, 14 Cal. App. 363, 112 P. 195, 113 P. 364, the plaintiff sued the individuals, describing them as partners. The partnership was not named as a defendant. The lower court rendered judgment against the partnership as well as against the individuals composing the partnership. The appellate court reversed the judgment against the partnership, but upheld the judgment as to the individuals composing the partnership. The court said:

"But where, as here, the action is against the members of the partnership in their individual character, and not against the partnership by its partnership name, the effect of service of process or summons on one member, or on all the members, is not to summon the partnership but only the member or members upon whom such service is had, and, in such case, in order to bind all the members of the firm by any judgment which may be obtained in the action, service of summons must be made on all. Of course, where the action is against the partnership, then, by the terms of section 388, supra, service of summons on one or more of the members of the partnership is sufficient, and thereby the judgment in the action is binding not only upon 'the joint property of all the associates,' but also upon 'the individual property of the party or parties served with process.'"

The appellants rely upon the case of *Redwood City Salt Co. v. Whitney*, 153 Cal. 421, 95 P. 885, in which the plaintiff sought to hold the partnership and one of the members composing the partnership as joint debtors. The evidence showed the debt was created by the partnership, and the court held that since the evidence showed the individual partner was not jointly liable with the partnership, no individual judgment could be had against him. However, the court said that he was jointly liable on the partnership debts, but was not sued with his copartners on this joint liability. The language of the court in the *Whitney* Case is not in conflict with the action of the trial court here, as will appear from the following extract from the opinion:

"But there was no liability on the part of defendant Arthur L. Whitney except such as the law imposed upon him as a member of the partnership for a partnership debt."

It appears, therefore, that under the case cited by appellant, as well as the other authorities cited herein, the rule is that if partners are joined with the partnership as defendants, a judgment against them in their individual capacities is valid, based upon their statutory joint liability.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

201 Cal. 190

DEACON v. DEACON et al. (L. A. 9561.)

Supreme Court of California. May 2, 1927.

1. Appeal and error ⇐348(1)—Notice of appeal on date proceedings for new trial were dismissed held "timely," where no notice of entry of judgment was served (Code Civ. Proc. §§ 660, 953a).

Where between dates of entry of judgment on July 9, and September 27, when notice of appeal was served and filed, motion for new trial was pending, notice of appeal was "timely," within Code Civ. Proc. § 953a, where 60-day period, under section 660, within which motion for new trial must be passed, had not expired, because notice of entry of judgment had not been given.

2. Appeal and error ⇐801(1)—Motion to dismiss appeal from alleged consent judgment is addressed to Supreme Court's discretion.

Motion to dismiss appeal, taken from alleged consent judgment because right of appeal was waived, is addressed to the discretion of the Supreme Court, which discretion may be exercised in favor of hearing appeal on merits.

In Bank.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Clara E. Deacon against Daniel A. Deacon and A. T. Roark, who filed a cross-complaint. Judgment for plaintiff, and defendant Deacon appeals. On motion to dismiss appeal. Motion denied.

Glen H. Munkelt, of San Diego, for appellant.

Sloane & Sloane, of San Diego, for respondents.

RICHARDS, J. [1] The respondents have move this court to dismiss the appeal of the defendant Deacon upon two grounds: First. That the appeal was not taken within the period prescribed by law. Second. That the judgment from which the appeal has been taken was one entered by stipulation of the parties and was a consent judgment, and that for that reason the appellant has waived his right of appeal. The facts as shown by the record upon which the respondents predicate their first ground of the motion; name-

ly, that the appeal was taken too late, are these: The action is one prosecuted by the plaintiff for an accounting as to the proceeds and revenue derived from certain real property known as the Ivy Apartments, and for the partition of said real estate and other property among the parties to this action according to their respective rights and interests therein. This action is the aftermath of a certain action for divorce between the plaintiff herein and the defendant D. A. Deacon, in the course of which a certain agreement in writing was entered into effecting a property settlement between the parties to said divorce proceeding, and which was carried into the decree therein. The complaint in the present action was filed on June 11, 1925. The answer of the defendant D. A. Deacon thereto was filed on June 22, 1925. A. T. Roark, who was sued and served with process under a fictitious name, appeared and filed an answer and cross-complaint on July 3, 1925, and to which the defendant D. A. Deacon filed his answer on July 18, 1925. The cause came on for trial upon the issues thus made up, whereupon the trial court on March 9, 1926, filed its findings of fact and conclusions of law, and also filed its interlocutory decree in conformity therewith, decreeing an accounting and partition, providing for the appointment of a referee to take such accounting and report upon the same and upon such partition to the court. Thereafter and on April 6, 1926, the defendant D. A. Deacon gave and filed his notice of intention to move for a new trial, which motion, however, was never brought on for hearing. The referee filed his report on June 21, 1926, whereupon the plaintiff and the cross-defendant Roark gave notice of a hearing thereon and of a motion for the adoption thereof and for the entry of a final judgment in accordance therewith, which motion came on for hearing before the court on June 28, 1926, whereupon the trial court made and entered its final decree of accounting and partition, wherein it was recited that the report of the referee as modified and amended by the court had been approved. Said final decree was filed on June 29, 1926. No notice of entry of such judgment was given, but on July 9, 1926, the defendant D. A. Deacon served and filed another notice of intention to move for a new trial. A hearing thereon was had on September 27, 1926, whereupon counsel for the plaintiff and intervener Roark objected to further proceedings thereon and moved for a dismissal thereof upon the ground that the notice of motion was not made or the matter brought to a hearing within the time prescribed by law. The trial court upon such hearing made and entered its order dismissing the proceedings for a new trial, said order being dated September 27, 1926. The notice of appeal herein was served and filed by the defendant D. A. Deacon on September

27, 1926. It would appear from the foregoing state of the record that the first ground upon which the respondents move to dismiss this appeal is without merit, for the reason that between the date of the entry of the judgment herein; namely, June 29, 1926, and the date of taking the appeal, there was pending a proceeding on motion for a new trial pursuant to the defendant's notice of intention to move for a new trial, which was filed on July 9, 1926, and which was apparently dismissed by the trial court on September 27, 1926. The time within which the motion for new trial must be passed upon would not have expired within the 60-day period provided by section 660 of the Code of Civil Procedure, since no notice of the entry of judgment had been given as provided in said section, and the notice of appeal herein would therefore have been in time, since the same was served and filed within the period after the determination thereof, provided in section 953a of the Code of Civil Procedure.

[2] As to the second ground upon which the respondents predicate their motion to dismiss this appeal, to wit, that the judgment was a consent judgment, from which no appeal would lie, the record discloses the following additional facts: The judgment does not upon its face purport to be a consent judgment. The respondents, in support of their motion upon that ground, present certain affidavits tending to show that the final judgment herein was agreed to in a conference between the attorneys of record of the respective parties and the judge of the trial court had at the time of the hearing upon the report of the referee, with the details of which all of the parties to the action and their counsel appeared to have been dissatisfied. Upon such a conference, the trial court undertook to amend and modify the referee's report in order to meet the objections urged thereto, and, having done so, the final judgment herein was accordingly prepared and filed. It is upon these facts that the respondents predicate their claim that the judgment is a consent judgment. On the other hand, the appellant strenuously opposes this view with his own affidavit to the effect that he had instructed his counsel not to agree to any consent or compromise judgment, and that whatever they had done in that regard had been done without his knowledge and in violation of his instructions. The record further discloses that almost immediately after the making and entry of the judgment the appellant discharged his attorneys of record and employed other counsel, through whom he is resisting this motion and is engaged in prosecuting this appeal, in the course of which his substituted counsel have prepared and served the appellant's opening brief, wherein the integrity of said judgment is assailed upon a number of grounds. The determination of the question as to whether the appellant was inju-

riously affected by the action of his former counsel, in apparently agreeing to the form of the final judgment, would require an examination of the entire record herein and would involve in a large measure a consideration of the merits of the present appeal; the motion of the respondents upon this latter ground is one which is addressed to the discretion of the court, and we have concluded to exercise this discretion in favor of hearing this appeal upon its merits.

The motion of the respondents to dismiss this appeal upon both grounds is therefore denied.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

201 Cal. 36
In re BUESON'S ESTATE. (S. F. 12201.)

Supreme Court of California. April 13, 1927.

1. Divorce ⚡243—Disposition of property by interlocutory decree does not become effective until final divorce decree.

Until entry of final decree of divorce, property rights of parties, in absence of property settlement, remain as before, and disposition of property under interlocutory decree remains ineffective.

2. Executors and administrators ⚡188—Right of separated wife to family allowance from husband's estate can be defeated only by showing she lost right to support by her conduct (Code Civ. Proc. § 1469).

Before court may deny to wife assignment of husband's estate under Code Civ. Proc. § 1469, it must appear that she has ceased to constitute member of family of husband by virtue of separation or interlocutory decree of divorce and that she had lost right to seek support and maintenance from him by reason of conduct, as by abandonment or voluntary surrender of right to support.

3. Divorce ⚡249(2)—Executors and administrators ⚡185—Husband and wife, on entry of interlocutory divorce decree, may make property settlement effective immediately (Civ. Code, § 158).

When parties to divorce proceedings execute property settlement in connection with entry of interlocutory decree, they are not required to postpone operation of settlement until final decree, but may provide settlement to take effect immediately, property settlement between husband and wife whereby wife relinquishes share in husband's estate and right to family allowance being valid under Civ. Code, § 158.

4. Divorce ⚡249(2)—On entering interlocutory decree, court had jurisdiction to determine validity of spouses' property settlement.

Court, on entry of interlocutory decree of divorce, had jurisdiction to determine validity of property settlement whereby wife surren-

dered right to property allowance from husband's estate.

5. Executors and administrators ⚡185—Having surrendered right in husband's estate by property settlement, wife could recover property allowance only by showing resumption of marital relations.

Where wife, on entry of interlocutory decree of divorce, surrendered right in husband's estate by property settlement effective on date of execution, right to family allowance could be established on husband's death only by showing reconciliation and resumption of marital relations justifying conclusion that parties agreed orally to abrogate property settlement.

6. Executors and administrators ⚡185—Court could not presume property settlement on interlocutory divorce decree was revoked unless evidence of resumption of marital relations indicated such intent.

Where wife, by property settlement on interlocutory decree of divorce, surrendered rights in husband's estate, revocation of property settlement could not be presumed on husband's death, unless evidence of resumption of marital relations was sufficient to satisfy court that parties intended revocation.

7. Domicile ⚡10—Matrimonial domicile was not established by showing husband visited at wife's residence, spent night with her, and made repairs on premises.

That husband spent night with wife at her residence and occasionally ate meals with her there and made minor repairs about premises did not establish residence as matrimonial domicile.

8. Executors and administrators ⚡185—Occasional visits by husband, without establishing matrimonial domicile or joint economic unit with wife held insufficient to show resumption of marital relations revoking spouses' property settlement (Code Civ. Proc. § 1469).

In proceedings by wife under Code Civ. Proc. § 1469, to have husband's estate transferred to her as family allowance, wife, having surrendered interest in husband's estate on property settlement made effective on interlocutory divorce decree, held not entitled to recover on showing that husband occasionally visited her thereafter, where matrimonial domicile was not established and husband and wife did not constitute joint economic unit; evidence being insufficient to show marital relations were resumed.

9. Appeal and error ⚡1036(6)—Where evidence was insufficient to support wife's claim opposed by state to family allowance from husband's estate, permitting foreign consul to intervene in behalf of unknown heirs held not prejudicial (Code Civ. Proc. § 1469).

Where proceedings by wife to have estate of husband assigned to her under Code Civ. Proc. § 1469, were contested by state on ground of property settlement, and wife's evidence was insufficient to show revocation of settlement by resumption of marital relations, permitting intervention by consul of Denmark in behalf of

unknown and unascertained heirs *held* not prejudicial.

10. Executors and administrators $\S$ 194(5)—
In proceeding by wife involving issue of revocation of property settlement, excluding undated newspaper advertisement of husband giving wife's residence as his own held not error (Code Civ. Proc. $\S$ 1469).

In proceeding by wife under Code Civ. Proc. $\S$ 1469, for family allowance from husband's estate, excluding newspaper advertisement in which decedent gave wife's place of residence as his residence, introduced to prove marital relations were resumed after interlocutory divorce decree and property settlement, *held* not error, where date of publication was uncertain and entire newspaper showing date was not offered.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding by Eleanor Boeson against the State of California, for the assignment to her of the estate of Robert Boeson, deceased, in which Fin Lund, Consul of Denmark, intervened. From an order denying the petition, petitioner appeals. Affirmed.

Byron C. Parker and Thomas Wicks, both of San Francisco (A. M. More, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Lionel Beale Browne, of San Francisco, for the State.

Eric Lyders, of San Francisco, for intervenor respondent.

SEAWELL, J. Appellant prosecutes this appeal from an order made by the court below denying her petition to have the estate of Robert Boeson, deceased, assigned to her, as his widow, under the provisions of section 1469, Code of Civil Procedure, which authorizes a transfer of estates of less than \$2,500 to the widow of a decedent upon the return of the inventory. The rights of a minor are in no wise involved in this proceeding. The court's action denying the petition was based on the proposition that appellant, although the widow of decedent, had deprived herself of the right to receive any portion of his estate by the terms of a property settlement previously entered into by them. Appellant admits the execution of said property settlement, and does not dispute the interpretation placed upon it by respondents and the court below, nor does she question its validity. She contends, however, that said settlement, which was executed by decedent and herself on the day she procured an interlocutory decree of divorce from him, was not in effect at the time of his death, but had been revoked by a subsequent reconciliation of matrimonial differences and an oral understanding that it should not longer be determinative of their property rights as

husband and wife. Respondents deny the fact of subsequent reconciliation and resumption of marital rights, duties, and obligations.

The consul of Denmark appeared at the hearing on the petition to set aside the estate to appellant, and informed the court that efforts were being made to ascertain if decedent left any heirs residing in Denmark, the supposed country of his nativity. Although he had filed no written petition or pleading in the case, and admitted that he was not representing any particular heirs of decedent, said consul was permitted, over the objections of appellant, to oppose her claim and to introduce evidence at the hearing. This action is assigned as error.

The decedent and appellant intermarried on October 30, 1920, and on May 31, 1921, appellant was granted an interlocutory decree of divorce from her husband on the ground of his extreme cruelty. The decree was not filed and recorded until August 3, 1921, almost two months after it had been granted. The property settlement was executed on the day the divorce was granted. The agreement contained certain preliminary recitals to the effect that unhappy differences had arisen between the parties and they had been living separate and apart and did not contemplate living together again, and that there was no community property save and except certain household furniture of the value of \$50. The appellant, "in consideration of the sum of \$10 in hand paid by the party of the second part [decedent]," receipt of which was acknowledged, released decedent from all obligation to support and maintain her from the date of the agreement "until the end of the world," and agreed that, in the event of filing an action for divorce, she would not seek or accept temporary or permanent alimony. The provision regarding the rights of each party to the agreement in the estate of the other is contained in the following paragraph:

"That said parties herein each hereby waive any and all right in the estate of the other and forever quitclaim any and all right to share in the same of the other by the laws of succession, and that each of said parties hereby waive any and all rights of homestead in the real property of the other, and that said parties herein waive any and all right to the estate or any interest in the estate of the other for a family allowance or by way of inheritance, and that from the date of this agreement to the end of the world said waiver of the other in the estate of said other party shall from this date be effective, and they shall have all the rights of single persons and maintain the said relationship of such toward each other."

The furniture, valued at \$50 and declared to constitute the only community property of the marriage, was assigned to appellant by said property agreement. The interlocu-

tory decree of divorce contained a provision approving and confirming said property settlement. Neither party to the divorce proceeding applied for a final decree. The husband died intestate on April 10, 1923, almost two years after the interlocutory decree had been granted. Letters of administration were thereafter issued to the public administrator. In explanation of her failure to apply for letters of administration appellant testified that she relied on her attorney to protect her in this as in all other matters.

[1-3] The obtaining and entry of an interlocutory decree of divorce does not sever the marital relation, and any disposition of property made thereby becomes effective only upon the entry of the final decree. *Estate of Dargie*, 162 Cal. 51, 121 P. 320; *Estate of Seiler*, 164 Cal. 181, 128 P. 334, Ann. Cas. 1914B, 1093. Until the entry of the final decree, the property rights of the parties, in the absence of a property settlement between them, remain as they were before the entry of the interlocutory decree, and the death of the husband does not cut off the right of the wife to succeed to the husband's estate as his heir. Nor does the interlocutory decree of itself deprive the wife of the right to require the transfer to her of an estate of less than \$2,500 under the provisions of section 1469, Code of Civil Procedure, nor limit her privilege to claim the benefit of rights conferred by other Code sections pertaining to family allowance. *Estate of Breitter*, 69 Cal. App. 424, 231 P. 351; *Estate of Gould*, 181 Cal. 11, 183 P. 146. Before a court may legally deny her an assignment by way of family allowance, it must appear that she not only has ceased to constitute a member of the family of the husband by virtue of a separation or interlocutory decree of divorce, but also that she has lost the right to seek support and maintenance from him by reason of her conduct, such, for example, as her abandonment of him, or her voluntary surrender of the right of support. *Estate of Miller*, 158 Cal. 420, 111 P. 255; *In re Noah*, 73 Cal. 583, 15 P. 287, 2 Am. St. Rep. 829; *Estate of Yoell*, 164 Cal. 540, 129 P. 999; *Estate of Bose*, 158 Cal. 428, 111 P. 258. Property settlements between husband and wife, whereby the wife parts with her right to share in the estate of the husband and relinquishes her right to a family allowance, are recognized as valid and enforceable by courts when founded upon a sufficient consideration and fairly made. Section 158, Civ. Code; *In re Davis*, 106 Cal. 453, 39 P. 756; *Estate of Edelman*, 148 Cal. 233, 82 P. 962, 113 Am. St. Rep. 231; *Estate of Brix*, 181 Cal. 667, 186 P. 135. When the parties to divorce proceedings execute such settlements in connection with the entry of the interlocutory decree, they are not required to postpone their operation until the marital tie shall have been severed by the entry of the final decree, but they may provide that they shall become effective upon exe-

cution. *Gould v. Superior Court*, 47 Cal. App. 197, 191 P. 56. In the instant case the parties to the agreement provided that the rights of each to inherit from the other or to claim the estate of the other by virtue of the sections of the Code providing for a family allowance should be terminated, and that the agreement of termination should become immediately effective, irrespective of whether or not a final decree of divorce should be entered.

[4] Appellant does not attack the validity of the property settlement. The divorce court possessed jurisdiction to determine the validity of said settlement, and in the exercise of this jurisdiction it ratified and approved the same. See *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 227 P. 715; *Loveren v. Loveren*, 106 Cal. 509, 39 P. 801; *McCahan v. McCahan*, 47 Cal. App. 176, 190 P. 460.

Although appellant in her reply brief expressly states that she does not dispute the soundness of the foregoing principles of law, all of which are well settled, she cites the court to *Estate of Breitter*, 69 Cal. App. 424, 231 P. 351, and insists that that case rules the instant case and impels a decision in her favor. Appellant has misapplied the principle announced in *Estate of Breitter* to the instant case. It was not there held that a wife who by contract has surrendered the right to receive support from her husband and to claim a family allowance from his estate may, notwithstanding her contract, claim a family allowance. No question of a separation agreement was before the court. The case is authority only for the proposition that a wife who is compelled to live apart from her husband by reason of his dereliction, or is authorized so to do by an interlocutory decree of divorce obtained against him, does not thereby lose her right to a family allowance for the benefit of the family.

[5, 6] It is apparent that the only way in which appellant may succeed, having surrendered by contract the rights she seeks by her action to rehabilitate (no interests of minor children of the marriage being involved), is by establishing a subsequent abrogation of the property settlement by showing a reconciliation and resumption of marital rights, duties, and obligations. Property settlements entered into by the spouses, it is true, should be set aside in cases where the acts, conduct and relations of the parties thereafter are of such a character as to justify the conclusion that they intended and agreed orally to abrogate the same. *Wells v. Stout*, 9 Cal. 479; *Sargent v. Sargent*, 106 Cal. 541, 39 P. 931; *Jones v. Lamont*, 118 Cal. 499, 50 P. 766, 62 Am. St. Rep. 251; *Estate of Martin*, 166 Cal. 399, 137 P. 2; *Brown v. Brown*, 170 Cal. 1, 147 P. 1168; 2 *Schouler, Marriage, Divorce, Separation, and Domestic Relations*, p. 1560. Before a court may indulge in a presumption of revocation, however, the evidence offered to establish full resumption of marital relations

must be sufficient to satisfy the mind of the court that such was the intent of the parties. Applying this rule to the facts of the instant case, it cannot be said that the court's conclusion that appellant failed to establish her case is not amply supported by the record.

Appellant testified that at the time the interlocutory decree was granted she was residing in a seven-room house which she owned as her separate property; that she continued to reside in said house after the granting of the decree, renting all rooms in the house, except the dining room and kitchen, to tenants; that she and decedent became reconciled about September, 1921; that decedent did not make his home with her because of the crowded conditions of her living quarters, but that he visited her, sometimes as frequently as two or three times a week, upon occasions took her to theaters, ate meals with her at her residence, and occasionally spent the night with her there; that it was the mutual desire of decedent and herself that she should sell her house and that they should then build a cottage at Palo Alto, where she believed her health, which was poor, would improve; that she did not wish to reserve a larger number of the rooms in her house for her own use, so that her husband might live with her, because she believed that the house would sell more readily if most of the rooms were rented; and that decedent offered to contribute to her support, but she refused his offers because she wished him to save as much as possible to be used later in building the house at Palo Alto. It appears that appellant derived an income from giving music lessons and from rentals of her house which was sufficient to meet her needs.

Four witnesses, on behalf of appellant, testified that they had seen decedent about appellant's house, had occasionally observed him eating with appellant, and had seen him hanging pictures and otherwise conducting himself in a manner which would indicate they had resolved their matrimonial differences. Two of these witnesses were friends of appellant, the third was a friend and a music pupil, and the fourth was a niece. One of the friends saw decedent at the house only three times, although she testified that she visited there frequently. The other friend had not seen decedent since October, 1921. The music pupil had ceased to take lessons from appellant in January, 1922, and had not seen decedent since that time. The niece testified that decedent was "peculiar," and that he visited appellant on friendly terms even while the divorce proceedings were pending.

The consul in Denmark, who opposed appellant's application on behalf of unknown heirs in Denmark, introduced two witnesses. George Hildenbrand, from whom decedent rented the housekeeping apartment which he occupied and in which he was found dead, testified that decedent kept his trunk, clothing,

and working tools in said apartment and sometimes cooked his meals there. Decedent first went to live at this apartment on May 31, 1921. On November 2, 1921, he left the apartment and went to live at the residence of Peter Miller, who had been his friend for 25 years. Boeson stayed at the Miller home until May 27, 1922, when he returned to Hildenbrand's, where he remained until his dead body was discovered by Hildenbrand, lying upon his bed. Hildenbrand, who was accustomed to see Boeson every day or two, noting his absence, made the investigation which resulted in the discovery above recited. He had probably been dead two days. Hildenbrand testified that decedent had made casual reference to his married life in his conversations with him, and had stated that it had proved unsuccessful. The witness testified that Boeson said to him at the time he first came to his apartment that in a money transaction with his wife she had wrongfully obtained \$800 of his money, and that he was afraid to live with her; that he "was tired of that kind of business"; that he would never again marry; and that he was "through" with appellant. This witness further testified that appellant said to him after Boeson's death that she could not live with Boeson because of his habitual failure to observe certain essential rules with respect to his person. The witness did not know appellant's place of residence and had never seen her until after Boeson's burial. Appellant had no knowledge of his death until several days after he was buried. Witness Miller testified that he had known Boeson, the decedent, for more than 25 years, and that decedent resided with him from November, 1921, to May, 1922, and during that time he did not speak to the witness concerning his wife. The latter did not call to see Boeson at any time within the knowledge of the witness.

[7, 8] Giving the fullest effect possible to the facts testified to by appellant, it appears from her testimony that she and decedent had not established a matrimonial domicile at the residence owned by her or at any other place. The fact that decedent on occasions spent the night with appellant at said residence and upon occasions ate meals with her there and assisted her in making minor repairs about the premises does not establish said residence as the matrimonial domicile of the parties. In the course of her testimony, appellant stated that decedent went to "his house" and to "his place," thus showing that she did not regard her residence as a matrimonial domicile. While the lack of a fixed joint domicile will not under all circumstances prevent the existence of a state of marital cohabitation, it is a factor to be considered. Appellant also stated that she refused decedent's offer to contribute to her support. She gave as a reason for the refusal a desire that his earnings be saved to be used in building a home at Palo Alto.

The fact remains, however, that they did not constitute a joint economic unit, such as is usual where two persons are living together as husband and wife. The court below, in denying appellant's application, may well have considered the circumstance that, although the intention to resume marital relations, according to appellant's testimony, was formed in September, 1921, a joint matrimonial domicile had not been established in April, 1923, more than a year and a half later, when Boeson died. Appellant also stated that decedent visited her on the Saturday night before his death, and that she was not informed of his death until the following Wednesday. By the testimony of another witness, the day of decedent's demise was fixed as Sunday, April 10, 1923. Although appellant testified that she had decedent's telephone number and that they had planned a trip to Palo Alto for the Sunday on which he died, it does not appear that she had made any effort to locate him up to the following Wednesday, when she was informed of his death. Such seeming indifference on her part does not add strength to her case. A wife's interest in a husband would at least prompt some inquiry as to the reason for his failure to meet an important appointment. Unquestionably her marital interest should become aroused before the expiration of three days with no word of explanation as to the cause of her husband's absence.

Appellant also testified that decedent asked her whether it was necessary for them to be remarried, and she replied, "No; that was not necessary," because "I thought this way, if he didn't do what he said he was, all I would have to do was to go back and get the final." Such a statement evidences an unstable mental attitude which is wholly inconsistent with the legal requirement that matrimonial relations must actually in good faith have been resumed.

[9] A determination of the merits of appellant's contention that the consul of Denmark did not have a sufficient interest in the matter to introduce witnesses in opposition to appellant's claim is not necessary to the decision of this case. Said consul filed no written petition or pleading in the case. At the hearing he stated that he did not represent any known heirs of decedent residing in Denmark, the supposed country of his nativity, but efforts were being made to ascertain the location of heirs of decedent residing in said country, and that he asserted the right to appear on behalf of such unknown and undiscovered heirs. The court thereupon permitted said consul to offer witnesses Hildenbrand and Miller. The question whether appellant was entitled to have decedent's estate set aside to her as his surviving widow was put in issue by appropriate allegations in her petition,

which were controverted by averments in the answer of respondent state of California denying that decedent left surviving him a wife entitled to his estate under the provisions of section 1469, Code of Civil Procedure. If all evidence offered by the consul of Denmark had been excluded, and only evidence introduced by appellant to substantiate her claim remained to be considered, it would be insufficient to sustain a judgment in her favor. Since the evidence offered by the consul cannot affect the decision, any error in its admission was without prejudice to appellant. We are inclined to the view, however, that it was not error to permit said consul to oppose appellant. By virtue of his office he is charged with the duty of protecting in this country the rights of subjects of Denmark, and he is acting within the scope of his duties when he endeavors to locate in Denmark persons who are heirs of decedents dying in this country. If, before said heirs have been located and before such a period of time has elapsed as to render it highly improbable that heirs will ever be found, proceedings are initiated which may jeopardize their rights, we believe that it is sound practice to afford the consul an opportunity to fully protect them. Our treaty with the Kingdom of Denmark, to say nothing of the comity that exists between nations, would justify such a course.

[10] Appellant offered an undated advertisement taken from a San Francisco newspaper, wherein, it is claimed, decedent gave his wife's place of residence as his place of residence. It was contended that the advertisement was caused to be published by decedent at a time subsequent to the granting and entry of the interlocutory decree of divorce and after the execution of the property settlement, and was material as a fact showing resumption of marital relations. The witnesses who were called to fix the date of publication as being after rather than prior to the signing of the property settlement were rather uncertain as to the time of publication. Besides, the best and most satisfactory evidence as to the actual date of the publication of the advertisement was obtainable, and no effort was made to furnish it. The entire newspaper containing the advertisement was not offered, but merely an undated, detached clipping. We think the ruling was correct, and at any rate its evidentiary value, even though appellant's contention be correct, was not sufficient to change the court's conclusion on the merits of the case.

The order appealed from is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

200 Cal. 609

HAINES et al. v. COMMERCIAL MORTGAGE CO. et al. (L. A. 9134.)

Supreme Court of California. April 26, 1927.

1. Usury ⚡142(3)—Plaintiff would not be awarded judgment declaring forfeiture of principal of usurious contract without averment thereof, even if entitled thereto.

On complaint praying that sale under a usurious trust deed be enjoined until maturity of the loan, and not averring forfeiture of the principal, the plaintiff would not be awarded judgment declaring forfeiture, even if entitled thereto.

2. Usury ⚡76—Usurious contract is void only as to interest and not as to principal debt (Usury Law, § 2).

Usurious contract is not altogether void, but only the portion relating to interest is void under the Usury Law (St. 1919, p. lxxxiii, § 2), providing that debt cannot be declared due until the full contract period elapses.

3. Usury ⚡76—Usurious broker's fee was severable from principal loaned, though both were contained in same note (Usury Law).

On note in principal amount representing the sum of usurious broker's fee and the amount actually loaned, the interest was clearly severable from the principal, notwithstanding they were contained in the same instrument, under Usury Law (St. 1919, p. lxxxiii), declaring void only obligation to pay interest.

4. Usury ⚡149(1)—Provisions declaring usury misdemeanor relate only to interest, not principal (Usury Law).

Provisions of Usury Law (St. 1919, p. lxxxiii), declaring the taking of usury a misdemeanor, relate only to interest, and bear no relation to the loan or repayment of the principal sum.

5. Usury ⚡49—Interest cannot be compounded, in absence of express stipulation, though rate within legal limit (Usury Law).

Compounding of interest, if not paid at time provided for, cannot be allowed, although the limit of the rate of interest is maintained at 12 per cent. per annum, under Usury Law (St. 1919, p. lxxxiii), providing that interest shall not be compounded, in absence of express written agreement therefor.

6. Usury ⚡42—Maximum lawful rate under Usury Law is 12 per cent. per annum for full period of loan (Usury Law).

Maximum rate allowed for loans coming under the Usury Law (St. 1919, p. lxxxiii), is at rate of 12 per cent. per annum for the full period of the loan.

7. Usury ⚡49—Interest may be compounded without violating usury law only when maximum rate is not thereby exceeded (Usury Law).

Interest on loans coming under Usury Law (St. 1919, p. lxxxiii) may be compounded without violating the law only when maximum rate of 12 per cent. per annum for full period of the loan is not thereby exceeded.

8. Usury ⚡55—Commissions and bonuses charged by lender when spread over loan period, together with interest, must not exceed 12 per cent. per annum (Usury Law).

Commissions and bonuses charged by lender on loans coming under the Usury Law (St. 1919, p. lxxxiii) must, when added to the interest specified and spread over the whole period of forbearance, be kept within legal limit of rate of 12 per cent. per annum.

9. Usury ⚡42—Loan bearing maximum rate may not provide for interest on delinquent installments (Usury Law).

A loan coming within the Usury Law (St. 1919, p. lxxxiii), and bearing maximum rate of interest, may not lawfully provide for interest on any unpaid installment when due.

10. Usury ⚡42—Agreement to pay interest on unpaid installment of loan bearing maximum rate may be made after maturity for new consideration.

Agreement to pay interest on an unpaid installment of loan providing for interest at maximum lawful rate may lawfully be made after the maturity of the installment, and on a new consideration.

11. Usury ⚡45—At maximum rate, no interest may be collected in advance (Usury Law).

At the maximum rate of interest under the Usury Law (St. 1919, p. lxxxiii), no interest may be lawfully collected in advance.

12. Usury ⚡45—In testing for usury, "principal" is amount of loan, less interest or commission deducted in advance.

In testing a transaction for usury, the principal sum loaned will be held to be the amount of the loan, less interest or commission deducted in advance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

13. Usury ⚡42—Loan contract providing for maximum rate, payable periodically with acceleration clause, is valid within Usury Law, if installments do not bear interest (Usury Law).

A loan contract, providing for the maximum rate of interest payable at end of any particular period such as monthly, during the full period of forbearance, and containing an acceleration clause for default of installment payment, is valid, within the Usury Law (St. 1919, p. lxxxiii), provided installments falling due be without accruing interest thereon, except upon a new contract and a new consideration.

14. Usury ⚡142(1)—Debtor need not make tender in suit for forfeiture of interest and of right to declare usurious loan due before maturity.

In debtor's suit, praying for forfeiture of interest and of the right to declare usurious loan due until lapse of the full period of time contracted for, the debtor need not make any tender whatever.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

On petition for rehearing. Petition denied. For former opinion, see 254 P. 956.

Schweitzer & Hutton, of Los Angeles, for appellants.

Woodruff & Shoemaker, and Laurence W. Beilenson, all of Los Angeles, amici curiæ.

George L. Sanders and B. R. Ware, both of Los Angeles, for respondents.

PER CURIAM. Petition for rehearing herein is denied.

The subject of usury presents countless legal questions, a great many of which could not possibly be considered germane to the questions involved in this appeal. Some five sets of amici curiæ, however, have filed briefs and have suggested many questions which the profession desires answered. In so far as those questions are deemed pertinent to the issues of the case before us, we have yielded to their importunities, and will undertake to discuss them.

Respondents, and also one set of amici curiæ, assert that in this case respondents should have had a sweeping provision in the judgment declaring not only forfeiture of the right to interest with penalties thereto, but also declaring forfeited and uncollectible the entire principal debt. There is not a semblance of merit in this contention.

[1] In the first place, the amended complaint does not aver such a forfeiture, and in the second place the prayer is only to the effect that said sale under said trust deed be enjoined until the "full maturity of said loan," and "that each defendant be enjoined at all times, until the full period of time said loan was contracted for has elapsed, from selling, or offering for sale, or exposing for sale, or taking any steps whatsoever to sell, or to offer for sale, the said premises or any part or portion thereof, or interest therein."

[2] Moreover, even a casual reading of the statute itself shows that the legislative intent was not to declare the whole contract void, but only the portion thereof relating to interest. The language in this connection is as follows:

"Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed." St. 1919, p. lxxxiii.

The contention that the principal debt is forfeited is wholly inconsistent with merely deferring the collection of the debt until the full period of time it was contracted for has elapsed. No authority has been cited, and none can be found, holding the principal debt forfeited under such provision of a statute. The authorities cited by counsel, in so far as applicable at all, are in direct opposition to this contention, for in *Jackson v. Shawl*, 29 Cal. 267, 272, the court said:

"The plaintiff's promise was to repay to the defendant the sum borrowed in one month, and also to pay him seven per cent. per month on the principal sum for its use. Here the contract between the parties was legal as to the principal sum, but illegal as to the interest. The two things were not inseparable. 'When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the courts will make the distinction, for the common law doth divide according to common reason; and having made that void that is against law, lets the rest stand. The general and more liberal principle now is, that when any matter, void even by statute, be mixed up with good matter, which is entirely independent of it, the good part shall stand and the rest be held void.' 2 Kent's Com. 467, and cases cited; *De Groot v. Van Duzer*, 20 Wend. 412; *Leavitt v. Palmer*, 3 N. Y. 37 [51 Am. Dec. 333] 1 Parson's Cont. 380."

In *Innes v. Goldwater*, 30 Cal. App. 101, 105, 157 P. 18, 19, the court again said:

"In the light of this express approval of the principle declared in the case of *Jackson v. Shawl*, we are constrained to give application to that principle in the case at bar to the extent of holding that the agreements of the plaintiff with the defendant for these several loans and pledges were legal in so far as the principal sum of such loans and the security therefor were concerned, and only illegal as to the interest to be charged, and hence that the plaintiff was not entitled to recover the personal property so pledged and made the subject of this action without first tendering and offering to repay to the defendant the amount of his original loans."

[3] Of course, if it were impossible to ascertain how much of the sum contained in the note of \$34,000 was principal, and how much thereof was imputable to interest, there might well be made the contention that, inasmuch as some of the transaction was void because prohibited by the statute, all should be so declared, but such is not the fact. The evidence shows without conflict that the item of \$1,020 was a 3 per cent. commission, and that the remainder of the sum, to wit, \$32,980, was actually delivered to, and received by, the respondents as principal. The interest is therefore clearly severable from the principal. The fact that they are contained in the same instrument is no argument against such a construction, and, as above noted, the statute declares only the obligation to pay interest void, but nowhere assails the integrity of the obligation to repay the principal.

[4, 5] It may also be said in passing that the provisions of the act declaring the taking of usury a misdemeanor relate only to the question of interest, and bear no relation whatever to the loan or repayment of the principal sum. The fact that the commission of 3 per cent. was construed to be interest made it incumbent upon the court to declare the contract usurious and to carry with it the penalties provided in the statute. Re-

spondents' desires have been whetted, and they now want, not only what the complaint did not ask, but what the statute does not allow. They desire not only the amount denominated a commission construed as carrying with it the death penalty to the covenant to pay interest, but also the same penalty for the entire principal debt. Indeed, respondents in one stroke desire to receive \$32,980 for which they gave nothing in return, and, in addition, to make a clear profit of twice the amount of interest paid on account of the transaction. The legislative power has not declared such a result, and we must decline to write such a meaning into the statute.

A second set of amici curiæ contend that, as long as the limit of the rate of interest is maintained at 12 per cent. per annum, the compounding of the interest, if not paid at the time provided for, should be allowed. This contention is in the teeth of the statute itself, and cannot be maintained.

[6] A third set of amici curiæ contend that the holding of the court is ambiguous as to the meaning of the maximum rate of interest allowable under the statute. We intended to hold that the maximum rate allowed for loans coming under the act is at the rate of 12 per cent. per annum for the full period of the loan, and that within such limit the parties may freely contract in respect thereto, if done in writing.

[7] This means that interest may be compounded, if the maximum rate is not exceeded.

[8] This means, also, that commissions and bonuses may be charged by the lender, but all such charges must, when added to the interest specified and spread over the whole period of forbearance, be kept within the limit set by the law.

[9, 10] This means, also, as pointed out above, that at the maximum rate compounding of the interest is illegal. It also means that at the maximum rate of interest the contract may not provide for interest upon any unpaid installment when due. Such an agreement may be made, but only after the date of maturity of such installment, and upon a new consideration.

[11, 12] This means, also, that at the maximum rate no interest may be lawfully collected in advance. It means, also, that if, in other cases, interest is deducted in advance from the amount of the loan, in testing the transaction for usury the principal sum loaned will be held to be the amount of the loan, less the interest or commission deducted in advance.

[13] But, notwithstanding all the above, we hold that no legal objection exists to providing in a loan contract that it shall bear the maximum rate of interest, payable at the end of any particular period, such as monthly, quarterly, semiannually, or annually, during the full period of forbearance, pro-

vided, of course, as noted above, that such installments as fall due will be without accruing interest thereon, except upon a new contract and new consideration, but the right to declare the whole obligation due for the nonpayment of such installment or installments of interest when due must be held to exist.

It should be stated here that on the conclusions above announced the authorities of the various states are in conflict. No state has a statute identical with our own; hence we have had to rely upon practically an independent construction of the provisions of our statute itself.

[14] Complaint is made, also, of our holding that in the instant case respondents were not required to do equity by tendering the principal sum and such other items, excluding interest, as might be due under the obligation before suit could be maintained in this case. Counsel have overlooked the fact that here the extent of the prayer was to cover two subjects only, to wit, forfeiture of interest and forfeiture of the right to declare the debt due until the full period of time contracted for had elapsed. As to relief on these grounds, it is not necessary to make any tender whatsoever. The law gives a prayer for such relief a special standing, which is not affected by the rule of equity urged upon us. What may or may not be required in that connection in a suit of a different type need not here be discussed.

Complaint is also made of our language as follows:

" * * * That inasmuch as the claim for interest is void, all payments will be referred to the principal and the obligation thus finally extinguished."

The contention is that, when taken in connection with other parts of the opinion, this provides for quadruple interest. There is no merit in the claim. The meaning of the phrase is as though the word "future" or "subsequent" were inserted between the words "all" and "payments." This clearly appears from the context from which the quotation is taken.

Complaint is also made of the failure of the court to declare whether or not lawful interest might be collected upon the advances made by appellants to discharge prior liens on the mortgaged property. No reason exists for especially passing upon this proposition, as the court in stating the account will undoubtedly allow interest, unless there are some special circumstances making such relief inappropriate. The same may be said of the contention that the court should declare whether the deed of trust should be foreclosed by the court or should be foreclosed under the procedure provided for in the deed itself. There appears to be no reason why we should anticipate a situation calling for a decision of this question.

Lastly, it is asserted that in holding the paragraph in section 3 of the act, respecting the exception of loans on corporate, municipal, and other public bonds, unconstitutional, and yet sustaining the other provisions of the act, we are doing violence to the previous holdings of the court, of which *Mordecai v. Board of Supervisors*, 183 Cal. 434, 192 P. 40, is a conspicuous example. Exactly the opposite is true. We are indorsing the doctrine thereof expressed in the words " * * * and if those provisions are reasonably separable from the balance of the act, and the purpose of the act and the intention of the Legislature will be subserved even with those provisions gone, the balance of the act will stand." We held that section 1 covered all loans, secured and unsecured, and the paragraph declared invalid would, but for the illegal exception thereto, have been merely a repetition of the meaning of or provision already contained in said section 1. This clause was declared invalid by reason of the exception.

If this whole clause passes from the statute as surplusage or extraneous matter, or as void because of an illegal exception, how can it be said that the meaning of section 1 is in anywise affected? By such action we have but clarified the situation and declared the legislative intent without in the slightest degree thwarting it. See in this connection, *Ex parte Schmolke* (Cal. Sup.) 248 P. 244. *Bacon Service Corporation v. Huss* (Cal. Sup.) 248 P. 235, is not authority for the contention of counsel, but distinctly supports the view here announced.

Each particular statute under interpretation must furnish its own basis for decision upon a question of this character.

201 Cal. 134

BRAUN, BRYANT & AUSTIN v. McGUIRE et al. (L. A. 9457.)

Supreme Court of California. April 26, 1927.

1. Patents ☞185—Patent grants to patentee exclusive rights to make, use, and vend patented article (Const. U. S. art. 1, § 8, cl. 8; U. S. Comp. St. § 9428).

Patent, under Const. U. S. art. 1, § 8, cl. 8, and Rev. St. § 4884 (U. S. Comp. St. § 9428), grants to patentee three exclusive rights, first, to make, second, to use, and third, to vend, patented article.

2. Patents ☞226—"Infringement" of patent right may consist in either making, using, or selling patented article without authority.

An infringement of patent right consists in either making, using, or selling patented article, or in all three thereof, without authority.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Infringement.]

3. Patents ☞212(1)—Right to make patented article does not pass by assignment of right to use unless license to use would otherwise not benefit licensee.

Right to make a patented article, being a separate and distinct right in hands of patentee and severable from right to use, does not pass by assignment of right to use unless license to use would not otherwise benefit licensee.

4. Municipal corporations ☞330(4)—Patented articles may be used in street and other improvement proceedings authorized by statute.

Patented articles may be used in street and other improvement proceedings which may be authorized by statute.

5. Municipal corporations ☞330(4)—Use of patented paving materials does not affect competition, where owner of patent stipulates to furnish to successful bidder at fixed price (Improvement Act 1911, § 79, subd. 6).

Specified use of patented paving materials in proceedings taken under Improvement Act (St. 1911, p. 767), § 79, subd. 6, does not prevent competition, where owner of patent rights stipulates with city that patented article will be furnished to successful bidder without reservation at fixed price.

6. Municipal corporations ☞58—If charter provision is free from ambiguity, no construction is permissible (Code Civ. Proc. § 1858).

City charter provision is subject to same rules of interpretation as statutes, and, if it be free from ambiguity, no construction or interpretation is required or permissible, and it must be given no other meaning than its words import, under Code Civ. Proc. § 1858.

7. Municipal corporations ☞330(4)—Charter provision for transfer of right "to use" patented pavement held not to contemplate city shall have right to manufacture (Los Angeles Charter, art. 1, § 3, subd. 10).

Los Angeles Charter (St. 1925, p. 1037), art. 1, § 3, subd. 10, providing that no pavement protected by patent shall be ordered by city until owner of patent has entered into written agreement with city transferring to city all right "to use" same within city, held not to contemplate that city shall also have right to manufacture same.

8. Patents ☞216—Owner of patented article electing to place it on market has right to fix price.

When owner of patented article elects to place article on market, it is his right to fix price to be paid for it.

9. Municipal corporations ☞330(4)—Charter provision relating to patented pavement contemplates agreement to fix price of material or fix royalty to be paid by city (Los Angeles Charter, art. 1, § 3, subd. 10).

Los Angeles Charter (St. 1925, p. 1037) art. 1, § 3, subd. 10, relating to use of patented pavement by city, contemplates that agreement between owner of patented pavement and city transferring right to use patent, fix price at which material will be furnished, or fix royalty to be paid by city for use of same.

10. Municipal corporations $\Rightarrow$ 330(4)—License agreement with owner of patented pavement transferring to city right to use patent held to comply with charter (Los Angeles Charter, art. 1, § 3, subd. 10).

License agreement, whereby owner of patented pavement transferred to city of Los Angeles all right to use of patented pavement and agreed to furnish to city or to any contractor awarded contract or to owners performing work as contracting owners at specified prices, held to be in accordance with charter provision, Los Angeles charter (St. 1925, p. 1037), art. 1, § 3, subd. 10, providing that no patented pavement should be ordered by city until owner has transferred to city right to use same.

In Bank.

Application by Braun, Bryant & Austin for a writ of mandate to compel Hugh J. McGuire and others, as members of the Board of Public Works of the City of Los Angeles, to execute a contract for the installation of certain patent street paving. Writ granted.

Roscoe W. Griffin, Arthur M. Ellis, E. R. Young and Paul S. Honberger, all of Los Angeles, for petitioner.

Jess E. Stephens, City Atty., Lucius P. Green, Asst. City Atty., J. Harold Cragin and Herman Mohr, Dep. City Attys., all of Los Angeles, for respondents.

Wm. J. Locke, of San Francisco, Charles N. Kirkbride, of San Mateo, H. C. Symonds, of San Francisco, and Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. County Counsel, both of Los Angeles, amici curiæ.

SHENK, J. This is an application for a writ of mandate to compel the respondents as members of and constituting the board of public works of the city of Los Angeles to execute a contract for the improvement of certain streets and to pass upon the form and sufficiency of the bonds required in connection with said contract.

On the 4th day of September, 1925, the city council commenced proceedings to improve Orlando and other streets, electing to proceed under the provisions of the Improvement Act of 1911 (Stats. 1911, p. 730). The requirements of the statute were complied with, and the petitioner was awarded the contract for the improvement of said streets, which was the paving thereof. Thereafter, on December 14, 1925, the petitioner presented a contract in due form, together with the necessary bonds, to the respondents for execution and approval. The respondents refused to execute and approve the same on the ground that they entertained doubt as to whether the requirements of subdivision 10 of section 3 of the city charter with reference to the use of patented paving material had been fully complied with. Hence this proceeding.

The street improvements in question contemplate the use of a patented paving material known as the "National Pavement

Wearing Surface," the letters patent of which are owned by the National Pavements Corporation of California, a corporation. The city charter, in section 386 thereof, contains a general authorization to the city to enter into contracts for the purchase of articles covered by letters patent granted by the United States without competitive bidding, but with reference to the use of patented paving material the charter contains the following special provision:

"No pavement protected by any patent, trademark, trade-name, copyrighted name, or any device which tends to prevent competitive bidding, shall be ordered by the city, until the owner thereof has entered into a written agreement with the city transferring to the city all right to the use of the same within the city upon the terms and conditions set forth therein. The city shall not be bound by any such agreement unless the same shall have been approved by the board of public works, two-thirds vote of the council, and the mayor, and executed by the mayor on behalf of the city. No such agreement shall be for a longer period than five years.

"Whenever the city shall let a contract for the construction of any such pavement the contractor therefor shall pay to the city the exact sum or royalty which the city is required to pay under its said agreement.

"Whenever the city shall construct any such pavement by the direct employment of labor and purchase of materials, the costs of which are chargeable upon the property in a special assessment district, the exact sum or royalty which the city is required to pay under said agreement shall be added to and included in the costs chargeable to the property in said special assessment district." Charter, art. 1, § 3, subd. 10 (Stats. 1925, p. 1037).

With the requirements of the foregoing charter provision in view, the National Pavements Corporation of California, on July 21, 1925, executed what is called a "National Pavements License Mixture Agreement." This agreement, so far as material here, provides that whereas it is deemed advisable by the proper authorities of the city of Los Angeles that certain streets in the city be paved with National pavements in accordance with specifications numbered 129, new series (wherein this and other patented paving materials are specified for street paving), and that competitive bidding is deemed advisable, and that whereas said corporation is the owner of all the patents and processes covering such National pavements wearing surface in the state of California:

"Now, therefore, National Pavements Corporation of California hereby agrees to transfer, and does transfer to the city of Los Angeles, all right to the use of said patented pavement and all of the patents, trade-marks, trade-names and copyrighted names now owned, or which may be hereafter owned by said National Pavements Corporation of California, necessary to the use of the said National Pavements pave-

ment constructed in accordance with said specifications, and pursuant to this agreement. And for the consideration hereinafter named, and in and for the consideration of the adoption by the city council of the city of Los Angeles of resolution or ordinance of intention, and such other proceedings as may be necessary to provide for the improvement of any one or more of the said streets, avenues, boulevards, places, courts, public ways, rights of way, lanes, alleys, and properties, in said city, or forming a part of the boundaries thereof, whether lying within or without said city, in accordance with the above named specifications, National Pavements Corporation of California hereby proposes and agrees to furnish to the city of Los Angeles for all work or improvement of paving any one or more of the said streets, avenues, boulevards, places, courts, public ways, rights of way, lanes, alleys, and properties, in said city, or forming a part of the boundaries thereof, whether lying within or without said city, with said National Pavements pavement, and to any contractor to whom may be awarded the contract for such work or improvement and to the owners of lots and lands proposed to be assessed for said work or improvement who may elect to take the work and enter into a contract to perform the same as 'contracting owners,' and for which an ordinance or resolution of intention has been regularly adopted by the city council of said city of Los Angeles at any time within four (4) months from date hereof, or at any time thereafter until this offer is withdrawn by the undersigned by a thirty (30) day written notice filed with the city council of the city of Los Angeles, the following material manufactured and mixed ready for laying as specified and required under and by said specifications, and services, with the right to use any or all of the patents, trademarks, or trade-names now owned or which may be hereafter owned by said National Pavements Corporation of California, necessary to lay said pavements."

The material specified in the agreement is described as "the necessary paving mixture for the wearing surface prepared under the patents and processes of National Pavements Corporation of California and in accordance with the said specifications of the city of Los Angeles above referred to, delivered at the temperature specified in said specifications in wagons or trucks of the contractor or purchasers of said mixture at National Pavements mixing plant in the city of Los Angeles." It is also provided that an expert whose time and expenses will be paid for by National Pavements Corporation will be furnished to the purchaser of said mixture at the expense of the corporation, and frequent tests of the mixture will be made by said expert so as to insure uniformity and best results. The prices at which the material may be obtained by any successful bidder are fixed at from 9 cents to 11½ cents per square foot of wearing surface, according to thickness. The term of the agreement is fixed at five years from its date. The agreement then provides:

"The execution of any work or improvement by the successful bidder or 'contracting owners'

and the city of Los Angeles, or department thereof, shall be deemed by the said National Pavements Corporation of California to be an acceptance of this proposal by the city of Los Angeles and shall bind the undersigned National Pavements Corporation of California to furnish said rights, materials and services to whom the contract to perform the work or improvement contemplated in the said ordinance or resolution of intention is let."

The agreement was duly executed by the National Pavements Corporation of California, was approved by a majority vote of the board of public works, by a two-thirds vote of the city council, and was executed on behalf of the city by its mayor as required by the foregoing charter provision.

As disclosed by their verified answer, the respondents contend that said charter provision requires the license agreement to transfer not only the right to "use" the patented material, but also "to make available to all contractors engaged in public improvement work and who desire to bid and enter into contracts for such work, a similar right to manufacture, sell and lay such patented pavement." The transfer of the right to sell is not now pressed, but it is particularly urged that the right to "use" as that word is employed in the charter provision includes the right to "manufacture."

[1-3] Clause 8, section 8, of article 1 of the Constitution of the United States, provides that the Congress shall have power to promote the progress of science by securing for limited times to inventors the exclusive right to their inventions. In pursuance of this constitutional provision Congress has provided, among other things, that there shall be granted to the patentee, his heirs or assigns, for the term of 17 years, the exclusive right to make, use and vend the patented article throughout the United States. U. S. Comp. Stats. 1916, § 9428; R. S. § 4884). The patent, therefore, grants to the patentee three exclusive rights, first, "to make," second, "to use," and, third, "to vend," the patented article. That the holder of a patent has these three separate and distinct rights was declared by the Supreme Court of the United States in *Adams v. Burke*, 17 Wall. 456, 21 L. Ed. 700. It was there said:

"The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee."

The rule is stated with a citation of numerous later authorities in 20 R. O. L. at page 1187, as follows:

"The patentee is secured in the right of making, the right of using, and the right of selling, the patented article; and any one of these privileges may be the subject of license."

An infringement may consist in either making, using or selling the patented article, or in all three thereof, without authority. 30

Cyc. 972. Cases are cited by the respondents to the effect that the license to "use" includes the right to "make." Generally, it may be said of these cases that they involve the construction of license agreements between private parties where the intention is the important element, or have arisen under laws the construction of which prompted the holding that the right to "make" was necessarily or reasonably implied from a grant of the right to "use." The rule in such cases is subject to the very important limitation included in the statement of Mr. Hopkins in his work on Patents as follows:

"A license to 'use' implies the right to make for use, where otherwise the license would not benefit the licensee." Hopkins on Patents, vol. 1, § 234.

See Walker on Patents, § 296. As illustrative of the cases in which the particular facts or circumstances evidence an intention that the right to make is included in the right to use in order that the licensee may have the benefit of the license is the case of Dunkley Co. v. California Packing Co. (C. C. A.) 277 F. 996, where it was held, quoting from Edison, etc., Co. v. Peninsula L. P. & H. Co. (C. C.) 95 F. 669: "If the circumstances indicate such an intention, a license to use implies a license to make the thing to be used." That case involved the right to make and use patented fruit peeling machines. The grant to the licensee was the "free right for the use of any machine or machines or inventions owned or controlled by" the grantor. After stating the facts, the court concluded that "every circumstance points to the conclusion that his [the grantor's] licensee was expected to make or have made whatever machines it desired to use." It appeared in that case that the grantor of the licensee had suspended business and that unless the licensee possessed the right to make the machines the license would be of no use to it. The control of the right to manufacture the patented article would seem in many cases to be of the very essence of the patentee's beneficial interest. The value of the article on the market and its continuing marketability may depend on whether it is manufactured according to the plan or formula specified in the patent. If the purchaser of the right to use the article also as matter of law thereby acquires the right to make the same, any deviation from the specified plan or formula, at the option of the licensee and for reasons of economy or otherwise, might result in the fabrication of an inferior article or product and completely destroy its standing in the avenues of trade. An examination of the authorities on the subject satisfies us that the correct rule is that the right to make a patented article, being a separate and distinct right in the hands of the patentee and severable from the right to the use, does not pass by assignment of the right to the use unless the license

to use would otherwise not benefit the licensee.

[4, 5] The subject of the purchase of patented articles by municipalities in this state has received consideration in several cases. Nicholson Pavement Co. v. Painter, 35 Cal. 699; Dunne v. Altschul, 57 Cal. 474; Perine v. Quackenbush, 104 Cal. 684, 38 P. 533; Sarver v. Los Angeles, 156 Cal. 187, 103 P. 917; Vale v. Boyle, 179 Cal. 180, 175 P. 787; Warren Bros. v. Boyle, 42 Cal. App. 246, 183 P. 706; Woodworth v. Sebastopol, 72 Cal. App. 187, 236 P. 981. The right in this state to use patented articles in street and other improvement proceedings which may be authorized by statute cannot be questioned. With reference to the use of patented paving material it is specifically provided in the Improvement Act of 1911 (St. 1911, p. 730), that the pavement of streets as therein contemplated may be accomplished by the use of paving material "whether patented or not" (section 79, subd. 6), and it is well settled that the specified use of patented paving materials in proceedings taken under said act does not affect competition where the owner of the patent rights stipulates with the city that the patented article will be furnished to the successful bidder without reservation at a fixed price. Woodworth v. Sebastopol, supra; Miller v. Sebastopol (Cal. App.) 241 P. 593. It is obvious therefore that the special Los Angeles charter provision has provoked the present controversy, and the proper interpretation thereof is the only matter involved in this proceeding.

[6, 7] When we approach the Los Angeles provision in the light of the foregoing considerations, we find that it is therein required that before any pavement protected by letters patent, etc., shall be ordered by the city, the owner of the patent rights shall enter "into an agreement with the city" transferring to the city "all right to the use" of the patented paving material within the city "upon the terms and conditions" set forth in the agreement. The terms and conditions to be specified in the agreement are safeguarded by the requirements that the agreement "be approved by a majority vote of the board of public works, two-thirds vote of the council and the mayor," which requirements were complied with in this case. No reference is made in the charter to the transfer of the right to manufacture. A determination that the owner of the patent must in said agreement specifically transfer to the city the right to manufacture the patented article would be justified only on the theory that the charter provision so requires. It does not do so in express language, and we find no expression therein which would support the conclusion that it does so by necessary or reasonable implication. The charter provision is, of course, subject to the same rules of interpretation as a statute. If it be free from ambiguity no construction or interpre-

tation is required or permissible, and it must be given no meaning other than its words import. "It is a cardinal rule applicable to the interpretation of statutes that in order to ascertain the intent of the Legislature in enacting the same, recourse must first be had to the language of the statute itself, and that if the words of enactment given their ordinary and proper signification are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning." *People v. Stanley*, 193 Cal. 428, 431, 225 P. 1, 2. In the construction of the instrument the office of the court "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." Section 1858, Code Civ. Proc.; 23 Cal. Jur. 729. What the respondents are urging the court to do is to declare that when the charter says "to use" it means "to use and manufacture." It is insisted that we ought so to do on the ground that the language of the charter evidences that intention. We fail to find in the language employed any evidence of such intention. To interpolate the words "to manufacture" would do violence to universally recognized rules of statutory construction. As above stated, it could only be justified on the theory that the words "to use" as employed mean "to use and manufacture" as a matter of law. In view of the separate and severable assignable interests of the patentee in the invention, it cannot be so held under the circumstances here presented.

For the purpose of indicating circumstances which might justify the court in so holding, the respondents in their answer allege that if the city or any successful bidder or the property owners in the assessment district are to receive any substantial benefits from the requirements of the charter provision it must be held that the right "to use" includes the right "to manufacture." It is alleged that the petitioner and many other contractors engaged in the paving contracting business "own, possess or control various paving mixtures patented or otherwise protected under the laws of the United States, or possess an exclusive right and license for the use of such patents and such patented paving mixtures"; that the petitioner and such other contractors possessing such rights are enabled to charge and exact from property owners and others required to pay assessments for street paving excessive and exorbitant amounts for the use of such patented paving material; and that the specification of such materials in assessment work without a license agreement to make and use the patented materials results in the creation of a monopoly and of the opportunity to charge unfair, unreasonable, and exorbitant prices for such pavements, and further results in favoritism in the securing of contracts and

prevents competition at the expense of property owners who are assessed and required to pay for such patented paving. It may be that the framers of the charter provision had in mind the prevention or correction of some or all of the alleged abuses. If so the question arises, Was the result fully accomplished by the particular charter provision adopted? For aught that appears in the record herein it would seem that in so far as the charter provision and the license agreement executed pursuant thereto make available to the city and all bidders on such public work the use of such patented material at a fixed and uniform price the purpose has been accomplished. If the full purpose suggested by respondents has not been accomplished it may be noted that there appears to be no obligation on the part of the city to specify such patented material to be used in work to be done either by the city itself or under the assessment district plan. There is likewise no compulsion on the part of property owners to petition for any particular kind of patented pavement as was done in this case, and if the board of public works should conclude upon the consideration of the bids that the prices specified by the bidder are unfair or exorbitant or the proceeding is tainted with favoritism, it has the power under the statute to reject any and all bids should it deem this for the public good. Section 10, Stats. 1911, p. 735.

The respondents state that in framing the said charter provision the board of freeholders had before it the provisions of the charter of the city and county of San Francisco and the case of *Warren Bros. Co. v. Boyle*, 42 Cal. App. 246, 183 P. 706, wherein it was held that a license agreement transferring to said city and county the right to "use" a patented paving material, and which the owner agreed to furnish the city and county at a cost to the city of \$7 per ton for the patented wearing surface, was a sufficient compliance with the following charter provision:

"No patented pavement shall be ordered during the existence of the patent therefor, until the owner of such patent shall have transferred to the city and county all right to the use of the same therein, with the privilege to any person to manufacture and lay the same upon the streets under any contract that may be awarded to him with the city and county."

It is earnestly insisted by the respondents that under that case it must now be held that the transfer of the right to use includes the transfer of the right to manufacture. We cannot accede to this contention. It will be noted that the San Francisco charter specifically requires that the license agreement transfer "the privilege to any person to manufacture" the patented pavement "under any contract that may be awarded to him by the city and county." The said charter provision

does not seem to require the transfer to the city and county of the right to manufacture the patented article when the city is doing the work through its own instrumentalities and not through the medium of a contractor. In the case relied upon the city and county was proceeding to repave an accepted street, the cost thereof to be paid from a fund in the city treasury and not from an assessment under the district plan. It was properly held that the transfer of the right to use the material delivered to the city at a specified price per ton for said improvement was sufficient compliance with the charter provision. The license agreement involved in that case was in its recitals made particularly applicable to the improvement of the accepted street in question. The language of the San Francisco charter, when considered in the light of the limitations incident to the proceeding in that case, that is to say, the absence of any charter requirement of the transfer to the city of the right to manufacture when the city itself was performing and paying for the work, serves to accentuate the observation that if the framers of the Los Angeles charter provision had intended to include therein the requirements of a transfer either to the city or to a successful bidder of the right to manufacture, they could and should have done so in no uncertain terms or in terms that would admit of no other reasonable construction. The fact that they did not do so is persuasive that it was not intended that the additional right was required to be transferred.

It is further stated by the respondents that the framers of the Los Angeles charter provision had in mind the ruling of the Supreme Court of Wisconsin in the case of *Allen v. Milwaukee*, 128 Wis. 678, 106 N. W. 1099, 5 L. R. A. (N. S.) 680, 116 Am. St. Rep. 54, 8 Ann. Cas. 392. In that case the city of Milwaukee was proceeding to pave a city street through the medium of a contractor after advertisement for bids. The specifications called minutely for the use of specially named patented paving material. A taxpayer succeeded in enjoining the city and the contractor from carrying out the contract on the ground that such a proceeding was unauthorized under the laws of that state. The proceedings were taken, and the controversy arose after the adoption of a statute in 1903 imposing a prohibition on any city to the effect that no special brand of asphalt should be required by name to be furnished in any specifications for street paving. Waiving this statutory prohibition, and notwithstanding the same, the court declared that nearly 40 years theretofore said court in *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, had decided that when charters gave power to cities to impose by special assessment the cost of street improvements only by competitive bids, such cities had no power to specify a patented pavement so controlled by a monopoly that there could be no competition

in the fair and reasonable meaning of the word, and that during all of those years the Legislature had approved the construction of such grants by re-enacting them in substantially the same form. The case of *Dean v. Charlton* was decided in 1869. It was therein directly decided that where a city was empowered by its charter to improve streets at the expense of the adjoining property owners and was required to let such work to the lowest bidder, it could not contract for the laying of a pavement the right to which was patented and owned by one firm. The dissenting opinion of Chief Justice Dixon in that case points out that pending a motion for a rehearing the Supreme Court of Michigan, in an opinion by Chief Justice Cooley (*Hobart v. City of Detroit*, 17 Mich. 246, 97 Am. Dec. 185), had reached an opposite conclusion in the construction of identical statutory language. It is obvious that the holding in *Allen v. Milwaukee*, supra, in 1906, affirming the conclusion of the same court in *Dean v. Charlton*, was based upon an early statute of Wisconsin which prohibited the specification of patented pavement in assessment proceedings for street improvements, and when there had been no substantial change in the statutory law of the state in the intervening years. The case of *Allen v. Milwaukee*, supra, may therefore be considered only in its relation to the particular laws of Wisconsin, which had been in effect for nearly 40 years, and cannot be deemed of any controlling importance in the construction of laws of this state, where, under the Improvement Act of 1911, the use of patented pavement in such proceedings is specifically authorized. The use of such material as so authorized by our statute has been held not to prevent competitive bidding in the presence of a license agreement such as the one here involved. *Woodward v. Sebastopol*, supra; *Miller v. Sebastopol*, supra. It is pointed out by petitioner that similar license agreements have been attacked and sustained by numerous state courts as not preventing competitive bidding. *Farmer v. Dahl*, 19 Ariz. 395, 171 P. 130; *Sanborn v. City of Boulder*, 74 Colo. 358, 221 P. 1077; *McEwen v. City of Cœur d'Alene*, 23 Idaho, 746, 132 P. 308; *Tousey v. Indianapolis*, 175 Ind. 295, 94 N. E. 225; *Saunders v. Iowa City*, 132 Iowa, 132, 111 N. W. 529, 9 L. R. A. (N. S.) 392; *Pollock v. Kansas City*, 87 Kan. 205, 123 P. 985, 42 L. R. A. (N. S.) 465; *La Coste v. New Orleans*, 119 La. 470, 44 So. 267; *Baltimore v. Flack*, 104 Md. 107, 64 A. 702; *Ford v. Great Falls*, 46 Mont. 292, 127 P. 1004; *Wurdeman v. City of Columbus*, 100 Neb. 134, 158 N. W. 924; *Hastings v. Columbus*, 42 Ohio St. 585; *Reed v. Rockliff Gibson*, etc., 25 Okl. 633, 107 P. 168, 138 Am. St. Rep. 937; *Johns v. City of Pendleton*, 66 Or. 182, 134 P. 312, 46 L. R. A. (N. S.) 990, Ann. Cas. 1915B, 454; *Sherrett v. Portland*, 75 Or. 449, 147 P. 382; *Wagoner v. City of La Grand*, 89 Or. 192, 173 P. 305; *Great Northern*, etc., v.

Leavenworth, 81 Wash. 511, 142 P. 1155, Ann. Cas. 1916D, 239. Conceding some contrariety of authority on the effect of such an agreement, it is clear that the better reasoned cases recognize the distinction between contracts where the owner of the patented article stipulates to furnish the same to any bidder and cases where the contract is sought to be let without any stipulation on the part of the owner of the patent to supply it to all bidders at a fixed price.

[8, 9] In further support of their contention that it was intended by the said charter provision that the municipal authorities should be limited in the specification of patented pavement to the acquisition of "an unlimited license," which in the language of the answer would include the right on the part of the contractor "to manufacture, sell and lay such patented pavement," it is urged by respondents that unless the successful bidder has the right to make the paving material no benefit would accrue from the right to use the same, as any one could purchase the material and with the purchase the right to use it would necessarily follow. It may be assumed that the self-interest of the owner of a patented article would prompt him to market his product notwithstanding his legal right to withhold it from the market or to refuse to sell it to any one. *Heaton-Peninsula, etc., Co. v. Eureka Utility Co.* (C. C. A.) 77 F. 288, 294, 35 L. R. A. 728. When he elects to place the article on the market it is his right to fix the price to be paid for it. When he seeks to sell it to the city and the city desires to purchase it the transaction may take place, as above noted, without publication of notice inviting proposals and the letting of the contract to the lowest bidder (Charter, § 386, unless the article be patented paving material as provided in said subdivision 10. Finally, just what, then, does that subdivision require the owner of the patent to do in order that he may sell his product to the city? The first paragraph imposes upon him the obligation to transfer to the city all right to the use of the patented material ordered. The second paragraph, in terms, imposes no duty on the owner of the patent, but relates to the duties of the contractor in his relation as such with the city. The third paragraph does not relate to any obligation imposed on the owner of the patent nor to any duty imposed on the contractor, but provides that the cost of the material to the city under the license agreement "shall be added to and included in the costs chargeable to the property" in the assessment district, with the specification that such costs shall be so added and included "whenever the city shall construct any such pavement by the direct employment of labor and purchase of material, the costs of which are chargeable upon the property in the special assessment district." Taken as a whole the subdivision

would seem to contemplate that the license agreement fix the price at which the material would be furnished or to fix the royalty to be paid by the city for the use of the same. In the second paragraph it is provided that the contractor pay to the city "the exact sum or royalty" which the city is required to pay under the agreement, and in the third paragraph it is provided that the said "exact sum or royalty" be included in the costs chargeable to the property in said special assessment district when the pavement is laid by the city "by the direct employment of labor and purchase of material." The words "sum" and "royalty" obviously do not refer to the same exact item of expense. The "sum" to be paid to the owner of the patent in one case might readily be in excess of any "royalty" to be paid in another case, and vice versa. Just how this charter provision taken as a whole or as to its separate paragraphs was intended to dovetail into and supplement the requirements of the several statutes authorizing paving improvements by special assessment, and particularly, as in the present case, the Improvement Act of 1911, presents a difficult problem. The 1911 act contemplates an improvement through the medium of a contractor after advertisement for bids or by the property owners themselves as "contracting owners," and where the cost thereof may be assessed against the property in the district. We find in the provisions of the act no authority for a special assessment when the improvement has been constructed by the city by "direct employment of labor and purchase of material." Yet it seems that it is only when the city is so proceeding that "the exact sum or royalty" to be paid by the city to the owner of the patent may be included in the special assessment. If, when the city is proceeding as the agent of the property owners through the medium of a contractor, as in this case, and not by the direct employment of labor and purchase of material, the amount representing the exact sum or royalty cannot be included in the special assessment, but must be paid by the city as a contribution towards the cost of the improvement, then it appears that no such contribution was provided for in the ordinance of intention, and we would not be justified in assuming that the cost of such patented material could be included in the assessment as an incidental expense. These are some of the considerations which move us to conclude that if the charter provision was intended to apply to a street proceeding such as the one now in question and to the extent contended for by respondents, the said provision was inexpertly framed and does not fully accomplish the purpose intended. As the result of any liberal construction that may be placed on the charter provision the utmost that can be said of it is that it was designed to make the said patented paving material

available to all bidders for the contract at a fixed and uniform price. Said purpose would seem to be accomplished when by the written stipulation of the patentee or his licensee the patented material is made available to all bidders at such price. When the price is so fixed and is available to every bidder the bids may then be submitted on the basis of the same price to all.

[10] The respondents urge that in other respects the said license agreement is not in accordance with the charter requirements. We are of the opinion, however, that in so far as the charter provision may be said to apply to the special proceeding in question, the license agreement is in compliance therewith.

It is alleged in the petition that numerous paving materials protected by patents, trademarks, trade-names, and copyrighted names have been used by the city of Los Angeles; that numerous materials and articles protected by patents, etc., other than paving materials so protected, are now being specified and used by said city in the construction and improvement of streets, such as ornamental lighting systems, patented interlocking brick, patented cement sewer pipe, vitrified pipe, sewer flushing devices, and many other materials and devices; that no license agreement relative to the use of any such articles or materials so protected by letters patent, etc., has been or is required by the city; that during the year 1925 patented lighting posts and equipment were installed by the city of Los Angeles at a cost aggregating more than \$2,500,000, and that the owners of the patents on such lighting posts and equipment are not required by the charter of the city to execute a license agreement such as is imposed on the owners of patented paving material. These allegations are not denied by the respondents, and the petitioner predicates thereon an argument that said subdivision 10 of section 3 of the charter is unconstitutional for the reason that the same constitutes an unjust and unreasonable and unlawful discrimination against the owners of patented paving materials, entitled under the law to sell their goods, and in favor of owners of patents on other articles and materials purchased by the city. We deem it unnecessary to pass upon the points thus urged for the reason that we have concluded that the license agreement in question is in compliance with the charter provision as above indicated. Other points made by the respective parties have been considered. In view of what has been decided, we also deem it unnecessary to mention or to pass upon them specifically.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

FRANCE et al. v. SUPERIOR COURT OF STATE OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (L. A. 9213).

Supreme Court of California. April 26, 1927.

1. Criminal law $\S$ 1083—Generally, duly perfected appeal divests trial court of jurisdiction.

As general rule, duly perfected appeal divests trial court of further jurisdiction of cause.

2. Habeas corpus $\S$ 1—"Habeas corpus" is not proceeding in prosecution of one on whose behalf it is sought, but is independent action to secure his discharge.

"Habeas corpus," although granted to inquire into imprisonment in criminal prosecution, is not proceeding in such prosecution, but is independent action to secure discharge from imprisonment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Habeas Corpus.]

3. Habeas corpus $\S$ 44—In issuing habeas corpus, generally speaking, superior courts, District Courts of Appeal, and Supreme Court are on same plane.

Under Constitution, power to issue habeas corpus is conferred on Supreme Court and each of Justices thereof, District Courts of Appeal and each of Justices thereof, and superior court, and, generally speaking, in issuing writ such courts are on same plane.

4. Habeas corpus $\S$ 113(2)—Decision of court in habeas corpus proceeding, if it has jurisdiction, cannot be reviewed by any other court.

Decision of any court in habeas corpus proceeding, if it has jurisdiction, cannot be reviewed by any other court in any way.

5. Habeas corpus $\S$ 4—After appeal from conviction, trial court may not discharge appellant on habeas corpus for error, defect, or other infirmity in proceedings, which was or might have been legally presented to appellate court.

After appeal from conviction, trial court may not discharge appellant on habeas corpus proceedings for any error, defect, or other infirmity in proceedings appearing on face of record on appeal, which was or might have been legally presented to appellate court, regardless of constitutional provision that superior courts may issue writs of habeas corpus on petition by or on behalf of any person in actual custody in respective counties and conferring on Supreme Court and District Courts of Appeal power to issue like writs.

6. Habeas corpus $\S$ 117(2)—Superior court's order on habeas corpus, pending appeal from conviction, releasing for lack of jurisdiction defendants convicted for burglary with explosives, was void and did not prevent later enforcing penitentiary sentence (Pen. Code, $\S$ 464).

Where record on appeal from conviction in superior court showed conviction for burglary

with explosives, under Pen. Code, § 464, question whether such offense constituted misdemeanor or felony could have been presented to appellate court, and superior court's order on habeas corpus, in view of prior decision in another case that such offense constituted misdemeanor only authorizing jail sentence, releasing defendants because conviction was for felony, was void and did not prevent it from later enforcing its judgment of conviction by ordering defendants imprisoned in penitentiary after overruling of such prior case.

In Bank.

Original application by Homer France and Jack Black for a writ of prohibition to be directed to the Superior Court of Los Angeles County, Victor R. McLucas, Judge, to prevent enforcement of a judgment and commitment to the state prison. Writ denied.

Harold Ide Cruzan, of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondents.

CURTIS, J. The petitioners, Homer France and Jack Black, were convicted in the superior court of the county of Los Angeles upon two counts, each charging them with the crime of burglary with explosives, as defined by section 464 of the Penal Code, and upon a third count charging burglary. An appeal from the judgment of conviction was taken to the District Court of Appeal, and by said last-named court the judgment as to one count of said information charging burglary with explosives was affirmed. As to the two other counts thereof, the judgment was reversed. The decision of the District Court of Appeal was rendered on the 29th day of May, 1925. (73 Cal. App. 13, 238 P. 374). On the 30th day of July, 1925, the time within which an order for rehearing might be made having expired, the remittitur was filed in said superior court, and on the following day a certified copy of the judgment of conviction of the crime of burglary with explosives, as alleged in one count of said information, was delivered to the sheriff. However, after the rendition of said decision by the District Court of Appeal and before the going down of said remittitur, the petitioners had filed in said superior court their application for a writ of habeas corpus. In support of their application they relied upon the case of *In re Schiaffino*, decided December 2, 1924, and reported in 70 Cal. App. page 65, 232 P. 719. The appellate court in that case held that in a prosecution for the crime of burglary with explosives, as defined by section 464 of the Penal Code, the offense was a misdemeanor and punishable by imprisonment in the county jail only. The superior court in the habeas corpus proceedings in-

stituted therein by petitioners followed the *Schiaffino* Case, and held that, as the offense was a misdemeanor only and had been committed within the city of Los Angeles, the superior court was without jurisdiction of the action. Accordingly, said court on July 21, 1925, granted the writ of habeas corpus and ordered the petitioners to be discharged from custody. In the meantime, the district attorney had filed in the justice's court of the township of Los Angeles a new complaint against petitioners charging them with the same offenses with which they had been charged in the original information, and at the time the order discharging petitioners from custody was made the sheriff of said county had in his possession a warrant of arrest issued by the said justice's court, and under said warrant of arrest he continued to hold petitioners in custody, and upon receiving said commitment as mentioned above, the sheriff, in compliance with its terms and on August 1, 1925, delivered petitioners to the warden of the state prison at San Quentin. Thereafter and on the 25th day of August, 1925, on motion of petitioners' attorneys, said superior court made an order vacating said commitment and ordering that the petitioners be returned to the custody of said sheriff and be held by him in the county jail of said county "pending the further order of this court, and until the disposal of the subsequent cause now pending in the above-entitled honorable Superior Court, entitled the People of the State of California, Plaintiff, v. Jack Black and Homer France, Defendants, which said cause is numbered differentially from the one on which this order is given." Pursuant to said order, petitioners were returned to the custody of said sheriff. A preliminary examination was held under the new complaint filed against them, and, after due proceedings had thereunder, an information was filed against petitioners in said superior court charging them with the offenses set forth in said new complaint, which offenses were the same as those charged against petitioners in the original information filed against them.

Subsequent to the 21st day of July, 1925, the date of the order granting said writ of habeas corpus, and on the 29th day of said month, the case of *In re Wilson*, 196 Cal. 515, 238 P. 359, was decided by this court. In that decision the case of *In re Schiaffino*, supra, was overruled and the offense of burglary with explosives was held to be a felony punishable by imprisonment in the state penitentiary. While the petitioners were being held pending their trial under the second information, the district attorney on December 3, 1925, and undoubtedly relying upon the decision of this court in *In re Wilson*, supra, moved for an order of court remanding petitioners to the custody of the sheriff, to be by him delivered to the warden of the state pris-

on at San Quentin in accordance with the judgment rendered against them in the former or first action, which had been affirmed by the District Court of Appeal. This motion was opposed by petitioners. It was argued and submitted to the said court for decision, and thereupon petitioners instituted this proceeding against said court and the judge thereof to prohibit said court from considering said last-mentioned motion and from taking any further proceedings against petitioners in said former action. An alternative writ of prohibition was issued as prayed for by petitioners. The respondents have filed a return and answer to said writ setting forth the proceedings taken against the petitioners in the superior and in the District Court of Appeal in the actions pending there-in against them. There is no dispute as to any of the facts involved herein.

It is the contention of petitioners that the order of court made in the habeas corpus proceeding on July 21, 1925, discharging said petitioners from custody, had the effect of a final judgment releasing them from imprisonment under the judgment in the first or former action against them, and accordingly said superior court is without any authority or jurisdiction to remand petitioners to the custody of the sheriff of said county for the purpose of delivering them to the warden of the state prison, or to make any order or to take any action whatever in the first or former action against petitioners. In support of this contention the petitioners rely upon sections 362 and 1496 of the Penal Code and upon expressions of this court found in the cases of *Grady v. Superior Court*, 64 Cal. 155, 30 P. 613, *Ex parte Robinson*, 71 Cal. 608, 12 P. 794, *Matter of Zany*, 164 Cal. 724, 130 P. 710, and *In re Begerow*, 136 Cal. 293, 68 P. 773, 56 L. R. A. 528, as well as language to be found in *In re Crandall*, 59 Kan. 671, 54 P. 686, quoted with approval by this court in *In re Begerow*, supra.

Respondents disagree with this contention of petitioners. They further contend that the order of court discharging the petitioners in the habeas corpus proceeding was void for the reason that the superior court had no jurisdiction, to entertain the application for said writ, and therefore no power to grant the same, for the reason that the action then pending against petitioners was on appeal to the District Court of Appeal, and that while said appeal was pending the said superior court had no jurisdiction over petitioners or in the action pending against them. This question, so far as our knowledge goes, has never been directly before the appellate courts of this state.

[1-4] The general rule, of course, is familiar and universally recognized that a duly perfected appeal divests the trial court of further jurisdiction of the cause in which the appeal has been taken. The writ of habeas

corpus, however, although granted to inquire into the legality of one imprisoned in a criminal prosecution, is not a proceeding in that prosecution, but, on the contrary, is an independent action instituted by the applicant therein to secure his discharge from such imprisonment (*State v. Shrader*, 73 Neb. 618, 103 N. W. 276, 119 Am. St. Rep. 913). In this state the power to issue the writ of habeas corpus is conferred by the Constitution upon the Supreme Court and each of the Justices thereof, the District Courts of Appeal and each of the Justices thereof, and the superior court and "generally speaking as far as the power to issue the writ is concerned the Supreme Court, the District Courts of Appeal, and the superior courts are upon the same plane." 13 Cal. Jur. 257; *Matter of Zany*, 164 Cal. 724, 130 P. 710; *Matter of Hughes*, 159 Cal. 360, 113 P. 684. By this is meant, however, as we understand these decisions, "that the decision of any court in a habeas corpus proceeding, provided the court has jurisdiction, cannot be reviewed by any other court in any way." *Matter of Zany*, supra, page 726, 130 P. 710. The same principle is enunciated in the *Hughes Case*, supra, although stated in slightly different language.

The precise point involved herein does not appear to have received an extensive consideration by the courts of other states. However, a case involving a question somewhat similar to the one now before us was before the Supreme Court in the state of Colorado. In that proceeding it appeared that James Doyle was adjudged guilty of contempt of court and committed to the county jail by the district court. From this judgment of conviction he appealed to the Court of Appeals and applied for a supersedeas, which was denied. He then presented to the Supreme Court his petition for a writ of habeas corpus. The latter court refused to consider such petition, holding that, as the case was then on appeal to the District Court of Appeals the Supreme Court had no jurisdiction to entertain such a petition during the pendency of said appeal. In so holding the court said:

"With the case pending and undetermined in the Court of Appeals, can this court assume jurisdiction of this proceeding? That tribunal has obtained jurisdiction of the cause instituted there at the instance of the petitioner. The questions which he seeks to have determined in that action are identical with those which he asks this court to pass upon by the proceedings instituted here; and, if this court can entertain jurisdiction of petitioner's application, it must be upon the theory that, by so doing, that of the Court of Appeals would be ousted, for, unless such would be the result, serious and embarrassing complications might arise. It is to prevent such difficulties and contests between courts over jurisdiction that the rule of law obtains that, where a court has obtained jurisdiction of an action, it cannot be interfered with

by any other, but has the exclusive right to entertain and exercise such jurisdiction to the final determination of the cause. Works, Jur. 68; Merrill v. Lake, 16 Ohio [St.] 373 [47 Am. Dec. 377]; Taylor v. City of Ft. Wayne, 47 Ind. 274; Clepper v. State, 4 Tex. 242; Ex parte Booth, 3 Wis. 145. Under this rule, the Court of Appeals having first acquired jurisdiction of the cause, this court, pending final judgment in that, cannot invade it by reviewing the judgment of the trial court in another proceeding. In re Farrell, 22 Colo. 461, 45 P. 428. This rule is not only right in principle, but prevents unpleasant collision between different tribunals, and contests between them over the jurisdiction of causes, and has been universally recognized from the date when parties indicted in the federal courts for violation of the Fugitive Slave Law sought to be released by habeas corpus through the medium of the state courts; for it would be a subversion of judicial power for one court to take a case from another having jurisdiction, or exercise supervision before its final decision was given. Ex parte Robinson, 6 McLean, 355, Fed. Cas. No. 11,935; Church, Hab. Corp. § 265; Ex parte Bushnell, 8 Ohio St. 599." In re Doyle, 26 Colo. 52, 55 P. 1080.

Upon the authority of the case just referred to, and others of like character, the author of 29 Corpus Juris, page 116, lays down the following rule:

"Pursuant to a general rule of wide application, and upon which there is no conflict of authorities, it has been held that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated."

In 12 Ruling Case Law, page 1218, we find the following statement of the law:

"The fact that the judges of the inferior court have concurrent jurisdiction with the highest appellate court in habeas corpus proceedings does not authorize a judge of an inferior court to entertain habeas corpus proceedings for the release of a prisoner whose conviction had been affirmed by the appellate court."

Among the authorities relied upon for the above statement is the case of People v. Superior Court, 234 Ill. 186, 84 N. E. 875, 14 Ann. Cas. 753. In that case a defendant by the name of Ralph Lipsey had been convicted of receiving stolen property in the superior court of Cook county. He was sentenced to the penitentiary. Thereafter he sued out a writ of error to the Supreme Court to review the record of his conviction. Upon the hearing of said writ the judgment of conviction was affirmed, and Lipsey was taken to the penitentiary to serve his sentence. Thereafter and while so confined a petition was filed in his behalf in the superior court of Cook county for a writ of habeas corpus, and said superior court was proceeding to

hear said petition when the Attorney General obtained leave to file in the Supreme Court a writ of certiorari directed to the said superior court and the judge thereof, before whom said habeas corpus proceedings were pending, to send up the record of said proceedings. Upon the hearing of said petition for a writ of certiorari the Supreme Court of Illinois quashed the habeas corpus proceeding and held that the superior court of Cook county was without jurisdiction to issue said writ of habeas corpus. The following language from this decision indicates the position taken by that court in said proceeding:

"The first question for determination is whether or not the Superior Court, or any judge thereof, had jurisdiction to order the issuance of this particular writ of habeas corpus. It appears from the petition for that writ that Lipsey had sued out of this court a writ of error to review the proceedings of the criminal court, and that the judgment of that court had been by this court affirmed. It also appears that the question of the sufficiency of the verdict returned by the jury in the case in the criminal court was not raised by assignment of error in this court when the case was brought here, and it is stated by that petition that neither Lipsey nor his attorney discovered the alleged insufficiency of the verdict until after the petition for rehearing which was filed in this court had been denied. It is urged in the brief filed in the present proceeding on behalf of Lipsey that, 'If the judgment of the criminal court is void, and the Supreme Court of Illinois did not decide that such judgment was valid, habeas corpus lies.' It is true that the question as to the sufficiency of the verdict, and the validity of the judgment based thereon, was not specifically presented when the case was brought here by writ of error. It is also true that this question might then have been presented to and passed upon by this court had Lipsey seen fit to invoke the judgment of the court in reference thereto. The general rule is, when a judgment is affirmed by this court, all questions raised by the assignments of error, and all questions that might have been so raised, are to be regarded as finally adjudicated against the appellant or plaintiff in error. A judgment or decree having been affirmed by this court must be regarded as free from all error. Gould v. Sternberg, 128 Ill. 510, 21 N. E. 628, 15 Am. St. Rep. 138. * * *

"It is true, as contended by counsel both for respondent and for Lipsey, that circuit and superior courts, and the judges of those courts, have concurrent jurisdiction with this court in habeas corpus proceedings. That fact, however, does not authorize either of those courts, or either of such judges, to decide a question contrary to the way it has been decided by this court. When this court, in the exercise of its appellate jurisdiction, has determined a question, either of law or of fact, the matter is ended so far as the circuit and superior courts, and the judges thereof, are concerned, and they may not, by reason of the fact that their jurisdiction in habeas corpus is concurrent with that of this court, overrule or review such decision of this court dealing with questions ei-

ther of law or of fact. When the petition for the writ of habeas corpus was presented to Judge McEwen, it appeared therefrom that the judgment in the criminal case had been affirmed by this court, which, as we have seen, was an adjudication that the judgment of conviction was a valid one, and while he had all the power and authority in a habeas corpus proceeding that is vested in any other court or judge in the state he was without power or authority to determine that the judgment in question was void, when, as a matter of law, this court had determined that it was valid."

In *Ex parte Barfield* (Tex. Cr. App.) 44 S. W. 1095, the defendant, the petitioner therein, was convicted of a felony and sentenced to imprisonment in the penitentiary. He appealed from the judgment to the Court of Criminal Appeals of the state of Texas. Thereafter he applied to the district court where he had been tried for a writ of habeas corpus, which was granted, but upon the final hearing thereon he was remanded to the custody of the officer having him in charge. From this order remanding him he appealed to the said Court of Criminal Appeals, a practice undoubtedly permitted under the practice of that state. The Court of Criminal Appeals held that:

"Relator has no right to the writ of habeas corpus under such a state of facts. Everything complained of by him in his application for the writ can be urged on his appeal."

[5] It may not be necessary for us to go to the extent to which the courts in some of these cases have gone, and especially the Supreme Court of the state of Colorado in *Re Doyle*, supra. But we think there is sufficient to be found in the foregoing authorities to support this court in holding that a trial court, after an appeal from a judgment of conviction rendered by it in a criminal action has been perfected, is without authority to discharge through habeas corpus proceedings the appellant during the pendency of said appeal, for any error, defect, or other infirmity appearing or existing in the proceedings taken in said action, which was or might have been legally presented to said appellate court on said appeal. There is nothing to be found in this state, nor for that matter in the courts of any other state to which our attention has been called or of which we have any knowledge, contrary to such a rule of procedure. We have not overlooked the provision of the Constitution of the state (art. 6, § 5), investing the superior courts with power to issue writs of "habeas corpus on petition by or on behalf of any person in actual custody in the respective counties," nor the provisions of the Constitution, conferring upon the Supreme Court and the District Court of Appeal power to issue like writs. It may be conceded that the superior courts of the state have concurrent jurisdiction with the appellate courts in ha-

beas corpus proceedings, but this does not mean that they have the power to interfere with the appellate jurisdiction of either of said last-named courts in matters pending before said appellate courts or to overrule or set aside a judgment rendered therein. It is not claimed that this could be done directly by any proceeding instituted for that purpose in the superior court, but if the last-named court has power under the Constitution to discharge from custody by a writ of habeas corpus a defendant whose appeal is at the time pending before either of the appellate courts of the state, then the superior court may do indirectly that which it must be admitted it has no power to do directly. This question was considered by the Supreme Court of the state of Illinois in the case of *People v. Superior Court*, supra. The respective courts of that state are vested with jurisdiction in habeas corpus proceedings to the same extent and in like manner practically as are the courts of our state, and in determining the extent of these powers the Supreme Court of Illinois held that the superior courts of that state "may not, by reason of the fact that their jurisdiction in habeas corpus is concurrent with that of this court, overrule or review" a decision of the Supreme Court. In that case the Supreme Court set aside as void a judgment of the superior court of Cook county discharging on habeas corpus a prisoner whose conviction had been previously affirmed by said Supreme Court.

The court in that opinion went farther than it is necessary for us to go in the determination of any question before us in the present proceeding. That court held that an inferior court under its power to issue writs of habeas corpus was without jurisdiction to release from custody one imprisoned under a judgment which the Supreme Court of that state had determined to be valid. We are holding simply that, under the power invested in the superior courts of this state to issue writs of habeas corpus, they are not given the authority to invade the jurisdiction of an appellate court, and to oust said appellate court of its jurisdiction in a criminal action pending before it on appeal by discharging on habeas corpus the appellant in said action on any ground appearing upon the face of the record on appeal, and which is raised or could be raised on said appeal.

The failure of the courts to recognize such a rule of procedure or one similar thereto would lead to the greatest of confusion, resulting often in the failure of the courts to efficiently administer the law. In passing, we might call attention to the unusual condition shown by the record in the present proceeding, which might have been avoided if the above-mentioned rule had been observed.

[6] Upon the appeal taken by the petitioners herein to the District Court of Appeal the

very question raised in the habeas corpus proceedings before the superior court, resulting in the order releasing petitioners, could have been presented to, and for aught that appears in the record was considered by, the District Court of Appeal, although no mention of it was made in the decision. There surely was no reason why it could not have been so presented. The record on appeal showed that the petitioners had been tried and convicted of the offense of burglary with explosives in the superior court of the county of Los Angeles. Therefore the question of the jurisdiction of said court over said action and over said petitioners was plainly apparent upon the face of said record, and there was no reason why it could not have been presented and decided on said appeal. Moreover, the Schiaffino Case, on the authority of which the superior court discharged petitioners in the habeas corpus proceedings, had been decided by the District Court of Appeal of the First appellate district almost six months prior to the rendition of the decision of the District Court of Appeal of the Second appellate district affirming the judgment of conviction against petitioners. It may be that the decision in that case was not called to the attention of the latter court or that said court did not consider the question decided therein in determining petitioners' appeal, but there was nothing to have prevented petitioners from directing the court's attention to it, nor was there anything which precluded said court from considering said decision and the questions decided therein. Therefore petitioners have no ground to complain that they had no opportunity of presenting to the District Court of Appeal having jurisdiction of their appeal the very question raised by them later in their habeas corpus proceedings before the superior court.

As the question was one which either was raised or might have been raised before the appellate court, it could not, during the pendency of said appeal, according to the rule announced herein, be raised before the trial court in habeas corpus proceedings instituted therein for the purpose of securing petitioners' release, and the trial court had no jurisdiction to entertain said proceedings during the pendency of said appeal. It follows, therefore, that the order of the trial court of date July 21, 1925, discharging petitioners was illegal and void; that said order did not deprive said court from later enforcing its judgment of conviction rendered against petitioners; and that said court has jurisdiction to entertain and decide the motion of the district attorney now pending before it to remand petitioners to the custody of the sheriff for the purpose of enforcing the judgment of conviction rendered against them in said superior court.

As the trial court had no jurisdiction to entertain the habeas corpus proceedings, it becomes unnecessary for us to consider whether or not the order made therein, and purporting to discharge petitioners from custody, was a final judgment releasing them from imprisonment, as provided by section 1496 of the Penal Code. Being a void order, it in no way affected the legality of petitioners' imprisonment. The petition for writ of prohibition is denied.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; PRESTON, J.

BAIRD et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 12224.)★

Supreme Court of California. April 25, 1927.

Rehearing Granted May 25 1927.

1. Appeal and error $\S$ 1195(1)—Adjudication by Supreme Court that evidence was insufficient to support particular finding precludes such finding, in subsequent proceeding, on similar evidence.

Adjudication by Supreme Court that evidence offered upon trial was insufficient to support a finding of adoption precluded trial court from finding, in subsequent proceeding, on basis of same or substantially similar evidence, that an adoption did take place.

2. Executors and administrators $\S$ 315(6)—Judgment entered, after remittitur, denying petition for distribution of estate held to be judgment on merits finally concluding controversy.

Judgment by lower court denying petition for partial distribution of estate, after remittitur by Supreme Court, held to be judgment on the merits, finally concluding all controversy, and not judgment of nonsuit.

3. Judgment $\S$ 570(1)—Judgment of nonsuit does not bar subsequent action, while judgment on directed verdict does.

Judgment of nonsuit does not bar a subsequent action upon same cause, while a judgment upon a directed verdict is considered judgment upon merits and makes an end of litigation.

4. Appeal and error $\S$ 1176(3)—Petitioner's evidence being insufficient to sustain special verdicts and judgment granting prayer, Supreme Court could direct reversal and entry of judgment denying petition on merits.

Where petitioner's evidence was insufficient, as matter of law, to sustain special verdicts and findings and judgment granting prayer for distribution of estate entered pursuant thereto, Supreme Court could, on appeal, direct reversal of judgment entered in trial court and the entry of judgment denying petition for distribution, which would operate as adjudication upon merits and bar further inquiry into same subject of litigation.

5. Appeal and error ⚡1194(1)—**Direction by Supreme Court held for entry of judgment, denying petition for distribution of estate effective as adjudication on merits.**

Where Supreme Court found that petitioner's evidence was insufficient, as matter of law, to sustain special verdicts and findings and judgment granting prayer for distribution of estate entered pursuant thereto, directions given to lower court *held* to be for entry of judgment denying petition for distribution which would operate as adjudication upon merits and bar further inquiry into same subject of litigation.

6. Appeal and error ⚡1202—**Insufficiency of defendant's evidence is not ground for new trial after Supreme Court has held that motion for nonsuit should have been granted.**

When Supreme Court has declared that state of evidence was such as to warrant granting of motion for nonsuit or directed verdict, it would be improper for trial court, after judgment on merits for defendant, to grant new trial because of insufficiency of defendant's evidence, since motion for nonsuit or directed verdict is based entirely on sufficiency of plaintiff's evidence, defendant's evidence being disregarded.

7. Judgment ⚡650—**Judgment denying petition for partial distribution of estate because petitioner did not prove adoption barred inquiry into question, on petition for final distribution (Civ. Code, § 230).**

Judgment denying petition for partial distribution of estate on ground that petitioner did not prove that he had been adopted by decedent, under Civ. Code, § 230, barred inquiry into question, in hearing on petition for final distribution.

8. Prohibition ⚡17—**Petitioners held entitled to prohibition preventing further proceedings on petition for distribution of estate, though objection was not made to subordinate court first.**

Where minor child's rights to succeed to estate of deceased had been subject of controversy for nearly 20 years and questions presented were barred by former adjudication, petitioners *held* entitled to writ of prohibition to prevent further proceedings upon child's petition for distribution, even though objection to action of subordinate court was not first made to that court and overruled by it.

In Bank.

Application by Veronica C. Baird and others for writ of prohibition to be directed to the Superior Court, City and County of San Francisco, T. I. Fitzpatrick, Judge, to prevent further proceedings on a petition for distribution. Writ granted.

Karl O. Partridge, of San Francisco, for petitioners.

R. P. Henshall, Robert R. Moody, C. M. Fickert, and E. A. Cunha, all of San Francisco, for respondents.

PER CURIAM. Petition for writ of prohibition by Veronica C. Baird, Benjamin H. Baird, and Thomas R. Baird, who are named as devisees and legatees in the will of David J. Baird, deceased. The prayer of petitioners is that a petition for distribution of the estate of said decedent, filed by one David Jennings Baird, by his guardians, wherein it is alleged that said David Jennings Baird is the son and heir of decedent and entitled to his entire estate under the provisions of the laws of succession of this state, because not mentioned in the will of decedent, be ordered stricken from the files of the respondent superior court in and for the city and county of San Francisco, and that said court and respondent Hon. T. I. Fitzpatrick, judge thereof, be restrained from further proceedings in the matter of hearing said petition. It is averred in the petition for distribution, which is annexed to the petition for the writ of prohibition herein sought, that David Jennings Baird, although born illegitimate was adopted and legitimated by the procedure prescribed in section 230, Civil Code.

The right of the minor child known as David Jennings Baird to succeed to the estate of David J. Baird, deceased, has been the subject of a controversy which has extended throughout a period of almost 20 years and has on several previous occasions engaged the attention of this court. Estate of Baird, 173 Cal. 617, 160 P. 1078; Id., 181 Cal. 742, 186 P. 351; Id., 182 Cal. 338, 188 P. 43; Id., 193 Cal. 225, 223 P. 974; Id., 195 Cal. 59, 231 P. 744; Id., 198 Cal. 490, 246 P. 324. Complete statements of the facts out of which the controversy arose appear in the opinions heretofore filed. We shall therefore briefly notice only those facts in the history of the litigation which we deem most pertinent to an understanding of the present inquiry.

David J. Baird died on November 25, 1908, leaving a will in which he neither provided for nor mentioned the minor, David Jennings Baird. On April 27, 1914, said minor, by his guardian, filed a petition for partial distribution of the estate of the decedent, in which he alleged that he was the son of decedent and his heir by virtue of an adoption and legitimation complying with all the requirements of section 230, Civil Code. His claim was opposed by the mother, brothers, and sister of decedent. Thereafter the court heard the petition sitting without a jury, the late Hon. James V. Coffey presiding, and found adversely to the claimant on all issues of adoption. The order denying the petition was reversed by this court on appeal because of the refusal of the probate judge to grant a jury trial on the issue of adoption. Estate of Baird, 173 Cal. 617, 160 P. 1078. The court expressly stated that it refrained from expressing an opinion regarding the sufficiency of the evidence to prove an adoption. After a jury trial, the matter again came before this court upon an appeal from an order distributing the

entire estate of decedent to the claimant in pursuance of special verdicts of the jury finding for the claimant on all issues of adoption. This court reversed the lower court on the ground that the evidence was insufficient to support the finding that the decedent had adopted said minor child. *Estate of Baird*, 182 Cal. 338, 188 P. 43. A second jury trial was had, which, as in the previous case, resulted in special verdicts favorable to the minor child on all issues of adoption. The order distributing the entire estate to said minor, which was entered in pursuance of the special verdicts of the jury, was likewise reversed by this court on appeal (*Estate of Baird*, 193 Cal. 225, 223 P. 974), the court being of the opinion, first, that the second appeal (*Estate of Baird*, 182 Cal. 338, 188 P. 43) established as the law of the case that all evidence adduced upon the second trial was insufficient to establish a legal adoption of the child, and that, since the evidence introduced upon the third trial was substantially the same as that introduced upon the former trial, the law of the case required a finding and judgment that an adoption had not taken place, and, secondly, that irrespective of the law of the case, the evidence introduced upon the third trial would not sustain a finding of adoption. This court thereupon ordered and directed the trial court to set aside the special verdicts and findings in favor of the child and to enter judgment for the appellants denying the petition for distribution upon the ground that the child was not the adopted son or heir of decedent. The trial court upon the going down of the remittitur entered judgment in accordance with the directions contained therein. It is upon the interpretation to be given this judgment, entered in obedience to the mandate of this court, that the rights of the applicants for the writ of prohibition in the present proceeding depend.

After the going down of the remittitur to the lower court, two notices of intention to move for a new trial were filed on behalf of said minor, David Jennings Baird. Both motions were granted. Upon appeal to this court the order granting the motions was reversed on April 23, 1926. On August 18, 1926, Veronica C. Baird and I. I. Brown, as executors of the estate of David J. Baird, deceased, filed their final account and petition for final distribution. The petition was set for hearing on August 30, 1926. On August 28, 1926, said minor, David Jennings Baird, filed a petition for distribution to him of the estate of said decedent. When the petition of the executors came on for hearing on August 30, the court, after hearing the account, continued the hearing on the executors' petition for distribution to September 20, 1926, and set the petition of said minor child for hearing on said date. Veronica C. Baird, decedent's mother, and Benjamin H. Baird and Thomas R. Baird, his brothers, all of whom are named as legatees and devisees in decedent's will,

thereupon filed the petition for writ of prohibition now before us with the object of restraining further proceedings for the consideration of the petition of said minor child for distribution. The petition for distribution does not differ in material respects from the petition considered by this court on the four former appeals. In each the petitioner claims to be the legitimated son and heir of decedent by virtue of an adoption complying with the requirements of section 230, Civil Code.

[1] It is contended on behalf of said minor child that the judgment entered on April 22, 1924, in obedience to the mandate of this court (*Estate of Baird*, 193 Cal. 225, 223 P. 974), is not an adjudication on the merits of the claim of adoption which finally and conclusively determined that said minor child was not the legitimated son or heir of decedent, but merely a judgment of nonsuit, and hence not a bar to an inquiry into the question of heirship in a subsequent proceeding such as that here sought to be restrained. Even though the claimant's right to file the petition for distribution and to compel a hearing thereon be conceded, it seems extremely doubtful whether any benefit will result to him from an insistence on these rights. Although the judgment be a mere nonsuit and not a binding determination that an adoption did not take place, as a nonsuit it is, nevertheless, an adjudication that the evidence offered upon the trial was insufficient to support a finding of adoption, and as such precludes the trial court from finding in a subsequent proceeding on the basis of the same or substantially similar evidence that an adoption did take place. 2 Freeman on Judgments, p. 1532. Upon each successive appeal in this matter it has been vigorously contended that the evidence offered differed sufficiently from that introduced upon previous trials to sustain a finding of adoption. In each case this court has ruled the evidence insufficient. Approximately 16 years elapsed between the date of decedent's death and the date when the notices of intention to move for a new trial were filed by the claimant with accompanying affidavits purporting to set forth newly discovered evidence, and the proceedings have been vigorously contested throughout. Counsel representing said minor make no suggestion that they are now prepared to offer evidence differing in legal effect from that heretofore presented. In the absence of such evidence, the prolongation of this proceeding would seem to be in vain, wasteful of the time of the courts, and involving useless expense to the state and to the litigants.

[2] We do not, however, deem the judgment of April 22, 1924, a judgment of nonsuit. The remittitur, in pursuance of which said judgment was entered, contains the following provision:

"It is hereby ordered, adjudged, and decreed by the court that the decree of partial distribution of the superior court in and for the city

and county of San Francisco in the above-entitled cause be and the same is hereby reversed and the trial court is ordered and directed to set aside the special verdict and findings, and to enter judgment for appellants denying the petition for partial distribution upon the ground that respondent is not the adopted son or heir of the deceased."

The judgment entered by the lower court, after quoting the remittitur provided as follows:

"It is therefore ordered, adjudged, and decreed that the hereinbefore mentioned special verdicts and findings be and the same are hereby vacated, annulled, and set aside, and the said petition for partial distribution of David Jennings Baird, a minor, is hereby denied."

[3-5] In advancing the argument that this judgment is a nonsuit and not a judgment on the merits finally concluding all controversy, counsel for said minor child rely upon certain language in the opinion rendered upon the third appeal (*Estate of Baird*, 193 Cal. 225, 223 P. 974), and in the opinion reversing the order granting the motions for a new trial made on behalf of said child (*Estate of Baird*, 198 Cal. 490, 246 P. 324). In the decision in volume 193 of our reports, which reversed the decree distributing the entire estate to the child, this court held that the trial court erred in denying both the motion for a nonsuit and the motion for a directed verdict, for the reason that all evidence offered on behalf of said minor at the trial, with all inferences properly deducible therefrom, was insufficient to establish an adoption. A judgment of nonsuit and a judgment upon a directed verdict resemble each other in that each is available to the defendant when the plaintiff fails to establish his case by all evidence introduced in support of his claim, but they differ in that a judgment of nonsuit does not bar a subsequent action upon the same cause while a judgment upon a directed verdict is considered a judgment upon the merits and makes an end of the litigation. 9 Cal. Jur. 547; 15 Cal. Jur. 131; 24 Cal. Jur. 913; 2 Freeman on Judgments, p. 1590; *Estate of Sharon*, 179 Cal. 447, 177 P. 283; *City and County of San Francisco v. Brown*, 153 Cal. 644, 96 P. 281; *Mohn v. Tingley*, 191 Cal. 470, 217 P. 733. If the trial court had granted the motion for a nonsuit, the minor might thereafter have filed a new action and on the basis of different evidence have established an adoption; but, if the trial court had granted the motion for a directed verdict, the judgment upon said verdict would have operated as a bar to subsequent litigation of the claim of the minor. When it became apparent that the evidence introduced to establish the child's claim, viewed in the light most favorable to the child, was insufficient to establish a legal adoption, it was within the power of the trial court to either grant the motion for a nonsuit, and thereby terminate the pending

proceeding with the right to the petitioner to commence a new action, or to grant the motion for a directed verdict, the judgment upon which would operate as a bar to future litigation of the same question. The court did neither, but, instead, submitted the case to the jury, which erroneously returned verdicts in the child's favor (upon which was entered the judgment which this court later held unsupported by the evidence. The petitioner's evidence being insufficient as a matter of law to sustain the special verdicts and the findings and judgment granting the prayer for distribution entered pursuant thereto, it was within the power of this court, on appeal, to direct the reversal of the judgment entered in the trial court and the entry of a judgment denying the petition for distribution which would operate as an adjudication upon the merits and bar further inquiry into the same subject of litigation—the adoption of said minor child. We are of the opinion that the direction given by this court was for the entry of such a judgment. The procedure adopted by this court reveals an obvious design and purpose to put an end to this litigation for all time. If the court had intended to permit the petitioner for distribution to relitigate his right to succeed to decedent's estate, it is reasonable to suppose that it would simply have reversed the case, as it had done upon the two-previous appeals, and thus have afforded an opportunity for the re-examination of questions of fact upon a new trial.

If, after the court had erroneously denied both the motion for a nonsuit and the motion for a directed verdict, the jury, upon the submission of the case to it, had brought in verdicts against the petitioner for distribution on all issues of adoption instead of the verdicts in his favor as in fact rendered, it could not successfully be contended that a judgment entered upon such adverse verdicts would not have been a judgment on the merits barring future litigation. If the jury had been given instructions consistent with the law of the case as announced in the earlier decision (*Estate of Baird*, 182 Cal. 338, 188 P. 43), it could not, this court has held, legally have reached the conclusion on the basis of the evidence before it that an adoption had been made out. It was the intent of this court to direct the trial court to enter a judgment denying the petition of said minor child for distribution to him—which was the only judgment that could lawfully be given—and that the judgment thus entered should operate as an adjudication on the merits barring subsequent litigation, with the same legal effect as a judgment based upon verdicts of the jury adverse to said minor would have had.

It was not necessary to the reversal by this court of the order of the court below granting the motions for a new trial (*Estate of Baird*, 198 Cal. 490, 246 P. 324) that the judgments directed by this court to be entered

should be a judgment of nonsuit in the strict sense, and when the decision is read in the light of the facts it becomes apparent that it was not the intention of this court to hold that said judgment was a judgment of nonsuit in the sense that it would not bar a subsequent inquiry into a question which had already been extensively litigated.

The trial court, in its order granting the motions for a new trial after judgment entered in pursuance of the mandate of this court, made the following statement:

"And in this regard the court in accordance with said section 657, C. C. P., doth further grant said motion for a new trial in addition upon the ground of the insufficiency of the evidence to justify and sustain the verdict and the decision, and in this regard the court doth specify that, in its opinion and decision herein, certain testimony of certain witnesses who testified on behalf of the respondent is not believed by the court to be credible and true, and therefore that the decision herein is not sustained by the evidence."

[6] A motion for a nonsuit or directed verdict is based entirely on the insufficiency of the plaintiff's evidence, defendant's evidence being disregarded when such motions are under consideration. When this court has declared, as it has in the instant case, that the state of the evidence was such as to warrant the granting of a motion for a nonsuit or directed verdict, it would be improper for the trial court after judgment on the merits for defendant to grant a new trial because of the insufficiency of defendant's evidence, although a motion for a nonsuit or directed verdict had not been made, or, having been made, had been erroneously denied as in the instant case. In such cases plaintiff must lose because of the insufficiency of his own evidence and not as a consequence of any evidence offered by those who oppose him. Since the adverse evidence is entirely disregarded, its alleged insufficiency cannot constitute a ground for granting a new trial.

[7, 8] It is also contended on behalf of said David Jennings Baird that the application herein for a writ of prohibition is premature. In this connection said minor relies on the frequently reiterated statements of this court

to the effect that objection to the action of the subordinate court must be made to that court and overruled by it before a writ of prohibition may be sought from this court. *McAneny v. Superior Court*, 150 Cal. 6, 87 P. 1020; *Havemeyer v. Superior Court*, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *Shriver v. Superior Court*, 48 Cal. App. 576, 192 P. 124; *Drew v. Superior Court*, 43 Cal. App. 651, 185 P. 680; 21 Cal. Jur. 627. We are of the opinion that the writ of prohibition may be issued in the instant case without doing violence to this long-established rule of practice. The petition of said minor was filed on August 28, 1926, after the executors had filed their final account and petition for final distribution on August 18, 1926. When the petition of the executors came on for hearing on the day set, to wit, August 30, 1926, counsel representing the executors and counsel representing the minor were present in court. Counsel for the executors challenged the right of said minor to compel a consideration of his petition and requested the court to proceed with the hearing of the executors' petition, on the ground that the question of said minor's right to inherit from decedent had already been determined adversely to him. It was apparent upon the face of the minor's petition, which was before the court, that the sole question presented by the petition related to the minor's right to succeed to the estate of decedent by virtue of an adoption, under the provisions of section 230, Civil Code, and the former adjudication barred any inquiry into this question. The remarks of the court showed a familiarity with the proceedings. Despite the apparent lack of jurisdiction, the court set the petition for hearing on September 20, 1926. We deem it the wisest exercise of discretion to issue the writ.

We feel constrained to say that the order here made is the logical and inevitable effect of the several orders and judgments made and entered in the original proceeding and others which followed it. In other words, the law of the case, as heretofore settled, rules our action in this proceeding.

Let the peremptory writ of prohibition issue as prayed for.

201 Cal. 155

CORATO v. CORATO'S ESTATE.

(Sac. 3649.)

Supreme Court of California. April 27, 1927.

1. Trusts ⚡44(1)—Evidence held to support finding that plaintiff placed money in hands of deceased as trust fund for her benefit 20 years before death.

In action on claims against estate, evidence held sufficient to support finding that plaintiff had placed \$600 in hands of deceased as trust fund, about 20 years before his death, to be held and managed by deceased for benefit of plaintiff.

2. Limitation of actions ⚡50(2)—One managing deceased's boarding house, with agreement for compensation but with no arrangement for amount or time of payment, held not to have continuing contract (Civ. Code, § 2011).

One managing boarding house for deceased for 23 years, with agreement that she should be compensated but with no arrangement for amount or time of payment, can recover compensation from his estate only for 2 years immediately preceding his death, in view of statute of limitations and Civ. Code, § 2011, providing that servant's employment is presumed to be by month in absence of agreement.

3. Executors and administrators ⚡221(3)—Insufficient will of deceased held admissible as recognition of plaintiff's claim against estate.

In action on claims against estate of deceased, introduction of evidence of insufficient will held not error, it being admissible as constituting recognition of plaintiff's claim.

4. Executors and administrators ⚡451(1)—Submission of equitable issues to jury, in action on claims against estate, held not error, in view of stipulation.

Submission of equitable issues to jury, in action on claims against estate of deceased, held not error, in view of findings that equitable issues were submitted "by stipulation of the parties and by order of the court."

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Matilda Corato against the estate of Joseph Corato, deceased, on claims against the estate. Judgment for plaintiff, and defendant appeals. Affirmed in part, reversed in part, and remanded, with directions.

Edwin L. Forster, of San Francisco, for appellant.

Gumpert & Mazzer, of Stockton, for respondent.

SHENK, J. Joseph Corato died on or about the 3d day of October, 1922, in the county of San Joaquin, leaving estate therein. The plaintiff is the administratrix of said estate. On February 28, 1923, she filed two claims against the estate, which were rejected by the court. She then filed her complaint

thereon in two counts. The first count was for the recovery of the sum of \$600, with interest, alleged to have been placed in the hands of the deceased, in 1903, as a trust fund, to be held and managed by the deceased for the use and benefit of the plaintiff. The second count was for services alleged to have been rendered by the plaintiff to the deceased in the capacity of a housekeeper and as manager of a boarding and lodging house run by the deceased, which compensation it is alleged the deceased agreed to pay to the plaintiff at the termination of said services at or before his death. A demurrer to both counts was interposed, and we think properly overruled. On the denials of the answer and the special plea of the statute of limitations the cause was tried before the court sitting with a jury. As to the first count, the jury rendered a verdict in favor of the plaintiff for the sum of \$2,322, being the principal sum of \$600 and interest thereon from February 10, 1903. The court adopted the verdict, submitted concededly in an advisory capacity, made its findings, and rendered a judgment accordingly. As to the second cause of action, the jury found for the plaintiff in the sum of \$5,500 for services rendered continuously for 23 years prior to the death of the deceased, and a separate judgment was entered on that verdict. From such judgments an appeal is prosecuted on behalf of the estate, and the matters are submitted on a single record.

[1] The defendant urges the insufficiency of the evidence to justify the findings as to the first count and the verdict as to the second count. With reference to the first count, the court found that on or about February 10, 1903, the plaintiff deposited with the deceased the sum of \$600, which was her sole and separate property; that it was understood and agreed by and between the plaintiff and the deceased that said sum of \$600 be held in trust by the deceased for the plaintiff and be kept by the deceased as a depository thereof; that the deceased was to invest the same, and the proceeds derived therefrom was to be held by the deceased for the use and benefit of the plaintiff until the same should be demanded by the plaintiff; that the deceased invested said fund in property, the character and description of which is unknown to the plaintiff, and commingled said fund with his own property and belongings and neglected and failed to keep a correct or any account of said trust fund or its increase, and that the said fund cannot now be identified either in its original or substituted form; that the plaintiff did not demand the said sum or any part thereof prior to the death of deceased; and that the whole thereof with interest is due from the defendant to the plaintiff.

The evidence shows that Joseph Corato and Mary Corato were husband and wife from their marriage in 1897 until they were divorced in 1911. A few years after their marriage

they separated and Mary Corato, with her young son, took up her residence at Sonora, in Tuolumne county. About 1897 a young uneducated woman, Matilda Nave, known in this litigation as Matilda Corato, came from Italy and lived with her brother in Stockton. She was industrious and frugal, and from her earnings in the course of a few years saved the sum of \$600, which she placed with her brother, who secreted the money in a can which he kept for that purpose. After the lapse of a few years she met Corato, the deceased, who was operating an express business in Stockton, began to live with the deceased, and continued to live with him, apparently as his wife, until his death. No marriage was ever solemnized. At the solicitation of the deceased the said sum of \$600 was delivered to him by the plaintiff. The evidence as to what transpired at the time of such delivery is clearly subject to two interpretations. It is the insistence of the defendant that the only interpretation which may be placed thereon is that the money was transferred to the deceased as a loan, and that if that be true the statute of limitations has long since run. The plaintiff contends that the evidence is subject to the construction that the money was transferred to the deceased with the understanding that he should hold the same for the use and benefit of the plaintiff, invest and reinvest the same as in his judgment seemed best, and account to the plaintiff on demand. There is evidence to the effect that the deceased agreed to take the money and pay the plaintiff interest thereon. There is also evidence that the deceased agreed to take the money and hold it for the plaintiff and to account to her for the benefits and profits to be gained from his management and control thereof. The jury and the trial judge placed on the evidence the interpretation most favorable to the plaintiff. A survey of the record satisfies us that the evidence is subject to such interpretation and is sufficient upon which to base the findings.

[2] The evidence in support of the claim set forth in the second cause of action discloses that soon after the plaintiff and the deceased met the deceased acquired a boarding and lodging house. The plaintiff undertook the management thereof, and with the co-operation of the deceased conducted the same for about 20 years. She cooked for the boarders, sometimes 20 in number, cleaned the house, made the beds, and did the washing and ironing. In fact, she appears to have done almost all of the work incident to the conduct of the boarding house. She continued to act in that capacity until the death of the deceased. At times the plaintiff would complain to the deceased of the difficulty of the work and of the necessity for assistance, whereupon the deceased would promise her that he would pay her for her work, that if she would continue he would pay her well

and that she would be glad in the end if she should do so. These conversations would usually terminate with a statement on the part of the plaintiff:

"All right, I will work if you will pay me."

The evidence is abundant to support the conclusion that the deceased promised to pay the plaintiff for work that she had done and for work to be done in the future. The record, however, does not disclose when the payment for such services would be made, nor the amount thereof. The allegations of the second cause of action are similar to those alleged by the plaintiff in the case of *Mayborne v. Citizens' T. & S. Bank*, 46 Cal. App. 178, 188 P. 1034. It is insisted by respondents that the proof of the allegations in the present case is so similar to the proof in the *Mayborne Case* as to render that case controlling in the determination of this branch of the present appeal. It is insisted that the evidence in this case shows a continuing contract such as was disclosed in that case, the interpretation of which called for the following declaration by that court:

"We think there is no merit in the contention that the claim is barred by the statute of limitations. The services were continuous for a period of 20 years, and it is a fair inference that it was the intention or expectation that they should be rewarded when terminated. They did not cease until the death of Mr. Dutton. The case falls clearly within the rule announced in *Krumb v. Campbell*, 102 Cal. 370 (36 P. 664) [and other cases cited]. * * * They are all to the effect that where the contract is for an indefinite time and no time for payment is specified, the statute does not begin to run until the services end. Of course, the same rule applies to an express contract and to one implied by law."

The defendant, on the other hand, contends that the contract proved was not an entire contract based upon an entire consideration, but was a contract of employment where the consideration became due and payable from month to month, and that recovery on account thereof is barred except for 2 years immediately prior to the death of the deceased, if indeed, any compensation may be recovered at all. The holding of the court in the *Mayborne Case* is undoubtedly a correct statement of the law applicable to a situation there presented; that is, where it is understood, expressly or by reasonable implication, as was held in that case, that the compensation should be paid at the termination of the rendition of the services. It appeared in that case by the production of the will of the deceased, although the will was insufficient in form and could not be admitted to probate, that the deceased intended to compensate the plaintiff therein at the termination of her services at his death by leaving her property "for care and faithful services rendered." In the present case, it likewise appears that the deceased made a will in

which the plaintiff was named as a beneficiary, and that this will was also insufficient in form and was not entitled to probate. But there is not in this will any indication of an intention to cause the bequest to constitute payment for services rendered. It also appears that the plaintiff herein repeatedly suggested to the deceased the matter of immediate payment, but was put off with the statement to the effect that he would pay her some time. The facts here presented would seem to bring the case within the provisions of section 2011 of the Civil Code, which provides:

"In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed."

Here there was no agreement either expressly or by implication for the term of service, the time of payment, or rate or value of the services, and no custom on the subject was alleged or proved. In the *Mayborne Case* there was an implied agreement as to the time of payment, and said section 2011 would therefore have no application for the reason that the presumption of a hiring by the month would not then be present. We are of the opinion that, under the facts in the present case, the plaintiff was entitled to reasonable compensation from month to month as the services were performed, and that the statute of limitations has foreclosed a recovery for any period except during the 2 years immediately preceding the death of the deceased.

[3] The defendant urges as prejudicial error the introduction of evidence of the insufficient will of the deceased. Although insufficient as a will, we think it was admissible as constituting some recognition by the deceased of a claim upon him for services rendered by plaintiff and as corroboration of the plaintiff's claim that her services were not gratuitous.

[4] The defendant complains because the trial court submitted the equitable issues tendered by the first cause of action to a jury. The contention is without merit. The findings recite that, "By stipulation of the parties and by order of the court, the equitable issues presented in and by the first cause of action herein" were "submitted by the above-entitled court to the jury aforesaid for its advisory verdict."

Other points made, if discussed, would not lead to a different conclusion on these appeals. It should be said, however, that the alleged meretricious relation between the plaintiff and the deceased is deemed of no controlling significance under the facts here presented.

The judgment on the first cause of action,

dated and filed December 31, 1923, is affirmed. As the record does not disclose the reasonable value of the services performed by the plaintiff during the 2 years prior to the death of the deceased, we may not properly find on that subject and modify the judgment accordingly, but as the defendant does not seriously contest the right of the plaintiff to recover for said 2-year period, if she is entitled to recover at all, it is ordered that the judgment on the second cause of action entered on November 15, 1923, be and the same is hereby reversed, and the cause as to said second cause of action is remanded to the trial court with directions to ascertain the reasonable value of the services rendered by the plaintiff for the 2 years immediately preceding the death of the deceased and render judgment in favor of the plaintiff for the amount so ascertained. Let each party bear one-half the aggregate costs on this appeal.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

201 Cal. 87

BAAR v. SMITH et al. (S. F. 12316.) ★

Supreme Court of California. April 20, 1927.

Rehearing Denied May 19, 1927.

1. Quieting title ~~§~~38—In action to quiet title to corporate stock, defendants not claiming any interest therein are out of case (Code Civ. Proc. §§ 738, 739).

In action to quiet title to corporate stock under Code Civ. Proc. § 738, defendants not claiming or asserting any right, title, or interest in such property are out of case, in view of section 739.

2. Judgment ~~§~~251(1)—Jury ~~§~~13(5)—Decree ordering delivery of stock or payment of value held void in action to quiet title to corporate stock (Code Civ. Proc. §§ 580, 738).

In action to quiet title to corporate stock under Code Civ. Proc. § 738, in which possession in defendants, conversion by them, or value of stock was not alleged, decree ordering delivery to plaintiff or payment of value held void as in excess of jurisdiction and violation of defendants' right to have issues of possession, value, and conversion tried by jury, in view of section 580.

3. Pleading ~~§~~432—Parties may submit issue without specific pleadings, or may introduce new matter in answer, and be estopped after judgment from complaining; "issue" (Code Civ. Proc. §§ 580, 590).

Parties may voluntarily submit and try issue without specific pleadings, or may introduce new matter in answer, and thus be estopped from complaining thereafter after judgment; since "issue," in Code Civ. Proc. § 580, may be broader than complaint, in view of section 590.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Issue (In Practice).]

4. Trial $\hookrightarrow$ 396(2)—In action to quiet title to corporate stock, statement in finding as to stipulation as to value before suit was filed held insufficient to introduce issue of possession and damages for detention without pleadings.

In action to quiet title to corporate stock, in which complaint was filed February 24, 1923, statement in findings that parties stipulated that value of stock on February 23, 1921, was certain amount is insufficient to introduce issue of possession and damages for detention with alternative of value of stock and damages, without pleadings.

5. Trial $\hookrightarrow$ 396(2)—In action to quiet title to corporate stock, finding that it was under control of defendant held not to introduce issue of detinue or trover.

In action to quiet title to corporate stock, finding that it was under control of defendant and continued under his control after transfer to wife held not to introduce issue of detinue or trover by consent or by silence, since finding was consistent with claim of fraud urged by plaintiff.

6. Judgment $\hookrightarrow$ 505—Judgment may be collaterally attacked as to relief not justified by pleadings.

Though court has jurisdiction of case, judgment may be collaterally attacked where it had no jurisdiction under pleadings of question which judgment assumes to determine or power to grant relief it assumes to afford; and prayer for general relief will not aid situation.

7. Action $\hookrightarrow$ 44—Trover and detinue cannot both be made basis of relief in one judgment.

Detinue and trover are inconsistent and cannot both be made basis of relief on same set of facts and in one judgment.

8. Appeal and error $\hookrightarrow$ 460(1)—General execution cannot issue pending appeal in action to quiet title to corporate stock, on judgment for delivery or payment of value, where defendant was not in possession (Code Civ. Proc. §§ 942, 943, 949).

General execution cannot issue pending appeal in action to quiet title to corporate stock, on judgment for delivery of stock or payment of value, where defendant was not in possession, since Code Civ. Proc. §§ 942, 943, are inapplicable, and under section 949 filing of notice of appeal stays execution.

9. Appeal and error $\hookrightarrow$ 460(2)—Statute relative to appeals from money judgments held inapplicable to alternative judgment (Code Civ. Proc. § 942).

In case of alternative judgment, Code Civ. Proc. § 942, relative to appeals from judgment directing payment of money, and whether they stay execution, is inapplicable.

10. Execution $\hookrightarrow$ 7—General execution cannot issue on judgment for delivery of corporate stock or payment of value, which would confer on sheriff power to determine whether alternatives have been complied with.

General execution cannot issue pending appeal in action to quiet title to corporate stock,

on judgment for delivery of stock or payment of value, since such execution would confer on sheriff power to determine whether previous alternatives had been complied with.

11. Appeal and error $\hookrightarrow$ 460(2)—Where appeal stayed execution of mandatory provision for return of corporate stock, it also stayed execution on ancillary money judgment.

Where appeal stayed execution on mandatory provision of judgment for return of stock to plaintiff in action to quiet title to corporate stock, it also stayed execution on ancillary money judgment in case of failure to return stock.

In Bank.

Suit to quiet title to corporate stock by L. Baar against F. M. Smith and others. Judgment for plaintiff, and defendants appeal. On application for supersedeas to restrain the enforcement of the judgment pending the appeal. Writ granted.

Brobeck, Phleger & Harrison, of San Francisco, Louis W. Bennett, of Oakland, and Charles W. Byrnes, and James F. Peck, both of San Francisco, for petitioners.

Cyril Appel and R. P. Henshall, both of San Francisco, for respondent.

PRESTON, J. This is an application by the appellants, Evelyn Ellis Smith, F. M. Smith, and West End Consolidated Mining Company, a corporation, for a supersedeas to restrain the enforcement of the judgment in favor of the respondent, L. Baar, by an execution thereon pending their appeal therefrom. This relief is sought upon the ground that so much of said judgment as forms the basis for said execution is coram non jure and void, and also that their duly perfected appeal ipso facto stays the enforcement of the judgment in the respect in which it is about to be enforced without the giving by them of any bond to stay proceedings. There is no dispute as to the material facts.

Since the filing of this application the record, which includes the evidence as a part of the judgment roll, has been lodged in this court, and we have considered the same in disposing of this proceeding. For a determination of the question presented to us, it is necessary to give some consideration to the issues tendered by and litigated in the cause.

The amended complaint, filed February 24, 1923, after averring the corporate existence of the two defendant companies, and the representative capacity of certain other defendants, proceeds as follows:

"That plaintiff is now, and for some time past has been the owner of and entitled to the possession of 819,632 shares of the capital stock of the West End Consolidated Mining Company, a corporation."

Then follow the usual allegations of a complaint to quiet title, alleging that all de-

fendants, save and alone the West End Consolidated Mining Company, a corporation, claim some right, title, or interest in and to said corporate stock adverse to the plaintiff, and that such claims are without right and said defendants have not any title to or interest whatsoever in said stock or any part thereof. Then follows the allegation that on the 8th day of July, 1913, almost ten years prior to the commencement of this action, said stock stood on the books of said corporation in the name of B. F. Edwards, giving the number of each certificate and the number of shares represented by it. It is then alleged as follows:

"That plaintiff has no information or belief upon the subject sufficient to enable him to allege as to whether or not said shares of stock still remain in the name of said B. F. Edwards, or in whose name the same now stand on the books of said defendant West End Consolidated Mining Company, or in whose name certificates therefor are now issued and outstanding."

Then follows the usual prayer that defendants be required to set forth the nature of their claims and that it be decreed and adjudged that defendants, or either of them, have no right, estate, or interest whatever in or to said shares of stock, or any part thereof, and that the title of plaintiff thereto is good and valid; that defendants be forever enjoined and debarred from asserting any claim whatever in and to said stock adverse to plaintiff, "and for such other and further relief as to this honorable court may seem meet and proper, and for costs of suit."

It will be observed that as to defendant West End Consolidated Mining Company, a corporation, no allegation whatsoever appears that it in any way asserts any claim to said corporate stock adverse to plaintiff or otherwise. However, said defendant corporation filed its answer herein denying the ownership or right of the plaintiff to possession of said stock and further pleaded the statute of limitations, but asserted no claim of any kind whatsoever on its own behalf, or on behalf of any other person or corporation to said stock or any part thereof.

The defendant F. M. Smith answered denying the ownership in plaintiff of said capital stock or any part thereof and pleading the statute of limitations, but at the same time pleading a disclaimer as follows:

"Denies that the defendant, F. M. Smith, claims any right, title and interest in and to, or in or to, the stock alleged in plaintiff's amended complaint, or any part thereof."

The defendant Evelyn Ellis Smith likewise answered denying the ownership of plaintiff in and to said stock or any part thereof, denying on information and belief knowledge as to whether or not the shares of stock still remained on the books of the corporation in the name of B. F. Edwards or in whose name the same stood, pleading the statute of lim-

itations and in addition thereto alleging as follows:

"Defendant Evelyn Ellis Smith alleges that she is the owner of and entitled to the possession of the shares of the capital stock of the West End Consolidated Mining Company, a corporation, described in the amended complaint."

All other defendants either filed disclaimers or made no defense. With the pleadings in this condition the cause went to trial, without submission to the court expressly, by inference, or otherwise, of any other or different issues, and without any evidence applicable to any other issue or issues and the cause thereafter proceeded to judgment. The attorney for plaintiff at the beginning of the trial explained the issues to the court and the relation of appellants thereto in the following language:

"Mr. Henshall: No one has any standing in this court except Mr. Harrison. This is an action to quiet title. All of the defendants, other than Mr. Harrison's clients, do not assert any interest in the property. That being the case, they are entirely without any standing in this court. The only person who has a right to be heard is Mr. Harrison's client, Evelyn Ellis Smith. * * *

"This is an action to quiet title, and the rule in regard to actions to quiet titles is very simple. You can join anybody in the world you want. The law permits that, for obvious reasons. If one of the defendants—if any person who is joined as a defendant has no interest whatever in the controversy, all he has to do is one of two things: He can default or he can disclaim any interest or claim in it, and no judgment of costs is to be taken against him. If he wants to answer, however, he has got to assert an interest or he has not got any standing in court whatever. * * * The answer of F. M. Smith is a legitimate answer, and the only legitimate answer along this line, in my humble opinion in this case. The defendant Smith denies that he has got any interest in the stock, so he is out. He is entirely out of the case. It is true that he goes on and denies ownership in the plaintiff, but we can regard that as immaterial. It is true that while he is president of the company, he says in his answer that he does not know whether the stock stood of record in the books at all. But that is immaterial. The defendant Smith says he has got no interest in the stock, and he is out entirely.

"The defendant Edwards not only defaulted, but expressly disclaimed, so he is out. We need not concern ourselves with him. The West End Consolidated Mining Company has no interest in the stock. It was joined, of course, your honor, so that one of two things might happen. In the first place, it was a proper party as a corporation. In the second place, it might, under certain conditions be—I withdraw that. It has no interest. It does not assert any interest in the stock. It simply says the plaintiff is not the owner, and it passes out along with the others.

"The defendant Evelyn Ellis Smith filed a proper answer, because she alleged ownership herself, and she denied practically all the oth-

er things in the complaint, even denial for want of information of this situation with regards to B. F. Edwards."

The court thereafter made its findings of fact and conclusions of law, and made and caused to be entered its decree in favor of plaintiff and against appellants, the substance of which decree was similar, in all respects, to the usual decree quieting title and enjoining defendants from asserting any claim to the property adversely to the plaintiff, and enjoining also the transferring, conveying, or disposing of or incumbering of said stock; also enjoining and restraining the voting thereof by any person other than plaintiff; also containing a similar injunction respecting collection, payment, and receipt of dividends; also decreeing to plaintiff costs of suit against each of the appellants. Then appears in said decree the following anomalous language:

"It is further ordered, adjudged, and decreed: That the defendants Evelyn Ellis Smith, F. M. Smith, and any other defendant herein, in whose name said shares of stock are now issued, be and they are hereby required to indorse and deliver said stock to the plaintiff, L. Baar. That in the event the said Evelyn Ellis Smith and F. M. Smith fail to indorse and deliver the said stock certificates, above described, or certificates issued in lieu thereof, to the plaintiff herein, or are unable for any reason to do so, that said stock certificates, representing said 819,632 shares of the capital stock of the West End Consolidated Mining Company, are hereby ordered, adjudged, and decreed to be canceled, and in such an event the defendant West End Consolidated Mining Company be and it is hereby directed to issue and deliver to the plaintiff, L. Baar, a new certificate for 819,632 shares of the capital stock of the West End Consolidated Mining Company, and if for any reason a delivery of said 819,632 shares of stock cannot be had, that the plaintiff, L. Baar, do have and recover of and from the defendants Evelyn Ellis Smith, F. M. Smith, and West End Consolidated Mining Company the sum of \$408,316, the stipulated value thereof; and in the event that said defendants fail to deliver any part of said 819,632 shares, then the plaintiff have and recover of and from the defendants Evelyn Ellis Smith, F. M. Smith and the West End Consolidated Mining Company the sum of 50 cents per share for each and every share of stock, so undelivered."

The decree closes with the following language:

"This decree is rendered and is directed to be entered herein as and for a final decree in this action, but this court reserves to itself jurisdiction over plaintiff and over each of the defendants herein for the purpose of making any and all appropriate orders for the purpose of enforcing this decree and for the protection of the rights of the plaintiff awarded to him by this final decree."

The record shows that on November 10, 1926, plaintiff without order of court sued out an execution on said judgment, which

said execution recited the above-quoted provisions of said judgment and directed the sheriff to secure possession of said stock and deliver same to plaintiff, and if this could not be done that said execution be levied upon the real and personal property of said three defendants sufficient to satisfy said alternative money judgment of \$408,316, with interest and costs, or such lesser sum as might be due under said decree if a pro rata only of said stock be found and delivered to said plaintiff. On November 12, 1926, the defendants F. M. Smith, Evelyn Ellis Smith, and West End Consolidated Mining Company lodged in the court below a notice of appeal from said judgment and the whole thereof. Thereafter, on the 24th day of November, 1926, said defendants filed herein this petition for writ of supersedeas.

It should here be pointed out that neither the amended complaint nor the answer of any defendant alleges that the plaintiff was ever in possession of said corporate stock at any time or place. Neither is there any allegation that either of the defendants was in the possession of said stock at the time of the filing of the complaint or amended complaint. There is no allegation as to the value of said stock at any time or at all. In other words, there is no proper allegation whatever which would sustain a complaint for possession of the stock, an action known at common law as *detinue* or *replevin*. There is likewise no allegation as to the conversion of said stock by either of the defendants, nor is there any allegation as to the damage suffered had such conversion taken place. That is, there are no allegations whatever to sustain the action known at common law as *trover*. Indeed, an examination of the complaint excludes necessarily any intent by plaintiff to claim that he ever had possession of said property or that said defendants or either of them then had possession of it. The answers of appellants likewise tender no issue whatsoever that would sustain relief under our system of pleading in either or any of the actions known at common law as *detinue*, *replevin* or *trover*. In other words, in no one of the pleadings is the issue as to possession, value, damages, or conversion brought into the case. An examination of the proceedings on the trial itself indicates that not only were these issues not tendered, but no evidence to sustain either or any of them was introduced, and, as above noted, they were by necessary implication excluded on the trial of the cause by the statements of counsel for plaintiff.

[1, 2] Under section 738 of the Code of Civil Procedure a suit may now properly be brought in the nature of a suit to quiet title to determine adverse claims to personal property. This is essentially an action in equity, but in giving said remedy the Code has, to avoid confusion, specifically preserved by said section the right to a trial by jury on such

law issues as those described above, and in so doing uses the following language:

"And provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given."

In short, before judgment can be given for the possession of the property, the subject of this action, or for its value in case delivery thereof cannot be had or for damages for its conversion, if such has taken place, the defendants are entitled to have those issues actually tried and determined and, if they desire, tried by a jury. As to the defendant mining company, no cause of action whatsoever for any purpose was alleged against it. It neither claimed nor asserted any right, title, or interest whatsoever in said property. Under section 739 of the Code of Civil Procedure not even so much as a judgment for costs could be legally rendered against it. This was conceded by counsel for respondent, who at the beginning of the trial used this language:

"It has no interest. It does not assert any interest in the stock. It simply says the plaintiff is not the owner, and it passes out along with the others."

As to the defendant F. M. Smith, the same observation is true. He specifically disclaimed all interest in this property, and the language of counsel himself was that said defendant "is out entirely."

This leaves only the situation created by the claim of Evelyn Ellis Smith in her answer that she is the owner of and entitled to the possession of said stock. As pointed out above, the plaintiff neither alleges nor does said defendant in her answer claim to be in possession of said stock or any part thereof, and the findings not only fail to locate possession in her, but expressly state that the present possession of said stock is undisclosed, but that she had possession of same when suit was filed; that since that time "said defendants have not preserved said stock intact, but have allowed, without the consent of the plaintiff and with knowledge of his ownership, reissues and transfers of the same to be made. * * *"

It likewise appears from the allegations of the petition herein, which are undenied, that neither of said appellants has possession of any of said stock nor any part thereof, nor have either or any of them power to make a present delivery thereof. Therefore the insertion of the above-quoted language in said decree in view of the state of the pleadings and record herein brings to the foreground the question for solution in this proceeding.

Petitioners assert that said language and said provisions of said decree were extraneous matter erroneously inserted therein in excess of the jurisdiction of the court and in violation of their constitutional right to a trial of such issues before the entry of such

judgment; that said provisions undertake to dispose of legal issues that were neither tendered by the pleadings nor passed upon by the court; and that so much of said judgment is null and void and subject to collateral attack.

To this contention of petitioners we must give our unstinted indorsement, for the insertion of these provisions is an open challenge to our entire system of procedure. If such provisions of a judgment could be sustained, pleadings could be dispensed with altogether. A litigant under such laxity could receive benefits or injuries that he could not expect or anticipate until the chancellor, without restraint of any kind, announced the length of his own foot.

Section 580 of the Code of Civil Procedure furnishes the stabilizer for the situation confronting us. It reads:

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but, in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

In *Johnson v. Polhemus*, 99 Cal. 240, 245, 33 P. 908, 909, construing this section, the court said:

"In the section last quoted our Code adheres very closely to the rules in equity; that is to say, in case of default the relief is confined to the relief demanded in the complaint, as was the rule under a prayer for special relief in equity, while in other cases it is extended to granting relief similar to that granted under a prayer for general relief in the chancery courts. There being an answer in the case, the right of appellants to recover upon the agreement depends, not upon the prayer of their complaint, but upon the scope of that pleading and the issues made, or which might have been made under it."

To the same effect, see also, *Mock v. Santa Rosa*, 126 Cal. 330, 58 P. 826, and *McKesson v. Hepp*, 62 Cal. App. 620, 217 P. 802.

The court in *Johnson v. Polhemus*, *supra*, at page 244 (33 P. 909), defines the equity practice in vogue prior to the Codes as follows:

"Under the equity practice in vogue before the adoption of the Codes, the bill usually contained a prayer for that particular relief to which the complainant considered himself entitled. The usual practice was also to include a prayer for general relief. The object of the latter was to meet cases in which the plaintiff had mistaken the relief to which he was entitled, as under it he was regarded as entitled to any relief agreeable to the case made by the bill. Story on Equity Pleading, § 49. If he asked particular relief only he was restricted to his prayer by the decree. A court of equity would not, however, even under a prayer for general relief, permit a party to go beyond the general scope of the case made by the bill, and would not ordinarily permit a bill framed for one purpose answer for another and distinct

purpose, especially if the defendant might be surprised or prejudiced thereby. Story on Equity Pleadings, §§ 41, 42."

[3] The word "issue" as used in this Code section is broader than the complaint where the answer enlarges the same by introducing new matter. Section 590, Code Civ. Proc., and *Rogers v. Riverside Land, etc., Co.*, 132 Cal. 9, 64 P. 95. It is also true that the parties may voluntarily submit and try an issue without any specific pleadings and thus be estopped from complaining thereafter after judgment. *Poladori v. Newman*, 116 Cal. 375, 377, 48 P. 325; *Mock v. Santa Rosa*, supra; *Sidler v. Bakersfield*, 43 Cal. App. 349, 185 P. 194; and *McDougald v. Hulet*, 132 Cal. 154, 163, 64 P. 278. But no such exceptions exist in this cause; the bare question of ownership and right of possession of plaintiff against the same claim by defendant Evelyn Ellis Smith were the issues, and no other issues were litigated in any manner whatsoever. So much of a judgment that exceeds the issues as thus defined and determines issues not tried or involved is *coram non jure* and void.

[4] The statement in the findings that by stipulation of parties the value of the stock in suit was on February 23, 1921, at least 50 cents per share cannot be held sufficient to introduce by consent and without pleadings the issue of possession and damages for detention, with the alternative of value of stock and damages, for the reason, first, that the value on February 23, 1921, is no criterion of the value of the stock on June 22, 1925, and particularly is this true of mining stock. Moreover, this evidence was consistent with and in support of respondent's claim of title and must be held to have been introduced in support of this issue.

In *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 171, 135 P. 502, 503, we have this language:

"But here the pleadings raised no issue regarding security for the debt, and the finding, being entirely outside of the issues, must be disregarded. *Burnett v. Stearns*, 33 Cal. 469; *Gregory v. Nelson*, 41 Cal. 279; *Ortega v. Cordero*, 88 Cal. 221, 26 P. 80. The rule just stated is subject to the qualification that a finding may be considered where the issue, though not formally raised by the pleadings, was tried in the court below without objection. *Illinois T. & S. Bank v. Pacific Ry. Co.*, 115 Cal. 285, 47 P. 60; *Sprigg v. Barber*, 122 Cal. 573, 55 P. 419. But this exception has no application to the case at bar. It is true that evidence of the execution of a deed by Larson to plaintiff's agent was introduced in evidence by the defendant without objection, and that it was also shown that at the same time the said agent had given Larson a paper agreeing to reconvey the land to him if he should, within ninety days, pay a certain sum, which was, in fact, the balance due on the note. But the defendant's contention was that the deed was made and accepted as payment of the note and the evi-

dence introduced by plaintiff in this connection was offered for the purpose of rebutting the showing of payment. All of the evidence on this point was relevant to the issue of payment, which was in the case, and its introduction cannot therefore, be regarded as authorizing the determination of some other issue not presented by the pleadings. *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 P. 299."

[5] The above-quoted authority is also applicable to the claim that the findings show that the stock was under the control of defendant F. M. Smith, and after transfer to his wife continued to be under his dominion and control. This finding is consistent with and an integral part of the claim of fraud urged by plaintiff, and is not in any sense the introduction by consent or by silence of the issue of detinue or trover.

In the case of *Windsor v. McVeigh*, 93 U. S. 274, 282 (23 L. Ed. 914), the Supreme Court of the United States uttered the following appropriate language:

"Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases."

This language is approved by our own court in *Long v. Superior Court*, 102 Cal. 449, 452, 36 P. 807.

Again, in *Ex parte Reed*, 100 U. S. 13, 23 (25 L. Ed. 538), the Supreme Court of the United States used the following language:

"We do not overlook the point that there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed."

Freeman on Judgments (5th Ed.) pp. 737-739, § 355, reads as follows:

"* * * In some instances courts have undertaken to decide questions not involved in the suit or action before them and to grant relief

therein; and their judgments have been assailed for that reason, and to the extent to which they departed from the matters embraced within the record they have been denied effect. A court is limited in its determination to the matters properly before it. Ordinarily it has no authority to pass upon questions not involved and in respect to which its jurisdiction has not been invoked. For courts cannot ex mero motu set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings. What is decided within the issues is coram iudice; anything beyond is void, unless the parties voluntarily try an issue outside the pleadings. A judgment outside the issues is not a mere irregularity, but is extrajudicial and invalid. The foundation of the rule that judgments of a court of competent jurisdiction are attended with presumptions of verity is the fact that the parties have been properly brought before the court and given an opportunity to be heard upon the matters determined. But the foundation falls, and the rule of verity ceases, when it appears that the judgment adjudicated matters beyond the issues and upon which the parties were not heard."

[6] Our own court has either specifically or inferentially decided the same issue many times. See *Bachman v. Sepulveda*, 39 Cal. 688, 690; *Cummings v. Cummings*, 75 Cal. 441, 17 P. 442; *Noonan v. Nunan*, 76 Cal. 44, 18 P. 98; *Carpentier v. Brenham*, 50 Cal. 552; *Long v. Superior Court*, supra; *Elmore v. Elmore*, 114 Cal. 516, 46 P. 458; *Simmons v. Simmons*, 166 Cal. 438, 441, 442, 137 P. 20; *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986, 29 A. L. R. 1399; and *Tonningsen v. Odd Fellows Cemetery Association*, 60 Cal. App. 568, 213 P. 710, where the court uses this language:

"Although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the particular decree and judgment, it may be collaterally attacked."

The court, in the latter case, quoted approvingly 15 *Ruling Case Law*, § 327, as follows:

"A judgment may be collaterally attacked where the court had jurisdiction of the parties and subject-matter of the action but did not have jurisdiction of the question which the judgment assumes to determine or power to grant the particular relief which it assumes to afford to the litigants."

The prayer for general relief will not aid the situation, for in such case the relief cannot exceed the issue presented by the pleadings or voluntarily submitted to the court and tried by it. Mr. Freeman again disposes of this question as follows (*Freeman on Judgments* [5th Ed.] p. 739, § 355):

"A prayer for general relief authorizes the court to grant any relief within the issues presented by the allegations of the bill of com-

plaint and a judgment, though departing from the specific relief asked, if within the facts pleaded, is not void for lack of jurisdiction. But a prayer for general relief does not confer jurisdiction to determine matters beyond the issues presented by the allegations or the case, especially where there is no answer or defense pleading."

[7] Here not only is the common-law action of detinue or trover not included within the pleadings or within the issues submitted to the court, but these issues themselves are inconsistent and could not both be made the basis of relief in one judgment, for in *Kelly v. McKibben*, 54 Cal. 192, 195, we have this language:

"The distinction between this action and one to recover damages for the wrongful conversion of personal property, is just as broad as that between the common-law actions of detinue and trover. A good pleader, under the Code, would never confound the two causes of action. One lies for the recovery of the property itself, with damages for the wrongful detention of it, the other for the recovery of damages for the wrongful conversion of it. In the former case the judgment must be for the possession of the property, if a delivery can be had, or for the value thereof, if a delivery cannot be had, with damages for the detention, in either case."

Again, in *Richards v. Morey*, 133 Cal. 437, 65 P. 886, we have this language:

"This is an action to recover possession of personal property which, it is alleged, the defendant took against the will of the plaintiffs, and now detains from their possession. But the finding shows that the property sought to be recovered was not in the possession of the defendant when the action was commenced, nor within his power to deliver, and therefore said finding would not have sustained a judgment in favor of the plaintiffs for the delivery of the buildings, or for the value of them in case a delivery could not be had."

While under our system there is but one cause of action and the name by which it is called is not determinative, nevertheless the principles that apply to conversion are distinct from those that apply to detinue or replevin, and the same set of facts that will support the one will not support the other. *Cal. Packing Cor. v. Stone*, 64 Cal. App. 488, 492, 222 P. 193.

[8] There are other reasons which forbid respondent to sue out an execution in this case. The findings specifically show that Evelyn Ellis Smith is not in the present possession of said stock and was not at the time said judgment was rendered; therefore it would be impossible for her to comply with any order requiring her to deliver such stock to plaintiff; hence, section 943 of the Code of Civil Procedure would be inapplicable. See *Rohrbacker v. Superior Court*, 144 Cal. 631, 78 P. 22; *Zappettini v. Buckles*, 167 Cal. 27, 138 P. 696; *Loudon v. Loudon*, 63 Cal.

App. 204, 218 P. 442; and *Halsted v. First Savings Bank*, 173 Cal. 605, 160 P. 1075.

[9] There is no serious contention that this judgment is within the provisions of section 942 of the Code of Civil Procedure, for in the case of an alternative judgment it has been specially held by this court that section 942 of said Code is inapplicable. *U. S. Fidelity Co. v. More*, 155 Cal. 415, 101 P. 302, and *Churchill v. More*, 7 Cal. App. 767, 96 P. 108. Since neither section 942 nor section 943 is applicable to the case, it must of necessity follow that section 949 of the Code of Civil Procedure applies, and the filing of a notice of appeal stays execution upon the judgment.

[10] There is a third insuperable difficulty standing between respondent and the right to an execution in this case. This judgment has two or three alternatives that must be complied with before a money judgment could in any case take effect: (1) There is a command to any defendant in whose name the stock may stand to indorse and deliver the certificates. (2) There is an alternative that in the event no one of the defendants can or will indorse the certificates and deliver them to plaintiff, then it is adjudicated that said certificates be canceled, with a mandatory direction that the corporation issue new certificates to plaintiff for the stock in question. (3) If for any cause, and only if, the certificates are not indorsed, or if the corporation does not comply with the mandatory decree, then a penalty of 50 cents for each share not obtained by plaintiff, or of \$408,316, if none are obtained, is assessed against the corporation and the two individual petitioners.

It will be seen that an execution such as the one issued in this case confers upon the sheriff judicial power to ascertain, rightly or wrongly, whether the previous alternatives have been complied with, and if he adjudges that they have not been complied with, he assumes the power to levy upon the real and personal property of defendants, two of whom do not claim any interest in the stock and none of whom have had their day in court on the matter adjudicated. A general execution where there was a previous alternative has been held improper. *Freeman v. Donohoe*, 188 Cal. 170, 174, 204 P. 593.

[11] Then, too, the judgment is not one giving the relief usually had in a suit for possession of personal property, but goes much further. It not only orders any defendant having possession of the stock to deliver it to plaintiff, but it directs in case of failure or inability to comply with this order that the corporation cancel the stock certificates upon its books in the name of whomsoever they may be and issue new certificates and deliver them to the plaintiff, and then, after failure to get both these sets of relief, is the money

judgment against any of the defendants to be operative, but not otherwise. It will thus be seen that the money judgment is clearly ancillary and incidental only to the mandatory directions to which it is subjoined. The following language in *Foster v. Superior Court*, 115 Cal. 279, 284, 47 P. 58, seems particularly appropriate:

"The injunction, in the judgment, against the interference with Smith's right to act as a director was but ancillary to the judgment determining that he had such right, and was merely incidental thereto. Although preventive in form, it was, in effect, mandatory, as it required Foster and the other directors to recognize Smith as one of their number, and to refuse to recognize Lilienthal. As that portion of the judgment declaring that Smith was elected was suspended by the appeal, the injunctive portion of the judgment, being merely incidental thereto, was also suspended, and the power of the court to enforce any portion of its judgment by inflicting punishment for its violation was stayed. An enforcement of this portion of the judgment would operate to carry the decree into effect, and would change the relative positions of the parties from those existing at the time the decree was entered, and might render a reversal of the judgment entirely ineffectual."

See, also, *Mark v. Superior Court*, 129 Cal. 1, 61 P. 436, *Schwarz v. Superior Court*, 111 Cal. 106, 43 P. 580, and *Stewart v. Superior Court*, 100 Cal. 543, 35 P. 156, 563. The appeal from these mandatory provisions of the decree will therefore necessarily stay execution upon the incidental and subordinate provisions thereof.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.

82 Cal. App. 426

In re McKELVEY. (Civ. 5286.)

District Court of Appeal, Second District, Division 1, California. April 19, 1927.

1. Attorney and client ~~61~~—Application of disbarred attorney for reinstatement should be denied, where applicant has defeated disbarment by practicing indirectly.

Application of attorney disbarred from practice for reinstatement should be denied, where it appears petitioner has been practicing indirectly, thus evading legal effect of disbarment.

2. Attorney and client ~~61~~—Employment of disbarred attorney as law office assistant at small salary, and giving advice to employer's clients on small matters, held not to prevent reinstatement.

In disbarred attorney's application for reinstatement, evasion of disbarment by indirect practice of law, preventing reinstatement held not shown by fact that attorney was engaged at small salary as office assistant in law office, giv-

ing advice to employer's clients on matters of slight importance.

3. Attorney and client  61—Attorney, disbarred for conspiracy to violate mails, held entitled to reinstatement after 10-year period on positive showing of present good character.

Attorney, 67 years of age, disbarred after conviction on charge of conspiracy to violate United States mails, held entitled to reinstatement after 10-year period, in view of positive evidence as to present good character, though offense involved moral turpitude.

Application by Charles S. McKelvey for reinstatement and admission to practice law. Report of the board of bar examiners adverse to applicant, and he moves for admission notwithstanding the report. Application granted.

See, also, 247 P. 1114.

William M. Morse, Jr., Dana R. Weller, and W. H. Anderson, all of Los Angeles, for petitioner.

Kenyon F. Lee, of Los Angeles, opposed.

CONREY, P. J. By order entered herein on May 17, 1926, the application of petitioner was referred to the board of bar examiners, with the direction that the board take evidence concerning the moral qualifications of the applicant; that the evidence taken, together with the findings of the board as such referee, upon the question whether or not the applicant is possessed of such moral qualifications as to entitle him to reinstatement, be filed herein. Matter of McKelvey (Cal. App.) 247 P. 1114. Thereafter a hearing was had and evidence produced, which is now on file, together with a report of the board of examiners. In that report the board presented a summary of the evidence, together with a finding or conclusion that "applicant is not of good moral character in the sense in which that phrase is used when applied to attorneys at law, and he is not a fit and proper person to be entrusted with the privileges of the office of an attorney at law."

After said report was filed, and pursuant to notice, the applicant presented his motion that the applicant be admitted to practice, notwithstanding said adverse report.

Passing without comment those parts of the notice of motion which only relate to procedure, the court will proceed directly to the principal ground of the motion, which, as stated, is "that all of the evidence adduced shows that applicant is of good moral character and competent to carry on the practice of law before the courts of this state." At the time when the order of reference was made the court in effect determined that the applicant possessed the necessary mental qualifications. The case is one in which an applicant heretofore disbarred

after conviction in a federal court on a charge of conspiracy to violate the mails of the United States, and who has remained thus disbarred for a period now approaching ten years, should now be readmitted, and permitted again to practice law in this state.

The petition for reinstatement filed herein on the 28th day of December, 1925, is accompanied by verified statements of numerous persons, which in various terms attest the present good moral character of the petitioner and declare the belief of those persons that, if restored to his right to practice law, the applicant will be a credit to the legal profession. The persons furnishing these statements include William F. Palmer, W. S. Knott, W. H. Anderson, Ward Chapman, and other members of the bar, who would not, we assume, make such statements unless they believed that the petitioner is a man of good moral character. It further appears that after his conviction petitioner received a pardon from the President.

The report of the board of examiners states that none of the letters or affidavits on file with the application were offered or received in evidence before the board. The matter was submitted to the board on the oral testimony of eleven witnesses on behalf of the petitioner and one witness, Mrs. Julia Westover, on behalf of the Los Angeles county bar association. The witnesses for petitioner were C. C. Sinclair, J. C. Porter, Charles J. Kelly, J. C. Frank, Arthur Lasher, C. S. Mauk, J. C. Everett Brown, Curt E. Miller, W. H. Anderson, William M. Morse, and Charles S. McKelvey.

The following statements of fact are taken from the summary made in the report of the testimony received by the board:

First. That, after his disbarment, the petitioner, who is a mining engineer, remained away from Los Angeles about 1½ years. Since his return he has been listed in the telephone directory as a mining engineer; the directory showing the same telephone number as the law office of J. Everett Brown. Petitioner has not paid rent to Mr. Brown, but has been employed by him to do work in his office in looking up matters of law and writing briefs in various actions.

Second. That 3 or 4 years ago petitioner worked in the law office of William M. Morse, Jr., a few months; then went to Imperial county for a year; and again returned to the office of Morse, where he has been occupied as an employee of Morse in the examination of questions of law, drafting of pleadings, and writing of briefs. Petitioner's name is on Mr. Morse's office door as "Charles S. McKelvey, Mining."

Third. That during the 10 months preceding the hearing before the board petitioner has been doing work of a legal character for

Mr. Morse, including the giving of advice to clients of Mr. Morse on legal questions.

Fourth. That about 5 years ago the petitioner had space in the office of Mauk, Walters & Morse. Since then he has had space in the offices with the above named and other attorneys at law, and has been occupied substantially as stated in the preceding paragraphs.

Fifth. That petitioner has been the teacher of the men's Bible class of a certain church, where he has been a regular attendant during the past 6½ years, and is one of its officers.

[1-3] It has been suggested as a reason for denying the application for reinstatement that the evidence tends to show that petitioner has been practicing law indirectly, and thus has been evading the legal effect of his disbarment; and that this constitutes such misconduct that it shows his unfitness to be admitted to practice law. If it were true that he has been in fact acting as an attorney and counselor at law, or by his conduct has been attempting to do under cover that which he could not lawfully do at all, then, of course, his application should be denied. But the evidence wholly fails to establish the fact of such evasive conduct. It does not show, or tend to show, that the applicant has been obtaining clients or has retained his former clients, or has been serving them with the connivance and assistance and through the use of the names of the lawyers in whose offices he has been employed. The testimony is that he has been paid a small salary for his services as office assistant, but there is nothing to indicate that he was so paid in any other capacity than that of a clerk, or that his compensation was intended to be, or was, a substitute for fees which otherwise he might have received. The statement that petitioner has been "giving advice to clients of Mr. Morse" is based upon incidental matters of such slight importance that they should not be regarded as constituting an attempt to practice law. If there were any evidence tending to establish such an attempt to evade the consequences of the petitioner's disbarment, we should not only deny the present application, but we would not hesitate to call attention to such transactions as indicating misconduct upon the part of any attorney at law who thus assisted the applicant to conduct himself in violation of law. It cannot be denied that the offense of which the applicant was convicted, and on account of which he was disbarred, was an offense involving moral turpitude of a very serious character. The principal question presented is a test of the position which the court should take with regard to the permanence of disbarments. On the one hand, the important trusts involved in the practice of law, and

the necessity for upholding high moral standards in the profession, forbid the court to yield to the pressure of sympathy for one whose misconduct has placed him in an unfortunate situation. On the other hand, a decent regard for justice should leave open the door of opportunity for men who have reestablished their integrity and the evidence of it by a long period of good conduct after the commission of a serious offense. In another case, this court endeavored to express the rule as follows:

"The petition for restoration should be granted when, and only when, the court upon the case as presented to it is convinced by positive evidence that the applicant has established, and now possesses, that good moral character which will make of him a trustworthy and honorable member of the bar." *Matter of Nisbet* (Cal. App.) 246 P. 120.

This petitioner, now 67 years of age, has remained under the ban of disbarment for 10 years. We appreciate the careful consideration given to this matter by the referees, as well as the importance which they attach to the proceeding in its possible effect upon the high standards which should be upheld by the legal profession. Nevertheless, upon the record here, we feel compelled to the conclusion that the petition should be granted.

It is ordered that the petitioner, Charles S. McKelvey, be and he hereby is restored to the rights and privileges of an attorney and counselor at law, and is authorized to practice in all courts of this state.

We concur: HOUSER, J.; YORK, J.

82 Cal. App. 459

PEOPLE v. SHEASBEY. (Cr. 1364.)

District Court of Appeal, First District, Division 2, California. April 21, 1927.

1. Robbery ☞1—Felony element in robbery is not supplied solely by use of force or fear (Pen. Code, § 211).

Felony element in robbery, as defined in Pen. Code, § 211, is not supplied solely by use of force or fear, since force and fear are not always unlawful or felonious.

2. Larceny ☞3(1)—Intent to steal is essential element of "larceny."

Intent to steal or animus furandi is an essential element of larceny.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Larceny.]

3. Robbery ☞1—Larceny is essential element of "robbery."

Larceny is an essential element of "robbery."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Robbery.]

4. Robbery ⇐4—Ownership or right of possession of property taken must be in some one other than defendant to constitute "robbery."

It is essential to crime of robbery that ownership, or at least right of possession, of property taken, must be in some one other than defendant.

5. Robbery ⇐3—Seller taking property under claim of right of possession, without intention of stealing it, was not guilty of robbery.

Where seller took property from buyer under claim of right of possession, and not with intention of stealing it, he was not guilty of robbery.

6. Criminal law ⇐29—Conviction for robbery and kidnaping for taking property and taking possessor to town with property was not conviction of two crimes for same series of acts (Pen. Code, §§ 207, 211).

Conviction of crimes of kidnaping, under Pen. Code, § 207, and robbery, under section 211, for taking property under claim of right of possession, and binding possessor of property and taking him to town with goods, was not conviction of two crimes for same series of acts, since taking of property sufficient to constitute robbery was done before trip to town was commenced, and kidnaping commenced with transportation to town.

7. Criminal law ⇐390—Objections to questions regarding accused's intent regarding acts constituting alleged robbery held improperly sustained.

Objections to questions asked of defendant as witness with regard to his intent regarding acts constituting alleged robbery held improperly sustained.

8. Criminal law ⇐390—Sustaining objection to question calling for motive of defendant in kidnaping prosecutor held not error.

In prosecution for kidnaping, sustaining objection to question to accused, "What was your reason for taking Mr. Brown on the truck with you to Riverdale?" held not error, since question called for motive or state of mind of accused only.

9. Criminal law ⇐390—Where intent is element of crime, defendant may give direct testimony on that fact.

Where intent, state of mind, or belief of defendant is an element of crime, he is permitted to give direct testimony on that fact.

10. Kidnaping ⇐1—No state of mind or belief is part of crime of "kidnaping," nor constitutes, by itself, a defense to charge (Pen. Code, § 207).

No state of mind or belief is a part of crime of "kidnaping," as defined in Pen. Code, § 207, nor constitutes by itself a defense to charge, and, where no circumstances are proven which would constitute a lawful excuse, no intent is necessary, except intention of doing acts denounced by statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Kidnaping.]

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

G. W. Sheasbey was convicted of robbery and kidnaping, and he appeals. Reversed in part, and affirmed in part.

M. F. McCormick, of Fresno, for appellant. U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KOFORD, P. J. Defendant appeals from a judgment of conviction of robbery and kidnaping. The facts out of which the charge grew are briefly as follows: Defendant sold the complaining witness J. T. Brown two pumps with operating machinery and an electric range, which were delivered and installed upon the ranch and premises of the latter. The sale was made and evidenced by a written lease contract requiring installment payments to be made by the purchaser. Trouble and disputes arose between the two men in respect of promises alleged to have been made by the defendant as to the character of installation and in respect of the failure of the buyer to make the installment payments as they became due. These disputes found their way into the justice's court and the superior court. Defendant sought legal advice, and finally came to the conclusion that he had the legal right to go upon the premises of Brown and retake the range, pumps, and machinery. The lease contract contained the provision that, should the buyer fail to comply with any covenant or condition of the contract, "the seller may retake said personal property as owner thereof." It also had the customary provision found in such lease contracts that the title and ownership of the property should remain in the seller until payment (or payment of the notes) had been made in full. To retake the property defendant selected Raisin Day, thinking, so he said, that the Browns would not be home. Defendant, with a truck and several men, went to the ranch to carry out his recapture operations. But Brown and his wife were at home. Defendant told Brown that he had come to collect for the personal property. Brown ordered defendant and his helpers off the premises with threats, and started to proceed rapidly towards his dwelling house. Fearing Brown was going to secure a firearm, defendant ordered his men to seize and bind him. Brown and his wife were then both seized and bound with cords and placed in the shade of trees under guard of some of the men, while others removed and placed upon the truck the personal property in dispute. After this the wife was released, but Brown, with his hands tied, was compelled against his will to go with the party in the truck to town, where he was released upon arrival.

It is the contention of the appellant that the evidence is insufficient to constitute the

crime of robbery, because the defendant did not take the property *animo furandi*, or with intent to steal, but under claim of right of possession and of ownership. Respondent has not advanced any argument in support of the conviction of robbery, but has submitted this branch of the case upon the opening brief of the appellant. Defendant offered several instructions differently worded, but all generally to the effect of informing the jury that, if it found from the evidence that the defendant took the property openly and avowedly, believing in good faith that he had the right of possession, he should not be found guilty of robbery. This was the sole defense of the defendant. The court refused to give any of such instructions. Rulings upon evidence as well as the rulings upon the instructions refused and given to the jury by the trial court were apparently governed by the theory that the intent to steal was either nonessential or that defendant's intent could only be established by the circumstances connected with the offense as stated in Penal Code, § 21, and that defendant's claim of ownership and right of possession was immaterial. The trial and conviction of robbery were had upon this theory.

In Bishop's New Criminal Law, § 849, the author says:

"* * * One who takes another's goods to compel him, though in an irregular way, to do what the law requires him to with them—namely, to pay his debt—is on no legal principle a felon, though doubtless he is a trespasser. * * * A trespass is not theft, except when done with felonious intent. And he who carries away a thing openly, and not clandestinely, to enforce a just claim, not for fraud, not to injure the owner, but to compel him to do what the law requires, is not a thief, whatever the extent of the wrong viewed otherwise."

[1-4] In the Code definition of robbery it is stated:

"Robbery is the felonious taking of personal property * * * by means of force or fear." Pen. Code, § 211.

The "felonious" element is not supplied solely by the use of force or fear. Force and fear are not always unlawful or felonious. The intent to steal or *animo furandi* is an essential element of larceny. In re Bayles, 47 Cal. App. 517, 190 P. 1034; People v. Eastman, 77 Cal. 171, 19 P. 266; Burke v. Watts, 188 Cal. 118, 125, 204 P. 578; Wharton's Criminal Law (8th Ed.) 848, 853, 884. Larceny is an essential part of robbery. People v. Nelson, 56 Cal. 77; People v. Jones, 53 Cal. 59. It is essential to the crime of robbery that ownership, or at least the right of possession, of the property taken, must be in some one other than the defendant. People v. Ammerman, 118 Cal. 23, 50 P. 15; People v. Vice, 21 Cal. 345; People v. Hale, 64 Cal. App. 523, 530, 222 P. 148.

[5] We conclude that the part of the judg-

ment convicting the defendant of the crime of robbery should be reversed; the defendant having taken the property under claim of right of possession, and not with the intention of stealing it.

[6] Appellant attacks the part of the judgment convicting of the crime of kidnaping upon two grounds. One is that all of the acts constituting the charge of kidnaping were included in the crime of robbery, and that, therefore, the judgment convicts the defendant of two crimes for the same series of acts. He urges that the force used in taking the personal property was identically the same force used in the carrying away of Brown. With this we are unable to agree. The personal property was taken from Brown's possession sufficiently to constitute the element of "taking" in the crime of robbery, before the trip to town was commenced. The "taking and carrying" of Brown in violation of the section defining the crime of kidnaping commenced when his transportation to town commenced. Penal Code, § 207, reads in part as follows:

"Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another * * * county, or into another part of the same county, * * * is guilty of kidnaping."

[7, 8] Appellant assigns as error the court's ruling sustaining objections to questions asked of the defendant as a witness with regard to his intent. Most of these questions related to the acts constituting the alleged robbery group of facts. As to them the defendant should have been permitted to testify to his intent in doing the acts proved. But, so far as these rulings relate to the charge of kidnaping, the record shows the court sustained an objection to only the one question: "What was your reason for taking Mr. Brown on the truck with you to Riverdale?" The record of the trial shows the question did not call for the statement of any fact which might have made the taking lawful, such as a warrant, consent, or the like. If any such purpose was in the mind of the defendant's attorney, unobjectionable questions could have brought out such facts, without using such expressions as "why" or "for what reason." No suggestion of any such facts was or has been made. The question called for, and the record shows that it called for, the motive or state of mind of the defendant only.

[9, 10] Where the intent, state of mind, or belief of the defendant is an element of the crime, he is permitted to give his direct testimony on that fact. 16 Cor. Jur. 565; People v. Farrell, 31 Cal. 576, 582; People v. Mul-laley, 16 Cal. App. 44, 116 P. 88 (larceny); People v. Overacker, 15 Cal. App. 620, 115 P. 756 (murder, and facts showing intent); People v. Eastman, 77 Cal. 171, 19 P. 266 (larceny). But no state of mind or belief is a

part of the crime of kidnaping nor constitutes by itself a defense to the charge and, where no circumstances are proven which would constitute a lawful excuse, no intent is necessary, except the intention of doing the acts denounced by the statute. The purpose or motive of the taking and carrying away has been held to be immaterial in prosecutions for kidnaping. *People v. Fick*, 89 Cal. 144, 150, 26 P. 759; *People v. Bruno*, 49 Cal. App. 372, 193 P. 511.

In the *Fick* Case facts offered in evidence by the prosecution were held material to show the intent of the defendant, because it was an issue in that case as to whether the defendant carried away the person under a warrant which he held, or otherwise. The warrant was the defendant's defense, and in rebuttal certain facts were considered to show that the officer was not making an arrest in good faith followed by an escape, but that he used the warrant as a subterfuge. There the defense was a lawful warrant plus intent to execute it in good faith. Here nothing is urged as a defense except state of mind or motive alone.

The part of the judgment convicting defendant of the crime of robbery is reversed, and the part convicting him of the crime of kidnaping is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

82 Cal. App. 389

PEOPLE v. McAFEE. (Cr. 1444.)

District Court of Appeal, Second District, Division 2, California. April 18, 1927.

1. Criminal law §1023(12)—Order denying motion in arrest of judgment is not appealable.

An order denying a motion in arrest of judgment is not such an order from which appeal may be taken.

2. Criminal law §673(2)—Admitting photograph showing cloth claimed to have been used after intercourse only as additional photograph of place of offense held not erroneous (Pen. Code, § 288).

Where in prosecution for incest and lewd and lascivious conduct, in violation of Pen. Code, § 288, prosecuting witness testified to using cloth to wipe away the blood after intercourse, admission of photograph showing cloth lying on ground near bushes pointed out as place where offense occurred held not erroneous, in view of judge's statement showing it was received only as additional photograph of locality.

3. Criminal law §404(4)—Testimony of finding cloth claimed to have been used after intercourse as preliminary to its offer in evidence held not erroneous (Pen. Code, § 288).

In prosecution for incest and for lewd and lascivious conduct in violation of Pen. Code, §

288, permitting witness to testify of finding cloth claimed to have been used after intercourse at place shown by photograph held not erroneous, since such identification was necessary preliminary to offering cloth in evidence.

4. Criminal law §671—Discussion before jury relative to admissibility of handkerchief claimed to have been used after intercourse, and found four months later, held not erroneous under circumstances (Pen. Code, § 288).

In prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, discussion before jury relative to admissibility of handkerchief claimed to have been used after intercourse, and found four months later, held not to constitute ground for reversal, in view of court's cautious treatment of matter and his pointing out the lack of identification and its remote connection with case followed by express admonition to disregard all testimony bearing on handkerchief.

5. Criminal law §651(2)—Permitting prosecutrix to look about alone to locate place of incestuous intercourse in connection with jury's visit held not erroneous (Pen. Code, §§ 288, 1119).

In prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, permitting prosecuting witness, in response to suggestion of prosecutor, to look about alone to locate place of offense in connection with visit of jury, as authorized by section 1119, held not erroneous.

6. Criminal law §1170(2)—Excluding evidence of divorce from former wife for adultery, to show her hostility as witness, held not erroneous when divorce otherwise shown (Pen. Code, § 288).

In prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, wherein defendant's former wife had sworn to warrant, and defendant claimed she had instigated prosecution, excluding evidence that he had secured divorce from her on ground of adultery held not erroneous, when purpose of showing hostility was accomplished by allowing evidence that divorce was granted to defendant.

7. Incest §13—Testimony relative to defendant's former wife, claimed to have instigated incest prosecution, having gonorrhea, held inadmissible as bearing on disease contracted by prosecuting witness (Pen. Code, § 288).

In prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, wherein it was shown that prosecuting witness had contracted gonorrhea, testimony that defendant's former wife, claimed to have instigated prosecution, had such disease and that divorce was based thereon, held inadmissible, since definite origin of disease, if attributable to defendant, was immaterial.

8. Criminal law §1170½(1)—Sustaining objection to question without striking negative answer, held harmless (Pen. Code, § 288).

In prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, sustaining objection to question asked de-

defendant's divorced wife alleged to have instigated prosecution relative to bringing similar charges to cause defendant trouble, without striking negative answer thereto, *held* harmless.

9. Criminal law ⚡413(1)—**Testimony of defendant's conversation with divorced wife, claimed to have instigated incest prosecution, after acquittal on charge of offense against her sister, held properly excluded as self-serving (Pen. Code, § 288).**

Where, in prosecution for incest and lewd and lascivious conduct, in violation of Pen. Code, § 288, officer testified that defendant told him, after arrest, that divorced wife was to blame therefor, attempt to question defendant corroborating such testimony relative to conversations with divorced wife after acquittal on charge involving offense against her sister, *held* properly excluded, since declaration testified to was merely self-serving and did not justify additional testimony thereon.

10. Witnesses ⚡268(2)—**Defendant's divorced wife cannot be questioned as to knowledge of family relation that would cause child to accuse father of incest (Pen. Code, § 288).**

In prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, objection to questions asked defendant's divorced wife, claimed to have instigated prosecution, relative to knowledge of family relations which would cause prosecutrix to bring charge against defendant, *held* properly sustained.

11. Criminal law ⚡633(1)—**Court may not treat assault on defendant outside of courthouse as attempt to obstruct justice.**

Where assault was made outside of courthouse on defendant in prosecution for incest and for lewd and lascivious conduct, by husband of defendant's divorced wife claimed to have instigated prosecution; it not having occurred in presence of court, and no foundation having been laid for punishment as contempt elsewhere, court was not empowered to treat attack as attempt to obstruct justice.

12. Incest ⚡13—**Evidence of attitude of prosecutrix towards stepmother claimed to have instigated incest prosecution held properly excluded (Pen. Code, § 288).**

In prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, objection *held* properly sustained to question asked defendant relative to attitude of prosecuting witness towards stepmother, claimed to have instigated prosecution, as being ambiguous and not germane to issue.

13. Incest ⚡13—**Evidence as to carrying notes between prosecutrix and boys to show improper associations held inadmissible in absence of showing knowledge of contents (Pen. Code, § 288).**

In prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, defense testimony by schoolmate relative to carrying notes between prosecuting witness and boys for apparent purpose of showing improper association *held* inadmissible, in absence of showing knowledge of contents.

14. Incest ⚡1—**Lewd and lascivious conduct, though ultimately relating to offense of incest, constitutes separate "crime" (Pen. Code, § 288).**

Lewd and lascivious conduct preceding incest, though ultimately relating to such offense, constitutes separate "crime" under Pen. Code, § 288.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Crime.]

15. Criminal law ⚡829(14)—**Refusing instructions on disregarding stricken evidence and misconstruing objections held not erroneous when covered by given charge (Pen. Code, § 288).**

Refusal in prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, to give instruction to effect that jury were to disregard matters ruled out and not to construe objections as attempt to suppress truth, *held* not erroneous, in view of given instruction answering all purposes as requested.

16. Criminal law ⚡1171(1)—**Alleged misconduct of prosecutor in attempt to introduce evidence and going outside record in argument held not to require reversal.**

In prosecution for incest and for lewd and lascivious conduct, in violation of Pen. Code, § 288, alleged misconduct of prosecuting attorney in respect to persistent effort to introduce certain testimony and going outside record in argument, *held* not sufficiently reprehensible to require reversal.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Robert McAfee was convicted of incest and for lewd and lascivious conduct, and he appeals. Affirmed in part, and in part reversed.

O. E. Mark, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Dep. Atty. Gen., for the People.

JOHNSON, Justice pro tem. The defendant was charged with the crime of incest with his daughter Melba, a child of 11 years, on two occasions, the first about the beginning of April, 1926, the second on June 19, 1926; and also with the commission of lewd and lascivious conduct on each occasion, in violation of section 288 of the Penal Code.

The information on which the defendant was tried contained four counts; the first and third relating to the occasion in April, the second and fourth to that in June. He was convicted on all four counts; but the Attorney General concedes, justly, that the evidence does not support the conviction under the fourth count—that of lewd and lascivious conduct in June—and that the conviction under that count should be set aside. Attention will therefore be confined to the grounds urged by defendant for a new trial as to the other three counts.

[1] In addition to his appeal from the

judgment of conviction and the order denying his motion for a new trial, defendant has attempted to include an appeal from an order denying a motion in arrest of judgment. Such order is, however, not an appealable order, and hence needs no further consideration.

Upon the trial the child testified at considerable length. It appears that the defendant had been twice married, and that the little girl was the elder of the two children of defendant's first marriage, but had been living with the defendant and his second wife for about a year before the acts charged. There had been a divorce between defendant and the child's mother, who had also remarried, and who at the time of the trial was known as Mrs. Nancy Morgan. According to the girl's story, the defendant about the beginning of April, 1926, invited her, upon her return from school one afternoon to take a ride with him in his automobile to a rabbit farm near San Diego, in order to procure some rabbits to bring home. When they reached a remote spot, she testified that they alighted, and while sitting in a clump of bushes her father, after certain caresses, used his hands upon her in a lascivious way, and afterwards caused her to submit to sexual embraces, during which bleeding occurred. She testified further that to wipe away the blood a handkerchief or cloth produced by her father was used, and was then thrown upon the ground near by. On the occasion in June, the child said that the occurrence took place in her father's automobile near the spot visited in April. Upon her return home after this trip, the suspicion of her stepmother being aroused, as Melba testified, by spots of blood upon her skirt, the child related what had happened. In July following a medical examination showed that she had at some time contracted gonorrheal infection.

Upon the appeal, stress is laid for the most part upon asserted errors in respect of the evidence. Six of defendant's specifications of such errors deal with the introduction of photographs of the alleged locus and the effort of the district attorney to introduce a handkerchief or cloth such as was referred to in the child's testimony. These particular specifications can be advantageously dealt with together.

[2] The photographs were taken and identified by a photographer, Samuel S. Williams, who visited the scene on August 5, 1926, in company with the child and M. Quitsow, an assistant investigator in the district attorney's office. The photograph thought to be especially prejudicial to the defendant was one admitted in evidence as People's Exhibit No. 6, showing the cloth lying on the ground near bushes pointed out by the child—the same cloth which during the examination of other witnesses in court was presented to view, but not received in evi-

dence. In admitting the photograph showing the cloth, the court said:

"It may not have much significance, but it is another photograph of the vicinity in which it is claimed that one of these offenses took place; and, whether the presence or absence of a cloth there is of any significance or not, I think perhaps the picture should be received."

The statement of the judge made it clear to the jury that the photograph was introduced merely as an additional picture of the locality; and, moreover, at a later stage of the trial the jury, properly accompanied, was permitted to view the premises designated as the scene of the offenses charged. In view of the subsequent action of the court, when the cloth itself was offered and excluded, no prejudice can have been occasioned by the mere introduction of the photograph. The same may be said of a photograph of a spot called "Dead Man's Hole," which does not appear to have had any bearing on the case.

[3] As to the cloth, it is contended that the court erred in allowing the witness Quitsow to testify that, on his visit to the spot in August with the child and the photographer, he found at the point indicated in the photograph the handkerchief and some rags produced in court, and had kept them ever since in his custody at his office until they were delivered at the time of the trial to the district attorney, and that their condition had remained unchanged. This identification was a necessary preliminary to the offer of the handkerchief in evidence, and there was no error in the allowance of such testimony.

After the handkerchief had been thus identified, Dr. J. Francis White, a bacteriologist, was called to the stand. It developed that he had subjected the handkerchief to a laboratory test in order to determine the characteristics of certain discolorations which the district attorney described as due to smears of blood and spermatozoa. After rather a lengthy colloquy in the presence of the jury, the court excluded both the handkerchief and the testimony of the doctor. At the same time the court instructed the jury to disregard all the evidence in reference to the handkerchief. Appellant insists, however, that the court was tardy in its ruling, and that the discussion heard by the jury was grievously prejudicial, and constitutes ground for reversal. It is best, therefore, to quote at length from the record:

"Q. (by the Prosecutor): Did you subject that handkerchief, or any spots or stains upon that handkerchief, to any bacteriological experiment?"

"Mr. Mark: Just a moment before you answer, Doctor. Objected to as incompetent, irrelevant, and immaterial, no proper foundation laid, assuming an investigation or examination not in evidence, having no connection with the case."

"Mr. Johnson: Now, if your honor please, there has been testimony from the prosecutrix that at this time there was a handkerchief used."

There was a handkerchief used or piece of cloth. She described it. She could not identify this particular cloth, but she did state there was a handkerchief used there, white, of a similar character as the object that was exhibited. She made the best identification that she could under the circumstances. She did state that she used that handkerchief, and that there was blood on her person at that time, and that she wiped herself on it. She was wiped with that handkerchief. Now, then, we follow that up by showing that some months afterwards, within a radius of three feet of where that act took place, a handkerchief was found with certain stains upon it. Now, your honor, I propose to follow this up by showing that this witness, an expert in that particular field, a bacteriologist, with years of experience, subjected that handkerchief to a certain test, subjected certain spots there to all of the tests that are known to science to-day, and that those spots upon that handkerchief are blood. Now, isn't that testimony material, relevant, competent? The mere fact that it was found there months afterwards—we propose to follow that up by the testimony of this physician, this expert, to show that it does not make a particle of difference, under certain circumstances, if an object of that character were exposed to the elements, these things would remain there yet, these signs, after they are subjected to the experiments that are known, that science has led us to to-day, they can still be detected. That simply goes, of course, to the weight of the testimony, and not to its admissibility. If this was simply a handkerchief found here with spermatozoa on it, the human germ, seed, perhaps it would not be so strong. But here is the testimony of this prosecutrix. We have her testimony that she had never been violated before, that there was a penetration of her person on that spot for the first time, and that she had a hemorrhage. We follow that up by showing that on that spot, within three feet, we find a handkerchief with spots on it. These spots are subjected to a test known to science. And we have the expert testimony of a man that the spots show blood. Isn't that competent for the jury to determine? I say that the length, the duration, of time that intervened goes to the weight of the testimony, not to its admissibility. It is a question for this jury to determine, whether or not that was the handkerchief that she wiped herself with that time after she had been violated in the manner and form as she described in her testimony.

"Mr. Mark: That would be very well, your honor, if we could follow that up with any known test. If the doctor can answer two questions for me, I will remove my objection. I want to ask him if he can tell whose blood it was and whose spermatozoa it was, and we will subject this man here, this defendant, to examination of all his vital fluids to determine that. If that can be done, I will withdraw my objection.

"Mr. Johnson: That is the most absurd suggestion I have ever heard in a court of justice.

"The Court: I think this is too remote. I think the testimony shows that, if this handkerchief were left there at all, it was along about the 1st of April of this year.

"Mr. Johnson: Yes, your honor.

"The Court: And the testimony tends to show that it was found along about the 5th of August, or the early part of August, which would

be four months later. After seeing that country, and the litter of things that were there, papers and cloths and tin cans and everything else, I think it is altogether too remote to be received in evidence.

"Mr. Johnson: Will your honor permit me to take a recess for a time. I think I have one or two authorities on the proposition, if your honor please.

"The Court: Of course, where it is a matter of remoteness, it is largely in the discretion of the court. In addition to that, there is a lack of identification.

"Mr. Johnson: Your honor, the authorities hold remoteness must be an extreme proposition. It must go to such an extent that there is not the remotest possibility of there being any connection between them. The remoteness under all the circumstances goes to the weight of the evidence and not to its admissibility. That's a settled rule in this state, your honor.

"The Court: Yes; that is true.

"Mr. Johnson: And I am satisfied I can show your honor one or two authorities where matters which would ordinarily be considered very remote from the issue involved have been held admissible by the Supreme Court of this state. I consider this testimony one of the most vital pieces of testimony in this important criminal prosecution, your honor. Here is the sworn testimony with reference to where this thing was found.

"The Court: Four months later.

"Mr. Johnson: Yes, your Honor; the peculiar significance of it is that there was testimony from this prosecutrix that she wiped herself with it.

"The Court: No; not with *it*. There is no testimony to that. If there were, I should admit it. That is, when you say 'it,' you refer to this particular piece of cloth or handkerchief.

"Mr. Johnson: That she used it? I so understood the testimony, your honor.

"The Court: She used *a* cloth.

"Mr. Johnson: That she used *a* handkerchief; yes.

"The Court: Or a handkerchief. If you had identified it as being the one that was there on the 1st of April, then it would not be nearly as remote.

"Mr. Johnson: Yes; but it is almost impossible to identify a handkerchief unless you have got a monogram upon it, or something of that sort.

"The Court: That is the difficulty.

"Mr. Johnson: He said it was a white object and had the same general appearance of this handkerchief.

"The Court: There are many, many things that could make it less remote. If that were way off from human habitation, where very few people went, or anything of that sort; but we all saw the nature of the country there.

"Mr. Johnson: Yes, your Honor, we did. We all saw that little hollow place there, that sort of cave in those trees, your honor; and this handkerchief is found, as the witness Quitsow has said, within an area of three feet. That was about the only object that was in there.

"The Court: I think there perhaps is some discrepancy in the testimony as to where that was found. One witness testified to three feet, but I think another testified it was much fur-

ther than that. But, taking into consideration the nature of the country, taking into consideration the fact that this was not identified at all as the handkerchief that was used there, taking into consideration the nature of the country in general, I think it is altogether too remote to be admissible. As has been suggested here, if this could be identified as the blood of the defendant, or something of that sort, that would be entirely different.

"Mr. Johnson: I do not know how we are going to identify the blood on this handkerchief as the blood of the accused. It is humanly impossible.

"The Court: Surely; but it does not necessarily follow that I must admit it because it is impossible to get any better evidence, the mere fact that it is a difficult thing to prove.

"Mr. Johnson: Your honor, I feel this matter is of such importance that I want to—

"The Court: We will not take any more time for it now. I will sustain the objection for the present. If you find any authority between now and to-morrow morning that you want to submit to me, I will be glad to see it.

"Mr. Johnson: Yes, your honor.

"The Court: But ordinarily the different circumstances make cases so different that it is a little difficult to find an authority which would be a parallel case to this. The objection sustained.

"Mr. Johnson: I will try to find some authority on it before to-morrow morning.

"Mr. Mark: Then, your honor, may we repeat our request that, since this handkerchief in question has been paraded before the jury with hints and insinuations—

"Mr. Johnson: What kind of insinuations?

"Mr. Mark: Hints and insinuations, they be instructed to disregard it?

"The Court: Yes; the jury is instructed to disregard all the testimony with reference to this handkerchief in connection with this case."

[4] The court's cautious treatment of the matter could have left no doubt in any juror's mind that the court deprecated the evidentiary value of the handkerchief. Again and again the court pointed out that there was no identification of the handkerchief produced with any handkerchief actually used, while the circumstances under which the handkerchief was found, together with the lapse of four months' time, left its connection with the case too remote to justify its use as evidence against the defendant. The remarks of the court during the lively interchange of counsel, followed by the express admonition to cast out all testimony bearing on the handkerchief, cannot have failed to impress upon the jury that they were to banish from their minds all references to the handkerchief. Under these circumstances, the zeal of the district attorney in endeavoring to convince the court of the propriety of the evidence offered cannot be deemed ground for reversal.

[5] In connection with the visit of the jury to the premises mentioned in the child's testimony, complaint is made that there was some private conversation between the little girl and the prosecuting attorney. The attor-

ney for the defendant, assuming some undue suggestion to have been made, insisted that the prosecutor was coaching the witness. The prosecutor explained, however, that he was merely asking the child something about the roadway, and then suggested that she be allowed to alight from the bus occupied by the party and move about by herself, so as better to locate the spot to which testimony had been directed. In response to a question by the judge, the child said she thought it would help her if she could look about alone, and this she was then permitted to do. The circumstance complained of could not have done defendant any harm. The viewing of the location was not conducted strictly in accordance with section 1119 of the Penal Code, but no objection based on nonconformity with the section was made, nor was any prejudice suffered.

[6] Another set of specifications of error deals with the exclusion of certain evidence bearing upon the family relations between defendant and his first wife, Mrs. Nancy Morgan, and the relations also between the child and the defendant's second wife, Mildred McAfee. Defendant, insisting upon his innocence, contended that the charges against him were instigated by his former wife, the child's mother, who had sworn to the warrant for his arrest. In the examination of Mrs. Morgan, there was an effort on two occasions to show that seven years previously the defendant had obtained a divorce from her on the ground of her adultery. While the court in each instance sustained an objection to inquiry concerning the grounds of the divorce, and each time struck out the answers of the witness when, notwithstanding the rulings, she answered the question affirmatively, yet, in response to other questions, the fact of a divorce in favor of the defendant was brought out by his attorney. The purpose of the questions was to show hostility of the defendant's former wife. In connection with considerable other testimony directed to the same end, defendant's purpose was sufficiently accomplished by the allowance of evidence of a divorce granted to the defendant, without retaining in the record Mrs. Morgan's admission of the specific grounds.

[7] While the defendant and his first wife were living together, according to the testimony given by her, the defendant told her that he had contracted gonorrhea. This was denied by defendant, and there was an attempt to show that the wife herself had had venereal disease and that the divorce in the husband's favor seven years previously was based on that circumstance. Such evidence was excluded, and likewise evidence designed to prove from clinical and police records that Mrs. Morgan had been treated for venereal disease. She herself admitted that while the wife of defendant she "did take treatments to

keep from getting it." Though the presence of some old infection in the defendant was an issue in the trial, the defendant in his testimony told his own story about his relations with his former wife, and produced also as a witness Dr. Compton, who stated that an examination made by him of the defendant in August, 1926, showed no trace of venereal disease or of prior infection. If infection in the daughter was attributable to a diseased condition of the defendant in the year 1926, the definite origin of such condition was not material, and the court properly kept the trial within the bounds of the real issue between the people and the defendant.

[8] Again, while Mrs. Morgan was under cross-examination, she was asked by defendant's attorney whether she had been the complaining witness in a former prosecution of defendant for some offense involving Mrs. Morgan's sister. In the course of this inquiry this question was put: "As a matter of fact, Mrs. Morgan, whenever you have wanted to cause the defendant here trouble, either in your married life or otherwise, you brought some charge like this against him, have you not?" The answer was: "I certainly have not." The district attorney objecting after the answer, the court sustained the objection, but did not strike out the answer. Clearly the ruling was harmless.

[9] Officer John A. Kane, who arrested defendant under the warrant herein, testified that on the way to the station defendant had said that his former wife was to blame for the arrest, and that a couple of years previously she had tried "to frame him" in some matter affecting her sister. Later, when defendant was a witness in his own behalf, he corroborated the testimony so given by Kane; but, when effort was made to question him about details of conversations between himself and Mrs. Morgan after he was acquitted of the offense charged to have been committed against her sister, the court sustained an objection on the ground of immateriality. Defendant's declaration to Kane as well as his own testimony on the same subject were purely self-serving, and not really admissible in evidence. The court was therefore right in closing the door to additional testimony of like sort.

[10] Error is also predicated on the sustaining of an objection to the question put to Mrs. Morgan: "Do you know of anything in the family relations that might cause Melba to bring a charge against her father of this nature without foundation?" Objection having been sustained, the inquiry was not pursued further. There was no error in the ruling.

During an overnight continuance of the trial, the defendant, while outside of the courthouse, was attacked by the husband of Mrs. Morgan, his face bruised, and his lip

cut. In a conference the following morning in the judge's chambers, defendant's attorney charged that Mrs. Morgan had been threatening witnesses, and had threatened many times to have her husband beat the defendant unless the latter turned over to her certain property. It was further stated that in the police court that morning Morgan had been fined \$50, with the alternative of 25 days' confinement in jail. The discussion in chambers ended with the following understanding between the court and counsel:

"Mr. Mark: Then may the record show that the counsel for the defendant requests the court for permission to explain the presence of a wound upon the face of the defendant, which was not there yesterday, and which appears to be there this morning, in order to relieve him from any implication of wrongdoing that might get into the minds of the individual jurors? Also let the record show that counsel for the defendant requests the court for permission to state the reasons why certain witness, to wit, Joe Martinez and Augustine Brown, are not to be called to the stand, although referred to in previous testimony; the reason for their not being called being that threats against their lives have been made by the present husband of the ex-wife of the defendant? I presume the request will be denied.

"The Court: I will have to make that ruling—you will have to make your offer, ask questions, not make any statement, and I will have to make my ruling out there.

"Mr. Johnson: We resist the application, of course.

"Mr. Mark: Just how far, now, do you want me to go, for the purpose of the record? That is all. I want to follow the suggestion of the court.

"The Court: You may ask any question, but not make any offer, any statement, as to what you expect to prove.

"Mr. Mark: You mean ask questions of the court?

"The Court: No; ask questions of the witness.

"Mr. Mark: I see. Then I will put the young fellow on the stand. In the meantime I am serious about that proposition of protection.

"The Court: That will have to be done in a separate proceeding. There is a statutory provision.

"Mr. Johnson: Certainly, your honor. And, moreover, your honor, I told this man, when he came in there last night, not when he came in there last night, but when that alibi witness, or the first witness that took the stand, came in there—who is a special deputy, without any powers of serving criminal process, however, without permission from the sheriff, just simply a special deputy out in the back country—I told him that I did not want to have anything occur that would prejudice this case at this time. I told him and the accused in that particular case—this woman's husband promised me to be in the courtroom, in the district attorney's office this morning at 9 o'clock—I told this man if they wanted any redress in our office they could have it, but I did not want this case prejudiced. As soon as the case was concluded, which would be in the next 24 hours, if they

wanted a complaint, action could be had in our office. That is what I told them. So they wait until about 10 o'clock last night and then come down and procure a warrant for him; and the case is heard at 8:30 down there in the justice court, and he is given no opportunity to defend himself whatsoever, had no testimony there.

"The Court: You see, we do not want to try out that other case in with this.

"Mr. Johnson: No; in so far as the testimony is concerned, there is just as much information in my hands that this man McAfee has threatened the life of his wife and the girl and that he ought to be put under peace bonds. I have all kinds of evidence in the district attorney's office there.

"The Court: We do not want to go into either side of it; it is too complicated, too long."

[11] The matter seems not to have been adverted to in any of the subsequent proceedings in court, and there is nothing in the judicial attitude of the court in reference to the unfortunate occurrence to justify criticism. The assault not having occurred in the presence of the court, and no foundation having been laid for punishment for a contempt committed elsewhere, the court was not empowered to treat the attack as an attempt to obstruct justice, as defendant seems to think was obligatory.

[12] During the examination of defendant, he was asked by his counsel: "What has been Melba's attitude toward Mildred [the stepmother]?" Objection to the question upon the ground that it was ambiguous and not germane to the issue was sustained; and this ruling is assigned as error. The question was merely general in character; and, if any pertinent instances of animosity existed, there was nothing to prevent counsel from adducing such evidence by more pointed questions. So also counsel could have made an offer to prove material facts or circumstances.

[13] For the purpose, apparently, of showing some association between defendant's daughter and boys at the same school with her, a schoolmate, Leslie Webb, was called as a witness by defendant and asked whether he had carried notes between the girl and a boy named Joe Martinez. Mrs. Gladys Webb was asked also whether she knew of such notes being exchanged between those children at school. Objections to such questions were in each instance sustained. It did not appear that either witness knew anything of the contents of such notes, if any; and the mere fact of the exchange of notes between school children is insignificant in this particular case.

The remaining assignments of error relate to instructions given or refused. Exception is taken to instructions stating to the jury in substance that an information may charge in separate counts two or more distinct offenses connected together in their commission, or different statements of the same of-

fense, and that as regards the counts in this case of incest and of lewd and lascivious conduct, the defendant, if found guilty, might be convicted on all, or any number less than all, of the four counts against him. The court further instructed the jury that, while an information might legally include a combination of charges, yet they were not to infer from anything the court had said that the jury were to find the defendant guilty of any of the charges on which he was being tried.

[14] As regards the first and third counts, relating to the April occurrence, the lascivious conduct charged in the third count, and found by the jury to have been practiced, preceded the more serious offense charged in the first count, and, though ultimately relating to that offense, was nevertheless distinguished from it and formed a separate crime under section 288 of the Penal Code.

As to the second and fourth counts, relating to the occurrence in June, the verdict on the fourth count is concededly without support. But the court was not asked to direct a verdict for the defendant on that count or any other, and the instructions complained of are correct statements of law.

[15] Complaint is made further of the failure to give two instructions requested by defendant, to the effect that the jury were to disregard matters ruled out by the court, and were not to construe objections made on behalf of defendant as attempts to suppress the truth or prevent a full investigation of the facts. The court did, however, give the following instruction:

"While you are the sole and exclusive judges of the facts and of the weight of the evidence, you are to judge of the facts upon the testimony and other evidence produced here in court. If any evidence has been admitted and afterwards stricken out, you must disregard the matter so stricken out, entirely. And if any counsel has intimated, by questions which the court has not permitted to be answered, that certain things are or are not true, you must disregard such questions and refrain from any inferences based upon them. If counsel upon either side have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are."

The instruction so given answered all the purposes of those requested by defendant.

[16] Finally, it is urged that defendant was deprived of a fair trial by reason of alleged misconduct of the district attorney. In this respect reference is made to the persistent effort of the district attorney to have the handkerchief received in evidence; and attention is directed also to some heated remarks made during the trial by the prosecutor in discussion with defendant's attorney, wherein the latter was charged with lack of good faith in opposing an attempt to show

Mrs. Morgan's friendly attitude toward defendant during his prosecution for the alleged offense affecting Mrs. Morgan's sister. That discussion ended when the court declared it out of order, stating at the same time that the matter had nothing to do with the case in hand.

In the closing argument to the jury, the district attorney went somewhat outside the record in referring to that prior prosecution. Defendant's counsel at once interrupted with a protest, whereupon the district attorney admitted that he was "overcharged," and the court forthwith directed the jury to disregard what had been said, again adding that it had nothing to do with the case. Under such circumstances the conduct criticized was not sufficiently reprehensible to cause a reversal.

The defendant was ably defended; and, while he stoutly denied guilt, the conflict in the evidence was resolved against him by the triers of the facts, after a trial lasting five days, which was guided throughout with fairness and moderation by the court.

On the record as a whole, the order denying defendant's motion for a new trial and the judgment of conviction are affirmed as to the first, second, and third counts of the information; and, as to the fourth count, the order denying defendant's motion for a new trial and the judgment of conviction are reversed. The appeal from the order denying defendant's motion in arrest of judgment is dismissed.

We concur: WORKS, P. J.; CRAIG, J.

82 Cal. App. 485

PEOPLE v. COLOMBO. (Cr. 1379.)

District Court of Appeal, First District, Division 2, California. April 22, 1927.

1. Intoxicating liquors $\Leftrightarrow$ 213—Information charging maintaining nuisance at "place situated on F— street, adjoining and fronting" described lots where liquor was kept and sold, held sufficient (Pen. Code Cal. § 950, subd. 2; Wright Act [Cal.]; Volstead Act, tit. 2, § 21 [U. S. Comp. St. § 10138½jj]).

Information charging defendant with maintaining nuisance at "place situated on F— street, adjoining and fronting" certain described lots "where intoxicating liquors, to wit, wine and whisky, were kept, sold, and stored, for beverage purposes," held sufficient in prosecution against the person only for violation of Wright Act (St. Cal. 1921, p. 79) and Volstead Act, tit. 2, § 21 (U. S. Comp. St. § 10138½jj), under evidence that defendant used place of taxi stand in street for selling liquor stored in rear lots; under Pen. Code Cal. § 950, subd. 2, providing that information must state acts constituting offense so as to enable person of common understanding to know what is intended.

2. Intoxicating liquors $\Leftrightarrow$ 233(1)—Evidence of liquor storage on adjoining lots and of intoxicated loiterers held admissible under charge against taxi driver for maintaining nuisance.

In prosecution of taxi driver for maintaining liquor nuisance at taxi stand on street, evidence of adjoining lots and shack where liquor was stored and presence of intoxicated loiterers held admissible as tending to prove charge.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Joseph Colombo was convicted of maintaining a nuisance in violation of the Wright Act (St. 1921, p. 79), and he appeals. Affirmed.

Thos. D. Johnston and H. M. Bishop, both of Martinez, for appellant.

U. S. Webb and Emery F. Mitchell, both of San Francisco, for the People.

KOFORD, P. J. Defendant was convicted of maintaining a nuisance in violation of the Wright Act (Stats. 1921, c. 80, p. 79) and section 21 of title 2 of the Volstead Act (U. S. Comp. St. § 10138½jj). The information as amended charged in part as follows:

"The said Joseph Colombo, on the 16th day of September, * * * at Martinez, * * * did then and there unlawfully maintain a common nuisance, to wit, a place situated on Ferry street, adjoining and fronting on lots 1 and 2, block 319, and on said lots 1 and 2, block 319, as the same are delineated and designated on that certain map entitled 'Map of the Original and Additional Surveys of the Town of Martinez,' filed March 30, 1895, in the office of the county recorder, * * * where intoxicating liquors, to wit: wine and whisky, were kept, sold and stored, for beverage purposes. * * *"

[1] Appellant urges that his demurrer to this information should have been sustained, in that the place alleged to have been maintained by him is not described therein with sufficient certainty. It is sufficient if the place is designated sufficiently to enable a person of common understanding to know what is intended (Pen. Code, § 950, subd. 2), and allege the facts in substantial agreement with the language of the statute constituting the offense. *People v. Frankovich*, 64 Cal. App. 184, 188, 221 P. 671. This prosecution does not proceed against the place as for abatement, but against the person only, and for that reason an exact description of the place is unnecessary. *State v. Kruse*, 19 N. D. 203, 124 N. W. 385; *State v. Wheeler*, 38 N. D. 456, 165 N. W. 574; 33 Corp. Jur. § 430, p. 717, cases cited in note 99.

The testimony was to the effect that defendant for several years had conducted a taxi business at a stand in the street fronting on the lots described in the information. He had no regular office, but had a telephone attached to one of the buildings on the lots for receiving calls. On September 16th spe-

cial agents of the district attorney's office purchased from him one-half gallon of whiskey. They drove up to the taxi stand, found defendant sitting in his taxi, and asked for the liquor. Defendant went in behind the first building on the lot, and returned with the liquor, which he then delivered and sold. The agents then went behind the building, and, following a path into the rear of the lot, discovered a bottle of liquor concealed alongside a fence, and, upon looking into a small shack, found a number of containers holding whiskey and wine, also articles useful in the sale and dispensing of liquor, such as bottles and corks. The door was forced and the liquor taken for evidence. There was also testimony of several other sales of liquor made by defendant immediately prior to this one. The details of these sales narrated by the witnesses were quite similar in detail to the one described above. A diagram of the lots, shack, building, and taxi stand was used by the witnesses in explaining the operations of the defendant on such occasions and his acts and conduct in and about the place in general. The evidence warranted the jury in concluding that the defendant used the place of his taxi stand in the street in front of the lots described to receive orders for and deliver liquor in exchange for money, and that the source of the liquor supply and place of storage was in the yard or shack in the rear.

The information sufficiently informed the defendant of the nature of the charge proven in stating "a place situated on Ferry street adjoining and fronting on lots 1 and 2," etc.

[2] The evidence concerning the lots, shack, and yard is attacked, in that these were not shown to belong to the defendant, and that he was not proven to possess a key to the shack. It is also urged that, defendant's brother being the owner of the lots, defendant had no right to dispel the gatherings of persons "hanging around." These matters, however, do not purport to constitute a crime in themselves in this prosecution, but are admissible as circumstances from which the jury might infer the truth of the real charge.

The railroad station agent, at the depot close by, testified over objection that there were a good many intoxicated people "hanging around" that corner; more so than any other place in town. On cross-examination he stated he did not know that these people got their liquor from the defendant. Several other witnesses gave similar testimony. Possession or sale of intoxicating liquor for bev-

erage purposes is one crime, and maintaining a room, building, vehicle or place where intoxicating liquor is sold or kept is another, to wit, a common nuisance and misdemeanor. More proof is required for the latter than the former. The testimony of the witnesses last referred to is objected to as insufficient to connect the defendant with responsibility for the maintenance of the "place", and, on the other hand, the testimony as a whole is attacked by appellant as insufficient to establish the misdemeanor of maintaining a common nuisance, because it is claimed to establish only an isolated sale. He should say several isolated sales.

The testimony of the surrounding circumstances, including the congregation at the place of intoxicated persons, is material proof upon a prosecution for maintaining a common nuisance. In *People v. Mehra*, 73 Cal. App. 162, 238 P. 802, the following passage is quoted from *Barker v. United States* (C. C. A.) 289 F. 249:

"Though a single sale of liquor, or the mere unlawful possession, does not under all circumstances violate National Prohibition Act, tit. 2, § 21, making it punishable to maintain a nuisance by keeping a place for the violation of the act, the circumstances surrounding the sale or the single act of possession may be such as to warrant the inference that the single act was part of a habit, and therefore sufficient to sustain a conviction for nuisance."

After reviewing the authorities upon the subject, the court, in *People v. Mehra*, supra, at page 170 (238 P. 802), summarizes some of the facts which may or should be proven in addition to a single act of possession or sale in order to raise the inference of a purpose to sell and support the charge of a nuisance. The presence of numbers of intoxicated persons is of the same class as those mentioned. The evidence complained of was essential and material.

The case of *People v. Johnson*, 63 Cal. App. 178, 218 P. 449, relied on by appellant, is not contrary. It was there held error to admit proof of reputation of the place which was held hearsay, while here the trial court limited the witnesses to testifying to what they themselves had seen.

We see no error in the record, and it is ordered that the judgment and order denying new trial appealed from be, and the same are hereby, affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

JEFFREYS v. POINT RICHMOND CANAL & LAND CO. et al. (Civ. 5555.)★

District Court of Appeal, First District, Division 2, California. April 14, 1927.

Hearing granted by Supreme Court June 13, 1927.

1. Constitutional law ☞143—Municipal corporations ☞907—Amendment to Street Improvement Act, permitting holder of bonds to foreclose, held not unconstitutional as impairing obligation of contract (Street Improvement Act 1911, § 76, as amended by St. Cal. 1921, p. 297, § 10; Const. U. S. art. 1, § 10).

Street Improvement Act 1911, § 76, as amended by St. Cal. 1921, p. 297, § 10, permitting holder of street bonds to foreclose and providing for method of pleading and proof, for substituted service, and for attorney's fees and costs, and altering redemption period, held not to violate provisions of Const. U. S. art. 1, § 10, prohibiting impairment of obligation of contract.

2. Courts ☞97(5)—Federal court rulings control question whether statute violates inhibition against impairment of obligation of contract (Const. U. S. art. 1, § 10).

In considering whether statute offends constitutional inhibition against impairment of obligation of contract, under Const. U. S. art. 1, § 10, rulings of federal courts are controlling.

3. Constitutional law ☞169—Statute providing additional remedy or enlarging existing remedy for enforcing contract is not invalid as "impairing obligation of contract" (Const. U. S. art. 1, § 10).

Statute may not be declared unconstitutional for violating Const. U. S. art. 1, § 10, by impairing obligation of contract, for giving additional remedy or enlarging or making more efficient existing remedy for enforcement of contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Impairing Obligation of Contract.]

4. Constitutional law ☞169—Legislature may change existing remedies without impairing obligation of contract, provided substantial remedy remains.

Legislature may modify or change existing remedies or prescribe new modes of procedure without impairing obligation of contract, if substantial remedy remains or is given, notwithstanding rule that laws in force when contract is made enter into its obligation.

5. Constitutional law ☞106—That Street Improvement Act provided method of summary sale to bondholders held not denial of right to pursue ordinary remedy (Street Improvement Act 1911 [St. 1911, p. 730]).

That Street Improvement Act 1911 (St. 1911, p. 730), provided method of summary sale to holders of bonds without suit, cannot be taken as denial of right to pursue ordinary, legal, or equitable remedies to enforce contract, particularly in absence of some expression of such intention in statute itself, since there is no vested right in particular remedy or form of procedure.

6. Constitutional law ☞106—Contracts are made in contemplation of state's power to amend remedy so long as parties' vested rights are not disturbed.

Contracts are made in contemplation of power of state to amend remedy or provide new one, so long as vested rights and obligations of parties are not disturbed.

7. Appeal and error ☞1030—Any error in statutory foreclosure proceeding by holders of street bonds held not prejudicial (Street Improvement Act 1911, § 76, as amended by St. 1921, p. 297, § 10).

Any error in bondholders' foreclosure proceeding under Street Improvement Act 1911, § 76, as amended by St. 1921, p. 297, § 10, prescribing pleading, making treasurer's certificate of nonpayment prima facie evidence of such fact, and in permitting recovery of attorney's fees and costs, held not prejudicial, in view of evidence, where no attorney's fees were allowed and costs were merely statutory costs.

8. Municipal corporations ☞907—Amendment to Street Improvement Act, permitting holder of bonds to foreclose, held applicable to bonds issued prior to enactment (Street Improvement Act 1911, § 76, as amended by St. 1921, p. 297, § 10).

Street Improvement Act 1911, § 76, as amended by St. 1921, p. 297, § 10, permitting holder of street bonds to foreclose, held applicable to bonds issued prior to enactment, though it does not expressly provide that it shall be retroactive.

9. Statutes ☞267(2)—Statutes affecting remedy or procedure for enforcement of existing rights apply to actions thereafter instituted, but not to pending actions.

General rule is that statutes, which merely affect remedy or procedure for enforcement of existing rights, apply to all actions thereafter instituted, but not to actions pending at time of enactment.

10. Municipal corporations ☞950—Street Improvement bondholder foreclosing held entitled to judgment for amount of taxes assessed pending litigation and paid by him (Street Improvement Act 1911, § 76, as amended by St. 1921, p. 297, § 10; Civ. Code, § 2876).

In action by holder of street bonds to foreclose under provisions of Street Improvement Act 1911, § 76, as amended by St. 1921, p. 297, § 10, judgment held not faulty for including amount of taxes assessed pending litigation and paid by plaintiff, in view of Civ. Code, § 2876.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action on street improvement bonds by W. M. Jeffreys against the Point Richmond Canal & Land Company and others. Judgment for plaintiff, and defendant Mintzer Estate Company appeals. Affirmed.

McCutchen, Olney, Mannon & Greene and John F. Cassell, all of San Francisco, for appellants.

Rufus H. Kimball, of San Francisco, and A. F. Bray, of Martinez, for respondent.
Ernest A. Wilson, of San Mateo, amicus curiae.

NOURSE, J. Plaintiff sued as the purchaser for value of 250 street bonds issued by the city of Richmond in the year 1917 under the Street Improvement Act of 1911 (Stats. 1911, p. 730). Judgment went for the plaintiff for the amount prayed and also for the foreclosure of separate liens on the lots of land involved. From this judgment the defendant Mintzer Estate Company, which held a mortgage on these lots declared to be subsequent to plaintiff's liens, has appealed on a bill of exceptions. The other defendants, the city of Richmond, the treasurer of the city, and the owner of the lots involved, have not appealed.

There is really no dispute as to the facts. The appellant was the holder of two promissory notes from the owner of the lots involved, which were secured by a mortgage on the lots and which were taken in the year 1920 subsequent to the issue and delivery of all the bonds and at a time when the owner of the lots was in the hands of a receiver. Both notes were taken by the appellant to secure payment of a past-due indebtedness, and both the notes and the mortgage were taken at a time when the corporation debtor was insolvent. No question is raised on this appeal affecting the validity of the proceedings under the Street Improvement Act by which the bonds were issued, and no suggestion is made that the work, in payment for which the bonds were issued, was not properly done in accordance with the contract.

[1] The primary question involved on this appeal is whether the amendment in 1921 to the Street Improvement Act of 1911 permitting a foreclosure suit of this character is inapplicable to bonds issued prior to the amendment as violative of the constitutional inhibition against the impairment of the obligation of contracts. The basis of the attack is this: The Street Improvement Act, as it read when the bonds were issued, specially provided two distinct remedies against the delinquent property owner—first, a summary sale of the property by the city treasurer on demand of the bondholder, and, second, a foreclosure of the lien of the assessment at the suit of the contractor. In addition to this, section 28 of the act seemed to contemplate some sort of legal action by the bondholder to enforce the lien of the bond which was established by the act as distinguished from the lien of the assessment. By the amendment to section 76 of the act made in 1921 (St. 1921, p. 297, § 10), it was expressly provided that "by way of a separate, distinct and cumulative remedy, the holder of any bond * * * may file and maintain a suit to foreclose the lien of the bond in the same

manner provided in this act for the foreclosure of the lien of delinquent assessments." The amendment also provided for a simple method of pleading and proof in such cases, for substituted service of process where the lot owner could not be found, for the foreclosure of the lien of the bond, and for attorney's fees and costs. The right of redemption of the property after sale was preserved "as in other cases."

[2, 3] In considering the question whether the amendment offends the constitutional inhibition against the impairment of the obligation of a contract, it is well to point to the accepted rule that an attack upon a law on this ground is a federal question upon which the rulings of the federal courts are controlling. 12 Cor. Jur. p. 1057. The rule of the federal courts on this subject is correctly stated in 12 Corpus Juris, pp. 1070 and 1072, where it is said:

"A statute may not be declared unconstitutional for giving an additional remedy, or enlarging or making more efficient an existing remedy for the enforcement of a contract. * * * A statute providing an additional method of enforcing an existing statutory lien is not unconstitutional as impairing the obligation of any contract of the owner of the property subject to the lien."

See *Livingston v. Moore*, 7 Pet. (32 U. S.) 469, 551, 8 L. Ed. 751; *Gross v. United States Mortgage Co.*, 108 U. S. 477, 488, 2 S. Ct. 940, 27 L. Ed. 795; *People v. Seymour*, 16 Cal. 332, 342 (76 Am. Dec. 521), where the court said: "It is nothing to say that the new remedy is more effectual than the old; so is, or ought to be, every new remedy." *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 85, 24 P. 648; *Teralto L. & W. Co. v. Shaffer*, 116 Cal. 518, 523, 48 P. 613, 58 Am. St. Rep. 194; *Boggs v. Ganeard*, 148 Cal. 711, 720, 84 P. 195; *Buck v. Canty*, 162 Cal. 226, 233, 121 P. 924; *Lantz v. Fishburn*, 17 Cal. App. 583, 589, 120 P. 1068; *Aikins v. Kingsbury*, 170 Cal. 674, 679, 151 P. 145, 147, where the court said: "A remedy may be given where none existed before and it follows that a new and more liberal remedy may be substituted for one which was in effect at the time the contract of sale was made." The amendment of 1921 was designed to come within this rule as it was declared to provide merely an additional remedy for the enforcement of an existing obligation.

In support of the appeal the appellant is of course forced to contend that the bond is a contract and that the obligation of that contract has been impaired by the amendment. In support of the argument *Chapman v. Jocelyn*, 182 Cal. 294, 187 P. 962, and *Oakland Street Improvement Bond Co. v. Fitzmaurice*, 47 Cal. App. 258, 190 P. 499, are cited. In reply, respondent and amicus curiae point out that the *Chapman Case* was

an appeal by a property owner from a judgment quieting title based upon a sale of the property by the city treasurer, and that the only issue involved was whether the sale was void because the treasurer incorrectly computed the interest chargeable under the bond, and that the latter case was a suit of the street contractor against the city treasurer to require him to make a sale under the Street Improvement Act without payment by him (the contractor) of the costs for a title search in order to give notice to all lienholders as required by a later amendment. It is argued that the statements in these opinions to the effect that these street bonds, as well as the street assessments, were contracts, should be disapproved as mere dicta and not supported by the authorities. It is not necessary for us to do this in this proceeding. We may assume that these bonds are contracts, but that would not aid the appellant because, if they are contracts, they do not run to a mortgagee of the premises, but are obligations between the contractor and the city.

Appellant insists that because of *Chapman v. Jocelyn*, supra, we should hold that the bond is a contract to which the lot owner is in some measure a party. Conceding the point, we are unable to see how it may avail appellant in this proceeding. If the lot owner is a party to the contract, his obligation under it is to pay into the city fund sufficient money to meet the principal and interest on the bond and the penalties added in case of forfeiture. The obligation on the part of the city is to turn over these payments to the bondholder when, and only when, they have been paid into the special fund for that purpose. The obligation of the bondholder, if any, is to make proper acknowledgment of these payments and release of the lot owner's obligation. The obligation of the lot owner to pay is in fact fixed by the assessment proceedings under the statute rather than by the bond. These proceedings being regular (a matter which is conceded on this appeal), that obligation is just as firmly fixed as if it had been covered by a final judgment against the lot owner. By the terms of the act the bond was declared to be a lien upon the property to cover all these costs and penalties. This lien was made enforceable by sale by the city treasurer, but we have been shown no authority holding that no other method could have been employed to enforce the fixed obligation against the lot owner.

The case is similar to those arising under the arbitration statute of the state of New York, which has been held to apply to contracts providing for arbitration executed before the statute was passed. An attack upon the statute was based upon the claim that it impaired the obligation of these contracts, but the courts of the state of New York, as well as the Supreme Court of the United States, have held that the statute merely

provides an additional remedy and is therefore not subject to the objection that it violates section 10 of article 1 of the federal Constitution. In the *Matter of Berkovitz*, 230 N. Y. 261, 272, 130 N. E. 288, 290, Cardozo, J., speaking for the Court of Appeals, said:

"The wrong to be redressed is the rejection of merchandise in violation of a contract. Such a wrong had a remedy for centuries before the statute. All that the statute has done is to make two remedies available when formerly there was one."

See, also, *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 123, 124, 44 S. Ct. 274, 68 L. Ed. 582.

[4] The appellant lays considerable stress upon the rule of cases cited that the laws in force at the time a contract is made enter into its obligation, and it is argued from this that because the lot owner contracted to suffer foreclosure by sale without proceedings in a court of law, the Legislature was powerless to add such a remedy for the breach of his obligation. In *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 439, 23 S. Ct. 234 (47 L. Ed. 249) Harlan, J., speaking for the court said:

"It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract."

To the same effect is *National Surety Co. v. Architectural Co.*, 226 U. S. 276, 285, 33 S. Ct. 17, 57 L. Ed. 221, and *Bernheimer v. Converse*, 206 U. S. 516, 530, 27 S. Ct. 755, 51 L. Ed. 1163.

Appellant advances the argument that the obligations of the contract are impaired because the period of redemption after sale is altered. In this connection it is pointed out that under a sale by the city treasurer under the original act the property owner was permitted to redeem within 12 months after sale and for a further period if the purchaser neglected to apply for a deed, while, under the amendment, the period of redemption was fixed at 12 months from the date of the foreclosure sale. As we read the statute, the amendment is more favorable to the appel-

lant than to the respondent. Under the original act the purchaser was not required to wait until the expiration of the 12 months' period to apply for a deed; this application could be made at any time within that period, and, if made in time, the deed would issue immediately upon the expiration of 12 months from the date of the sale. Under the amendment the period of redemption ran from the date of the foreclosure sale after the judgment became final. It is unnecessary to do more than mention the fact that the time required for service of process, the delay in bringing the cause to trial and in executing the judgment, and the time required to give notice of the sale, would extend rather than shorten the rights of the property owner in so far as his right of redemption is concerned.

[5-7] It is also argued that the amendment impairs some obligation of the contract because it prescribes a special and simple method of pleading the complaint, because it makes the city treasurer's certificate that the bond has not been paid "prima facie" evidence of that fact, and because it permits the recovery of costs and attorney's fees. We are not able to follow appellant in its contention that under the original act the bondholder had no legal action to enforce the lien of the bond. If, as appellant argues, the bond is a contract, we are unable to perceive why the bondholder, as one of the contracting parties, could not have his suit to enforce his contract under the ordinary rules of procedure. Certainly the fact that the statute provided a method of summary sale without suit cannot be taken as a denial of the right to pursue the ordinary legal or equitable remedies for the enforcement of the contract, particularly in the absence of some expression of that intention in the statute itself. There may be no controversy on this principle—that there is no vested right in a particular remedy or in a particular form of legal procedure. Black Constitutional Prohibitions, § 192; 12 Cor. Jur. p. 974; Tennessee v. Sneed, 96 U. S. 69, 74, 24 L. Ed. 610; Terry v. Anderson, 95 U. S. 628, 633, 24 L. Ed. 365; Boggs v. Ganear, 148 Cal. 711, 720, 84 P. 195. Contracts are made in contemplation of the power of the state to amend the remedy or to provide a new one so long as the vested rights and obligations of the parties are not disturbed. Wilson v. Standefer, 184 U. S. 399, 415, 416, 22 S. Ct. 384, 46 L. Ed. 612; Aikens v. Kingsbury, 170 Cal. 674, 679, 151 P. 145. But, in any event, the point is not available to appellant on this appeal. Though a demurrer to the complaint was filed, it appears from the bill of exceptions that at the opening of the trial the respondent offered in evidence without objection the street bonds with the coupons attached thereto and all the proceedings under which the bonds were issued. It also appears

from the bill of exceptions that the respondent "also offered proof sufficient * * * that the amounts thereof had not been paid, and also proof sufficient to sustain all of the remaining allegations of the plaintiff's complaint." It also appears that no attorney's fees were allowed and that the costs awarded were merely the statutory costs of suit allowable in ordinary actions. The appellant has therefore failed to show any prejudicial error in respect to any of these specifications.

[8, 9] The further point is made that the amendment is not applicable to bonds issued prior to its enactment because it does not expressly provide that it shall be retroactive. This question is always one of the intention of the Legislature—to be determined by the context of the act itself when possible and by the history and surrounding circumstances when necessary. *Smith v. Mathews*, 155 Cal. 752, 761, 103 P. 199, concurring opinion of Shaw, J. Here the amendment authorizes "the holder of any bond upon which any payment * * * has not or shall not be made" to maintain a suit to foreclose the lien. It would seem clear that the Legislature intended the amendment to apply to bonds outstanding and unpaid as well as to those issued in the future. Furthermore, the general rule is that statutes which merely affect the remedy or the procedure for the enforcement of existing rights are to be treated as prospective in that they apply to all actions thereafter instituted, but not to actions pending at the time of the enactment. *Matter of Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, 130 N. E. 288; *Dowell v. Talbot Paving Co.*, 138 Ind. 675, 38 N. E. 389.

[10] Finally, it is argued that the judgment is faulty in that it includes the amount of taxes assessed against the property involved pending the litigation and paid by the respondent. There is no merit in the point. Section 76 of the Street Improvement Act under which this suit is prosecuted provides that the action to foreclose the lien of the bond shall be governed by the Codes of the state when not in conflict with express provisions of the act. Section 2876 of the Civil Code provides that: "Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists." The latter section has been followed in *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 P. 922; *Weinreich v. Hensley*, 121 Cal. 647, 54 P. 254; *Windt v. Covert*, 152 Cal. 350, 93 P. 67; and *Morris v. Hartley*, 26 Cal. App. 61, 146 P. 73. But appellant argues that all these cases were suits for the foreclosure of a mortgage and that they cannot be controlling here. The Code section refers to "the holder of a special lien"; it is not limited to the holder of a mortgage

lien, and we can find no reason or equity in holding that the section does not apply to a street bond lien. In fact, the taxes were paid by the respondent upon the express stipulation and consent of the appellant to save the property from delinquent sales to the state. Under any view of the transaction it was a benefit to the appellant. The costs which would have arisen from the tax sales as well as the penalties which would have been added have all been eliminated by the payment of the taxes by respondent, and if appellant contemplates redeeming the property under the judgment rendered herein its burden is lessened to that extent at least.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

MOORE v. SUPERIOR COURT OF STATE OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.
(Civ. 5773.)★

District Court of Appeal, First District, Division 1, California. April 20, 1927.

Rehearing Denied May 20, 1927. Hearing Granted by Supreme Court June 18, 1927.

1. Divorce ☞289—Decree for maintenance of children against nonresident is void, unless he appears, or has been personally served within court's jurisdiction.

A decree for maintenance of children against nonresident is void, unless he has appeared in person or by attorney, or has been personally served with process within territorial jurisdiction of court.

2. Divorce ☞309—Decree for maintenance of children need not reserve discretionary right to modify decree (Civ. Code, § 138).

Under Civ. Code, § 138, providing that decree for custody and maintenance of minors may be modified or vacated at any time, decree for maintenance need not reserve court's discretionary right to modify decree because of change in circumstances of parties.

3. Divorce ☞309—No new service of process is necessary for modification of decree for maintenance of minors (Civ. Code, § 138).

No new service of process is necessary to confer jurisdiction on court to modify decree for maintenance of minors, as provided in Civ. Code, § 138, since power of court not having been exhausted, it has right and power to exercise unexhausted portions of its power in such manner as changed conditions and circumstances may require or indicate to be just.

4. Divorce ☞309—Court may modify decree for maintenance of minors without service of new process, even though party affected has become resident of another state (Civ. Code, § 138).

Court retains power to modify decree for maintenance of minors under Civ. Code, § 138, as long as there is a minor child provided for by decree, without new service of process, even

though either of parties, before modification, has become resident of another state.

5. Courts ☞30—Jurisdiction over person once acquired, court may bind him by any subsequent order which court has jurisdiction to make, though party becomes nonresident.

Once a judicial proceeding is commenced with jurisdiction over person of party concerned, it is within power of court to bind him by every subsequent order which court retains jurisdiction to make, notwithstanding order is made after removal from state of party affected by supplemental order.

6. Divorce ☞309—Where notice of motion to modify decree for maintenance was mailed to nonresident husband and filed with clerk, and husband appeared to question jurisdiction, order of modification was valid (Civ. Code, § 138; Code Civ. Proc. § 1015).

Where notice of motion to modify decree for maintenance of minor children was mailed to nonresident husband, and filed with clerk, as provided for by Code Civ. Proc. § 1015, and husband appeared for purpose of questioning jurisdiction of court, notice given was sufficient, and order modifying decree as provided for under Civ. Code, § 138, was valid.

Application by William H. Moore for certiorari to review an order of the Superior Court in and for City and County of San Francisco, John J. Van Nostrand, Judge, modifying final decree of divorce. Order affirmed.

Stanislaus A. Riley, of San Francisco, for petitioner.

Leo A. Murasky and R. F. Mogan, both of San Francisco, for respondents.

TYLER, P. J. Petition for a writ of review. It appears therefrom: That on the 8th day of April, 1914, the superior court in and for the city and county of San Francisco made and entered an interlocutory judgment and decree of divorce in favor of plaintiff and against defendant in an action entitled Alyce Moore, Plaintiff, v. William H. Moore, Defendant. That in and by said decree the care, custody, and control of the two minor children, the issue of the marriage, was awarded to plaintiff, with permission to defendant to visit them at reasonable times. The community property of the parties was awarded to plaintiff, and defendant was ordered to pay to her the sum of \$30 per month for the support and maintenance of the children, and the further sum of \$12.50 at stated intervals for necessary clothing. Thereafter, on April 12, 1915, a final decree was entered dissolving the marriage and restoring the parties to the status of single persons. This decree reiterated the provisions as to the custody of the children, and the payments to be made by defendant for their support and maintenance. Petitioner herein was represented by E. G. Ryker, Esq., in the action

referred to, up to and until after the entry of the final decree, at which time he ceased to represent petitioner. That on September 8, 1926, said Ryker was served with a notice of motion reciting that plaintiff would, on September 24, 1926, move the court for an order amending the final decree of divorce by directing defendant to pay plaintiff the sum of \$60 per month for the support and maintenance of the minor children, and the further sum of \$50 at stated intervals to assist in the purchase of their clothing. That on November 5, 1926, said Alyce Moore, in person and by counsel, appeared before the superior court, whereupon the following proceedings were had: A notice of special appearance was served upon plaintiff by counsel representing petitioner and filed with the clerk. The special appearance recited that it was made for the limited purpose of moving the court to quash the attempted service of the notice of motion, upon the ground that it had not been legally made, and the court had therefore acquired no jurisdiction to entertain it or make any order in the premises. In support of said objection counsel representing petitioner read and filed an affidavit of E. G. Ryker, petitioner's former attorney, in which it was recited that his employment as attorney for petitioner had ceased at the time of the entry of the final decree, and that he was not the attorney for petitioner at the time of the service of the notice of motion. Thereupon the plaintiff in the action offered in evidence an affidavit of service of said motion upon petitioner herein. This affidavit recited that a copy of the notice of motion had been mailed to petitioner at his residence in Portland, Or., in which state petitioner has resided since the year 1917. Thereupon the court overruled the objection to its jurisdiction, and proceeded to hear and determine the motion. It appeared in evidence that one of the children, a son, had reached his majority at the time of the hearing. Thereafter, in November, 1926, the court made and entered its order modifying the final decree by allowing the plaintiff \$50 for the maintenance and support of the daughter, a minor. It is under these facts that it is claimed that in hearing the motion for modification of the terms of the final decree the court exceeded its jurisdiction. It is argued that no proper service of the notice of motion was made upon petitioner, for the reason that at no time since a period long antedating the 8th day of September, 1926, had he been within the state of California, or within the territorial jurisdiction of the court, and that the only service alleged or relied upon so far as petitioner is concerned was the service by mail addressed to him at the city of Portland, state of Oregon, a place beyond the jurisdiction of the court. That no service was effected or acquired by leaving a copy of the notice of motion at the office

of his former attorney, for the reason that he had no authority to represent him at any time subsequent to the entry of the final decree. With reference to the attempted service by the mailing of the copy of the notice of motion to petitioner in the foreign state, we are cited to such cases as *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, to the effect that as a decree in alimony being in the nature of a judgment in personam, a court must acquire jurisdiction of the person by a personal service of process, and that such process cannot be served beyond the confines of the state to a sister state, so as to justify a personal judgment based upon such service. See, also, *Johnson v. Superior Court*, 63 Cal. 578; *Hobbs v. Tom Reed Mining Co.*, 164 Cal. 497, 129 P. 781, 43 L. R. A. (N. S.) 1112. Counsel for respondent has not favored us with a brief upon the subject.

[1-6] It is well established, however, that a decree for maintenance is allowed the wife in recognition of the husband's liability to support his children, an obligation which is personal, and, since a decree of this character is strictly one in personam, it must follow that such a decree against a nonresident is void, unless he has appeared in person or by attorney, or has been personally served with process within the territorial jurisdiction of the court. A discussion of this question, however, or of the question of the powers of a court over the res within the jurisdiction, when the proceeding becomes one quasi in rem, are questions that we do not think are in any manner involved in the instant proceeding. In divorce actions the statute expressly provides that a decree for the custody and maintenance of minors may be modified or vacated at any time as may seem necessary or proper, Civ. Code, § 138. The propriety of modification in this particular, as well as the extent thereof, because of a change in the circumstances of the parties, rests largely in the discretion of the trial court. A decree need not reserve this right of modification. In such cases it is not final as a matter of law because it does not purport to be final and conclusive as a matter of fact. This reservation by reason of the statute constitutes the order an unfinished determination of the judicial mind; that is, the court has not completely disposed of the case. The power of the court not having been exhausted, it has the right and power to exercise such unexhausted portion of its power in such manner as changed conditions and circumstances of the case may require or indicate, to be just. This being so, no new service of process is necessary to confer jurisdiction. In such a case the court does not undertake to confer power upon itself. It merely exercises the unexhausted portion of the jurisdiction it already has. The decree is a continuing one, and the

jurisdiction of both the parties and the subject-matter remains so long as there is a minor child whose welfare and maintenance are provided for in the decree. *Ruge v. Ruge*, 97 Wash. 68, 165 P. 1063, L. R. A. 1917F, 721. And this retention of the power of modification exists, notwithstanding that either of the parties may, after the entry of the decree, and before the modification, has become a resident of another state. The decree being under the control of the court, and jurisdiction not having been lost, a modification thereof is binding upon the parties wherever they may be. *Andrews v. Andrews*, 15 Iowa, 425. Once a judicial proceeding is commenced with jurisdiction over the person of the party concerned, it is within the power of the court to bind him by every subsequent order which the court retains jurisdiction to make (*McSherry v. McSherry*, 113 Md. 395, 77 A. 653, 140 Am. St. Rep. 428), and this notwithstanding the order is made after the removal from the state of the party affected by the supplemental order (*Laing v. Rigney*, 160 U. S. 531, 16 S. Ct. 366, 40 L. Ed. 525). Nor is there any merit in the further contention that the order is void for want of proper notice. Petitioner was fully advised as to the pendency of the motion, and appeared for the purpose of questioning the jurisdiction of the court to hear the application. Evidence was taken upon the hearing, and he had full opportunity to be heard. As above indicated, the court was not attempting to acquire jurisdiction over the person of the defendant under the notice, for it already had jurisdiction, and petitioner was given all the notice possible that the court intended to exercise its jurisdiction. Any other conclusion would be to say that, the court having jurisdiction, it was without power to exercise the same. Moreover, section 1015, Code of Civil Procedure, provides that, when a plaintiff or defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, service may be made on the clerk for him. The notice of motion was filed with the clerk. For the reasons given, the order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

82 Cal. App. 532

FISHER v. BROTHERTON et al.*
(Civ. 5568.)

District Court of Appeal, First District, Division 2, California. April 26, 1927.

Hearing Denied by Supreme Court June 23, 1927.

1. Exchange of property §8(3)—Complaint in action to rescind exchange of property sufficiently alleged that false representations were inducing cause.

In action to rescind contract for exchange of real and personal property, complaint al-

leging that the false representations were the inducing cause of the contract and that it was made on account of them, sufficiently alleged that without the representations the contract would not have been made.

2. Exchange of property §8(3)—Complaint in action to rescind exchange of property for fraud need not expressly allege pecuniary damage, but should allege injury to property rights.

In action to rescind contract for exchange of property, because of fraudulent misrepresentations, no express allegation of pecuniary damage is necessary, but it should be alleged that plaintiff has suffered injury to her property rights by reason of the fraud.

3. Appeal and error §1039(2)—That plaintiff, seeking to rescind exchange of property for fraud, did not expressly plead injury to property rights, held not reversible error.

In action to rescind contract to exchange property because of fraudulent misrepresentations as to the existence of springs and a supply of gravity water, and as to the productivity of the soil, failure to expressly allege pecuniary damages or injury to property rights held not reversible, particularly where no demurrer was interposed, and case was tried without objection on theory that complaint was sufficient.

4. Exchange of property §8(3) — Plaintiff, seeking to rescind exchange of property, for fraud, need prove only one specification.

In action to rescind contract to exchange real and personal property because of fraud, it is not necessary to prove that all of the specifications of fraudulent misrepresentations are true, but proof of one material representation is sufficient.

5. Exchange of property §8(3)—That complaint to rescind exchange of property alleges representations not actionable is immaterial.

In action to rescind contract to exchange real and personal property because of fraudulent misrepresentations, it is immaterial that the complaint alleges representations which are not actionable.

6. Exchange of property §8(1)—That findings in action to rescind exchange of property, included representations not actionable is immaterial.

In action to rescind contract to exchange real and personal property because of fraudulent misrepresentations, it is immaterial that the court's findings included representations which are not actionable.

7. Exchange of property §3(1)—Representations respecting water and productivity held each to authorize rescission of exchange of property.

False representations that there were several large springs on ranch and a vast supply of gravity water available, and that the soil was very productive, there being 60 acres of good bean land and 50 acres of bottom land, nearly all irrigable or subirrigated, and that the side hills were very dark loam, held each sufficient to authorize rescission of contract to exchange real and personal property.

8. Exchange of property $\S$ 5—Party to exchange of properties, who took possession in October and attempted to rescind in September following, for misrepresentations, held not to have unreasonably delayed.

Party to exchange of real and personal property, who took possession October 1, 1917, and attempted to rescind in September, 1918, did not unreasonably delay, in view of nature of false representations.

9. Exchange of property $\S$ 8(4)—Excluding defendant's evidence that agent who negotiated exchange of property sought to be rescinded for fraud was financially interested with plaintiff held error.

In action to rescind exchange of property because of fraud, it was error to exclude defendant's evidence that the agent who conducted the transfer was financially interested with plaintiff in the transaction, and received a profit other than the commission therefor.

10. Witnesses $\S$ 275(4)—Refusing to permit cross-examination of plaintiff, seeking to rescind exchange of properties, respecting alleged misrepresentations, held error.

In action to rescind exchange of real and personal property on the ground of fraudulent misrepresentations, it was error for the court to refuse to permit defendant to cross-examine plaintiff regarding alleged misrepresentations.

11. Appeal and error $\S$ 1056(4)—Excluding evidence held not prejudicial, where court was sitting in equity and assumed matter was proven.

In action to rescind exchange of real and personal property, excluding defendant's evidence that agent who conducted exchange was financially interested with plaintiff in the transaction, and received a profit other than the commission therefor, held not prejudicial error, where the court was sitting in equity without a jury and assumed matter to have been proven when it made its ruling.

12. Appeal and error $\S$ 1048(6)—Refusing to permit cross-examination held not prejudicial, where matter was later covered, and findings thereon favored defendant.

In action to rescind exchange of real and personal property on the ground of fraudulent misrepresentations, refusing to permit cross-examination of plaintiff regarding oral misrepresentations, which she claimed were made by defendant, held not prejudicial error, where the matter was covered at another period of the trial, and findings thereon were in favor of defendant.

13. Pleading $\S$ 329—Where party fails to comply with demand for bill of particulars within prescribed time, he may not introduce evidence on subject of account (Code Civ. Proc. $\S$ 454).

By the express terms of Code Civ. Proc. $\S$ 454, where a party fails to comply with demand to furnish a bill of particulars within 5 days after the demand, he is precluded from giving any evidence on the subject-matter of the account.

14. Pleading $\S$ 329—One suing to rescind exchange of property and for moneys expended, who failed to file demanded bill of particulars within prescribed time, held not entitled to recover for moneys expended (Code Civ. Proc. $\S\S$ 454, 473).

In action to rescind exchange of real and personal property and to recover for moneys expended in the care, operation, or maintenance of the property, where defendant demanded a bill of particulars, which was not furnished until first trial of action and granting of new trial, held, plaintiff was not entitled to recover for moneys expended, in view of Code Civ. Proc. $\S$ 454, providing that failure to furnish bill of particulars on demand shall preclude introduction of evidence of account, in view of section 473.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action to rescind a contract for the exchange of property, brought by Anna Mae Fisher against Theodore Willard Brotherton and another. From an adverse judgment, defendants appeal. Modified, and, as modified, affirmed.

Wm. A. Freeman and C. E. Spencer, both of Los Angeles, for appellants.

Kemp, Mitchell, Silberberg & Davis, Kemp, Partridge & Kemp, and Mitchell, Silberberg & Davis, all of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to rescind a contract for the exchange of real properties executed on September 20, 1917. Judgment went for the plaintiff, from which the defendants have appealed on a bill of exceptions.

The complaint is based upon charges of fraudulent misrepresentations on the part of the defendant T. W. Brotherton, who will hereafter be referred to as the defendant, inasmuch as the property exchanged was his separate property, and his codefendant took no part in the transactions. The complaint alleged that at the time of the exchange the plaintiff was the owner of certain real property situated in Los Angeles county, of the value of \$23,500, subject to a mortgage of \$7,500, and that the defendant was the owner of a ranch situated in San Diego county, of the reasonable value of \$10,000, and of personal property on the ranch, of the reasonable value of \$1,500; that the defendant caused a certain written prospectus or advertisement to be prepared, which contained many false representations, namely, as to the climate on the ranch, the water supply and its value, the quality of the soil, the description and value of the lands, the values of the buildings, improvements, live stock, equipment, and household furniture, and the estimates of the crops and the values thereof. It was also alleged that, in addition to the misrepresentations contained in the written paper, the defendant orally represented to the plaintiff facts relating to the number of cattle and horses

on the ranch, material for building a fence and for repairing a dwelling house, the quantity of wheat and hay then upon the ranch, that a certain spring was on the ranch and available for the water supply, and that there was sufficient water available to irrigate a 70-acre field of alfalfa; that the net income from the cows on the ranch was \$90 per month; that the farm implements were in good condition; that the ranch was a money maker and paid interest on \$20,000, and that a tractor had been rented for \$6 per day and with the income from the chickens had been sufficient to pay running expenses; and that all these oral representations were false and untrue, and that they were known to have been untrue by the defendant.

It was also alleged that the plaintiff went into possession of the ranch on October 1, 1917, and spent the sum of \$6,860 in the operation of the ranch before she discovered that any of the representations alleged were untrue. In this connection it is alleged that the plaintiff did not discover that these representations were untrue until about the month of July, 1918, and that she thereupon gave to the plaintiff written notice of rescission, offering to restore everything of value which she had received, upon condition that the defendant would do likewise, and also that he would pay to her all moneys which she had paid out, amounting to said sum of \$6,860.

The answer denied all the charges of false misrepresentations, and alleged that the plaintiff herself was the one who brought about the exchange of the properties, that she falsely represented the value of the property which she transferred to the defendant, that none of the alleged false oral representations was made by the defendant, and that in fact all said oral representations pleaded in the complaint as untrue were in fact true. In reference to the spring, it was alleged that prior to the transfer the defendant informed the plaintiff that he had not had his land surveyed, that he did not know whether said spring was on his property, that he was informed and believed that it was, but that the matter was in dispute. It was also alleged that this information was given to the plaintiff in September, 1917, but that the plaintiff made no complaint regarding this or any other representation claimed to have been false until after September 3, 1918, when the defendant demanded of the plaintiff that she meet the payment of accrued interest on the mortgages given to him as a part of the exchange.

The trial court found that the value of the property exchanged by the plaintiff was \$16,000, subject to a mortgage of \$7,500, and was not of the value of \$23,500, subject to this mortgage, as represented by the plaintiff at the time of the exchange, and as alleged in her complaint. It found that prior to the exchange the plaintiff was ignorant of the

character and value of the farm lands, but that defendant did not know of her inexperience, and did not take advantage thereof; that the property of the defendant, free of incumbrances, was of the value of \$31,588; that the written representations referred to in the complaint were all made by one Pierce, an agent of the defendant, with full knowledge of the truth or falsity thereof; that certain statements contained in said written paper were untrue, particularly those respecting the climate, water supply, and values of the water, soil, land, and crops; that other statements therein were mere matters of opinion, and that all statements therein respecting the number and value of the buildings, improvements, personal property, and stock were correct and true.

It was also found that the defendant did not make any of the 12 oral representations charged in the complaint, and that in fact all the facts detailed in said representations and alleged to be untrue were in fact true; that Pierce, as agent of the defendant, represented to plaintiff that a certain spring was on the ranch, but that the defendant himself personally pointed out the lines of the ranch to the plaintiff, and told her at that time that he had not had the land surveyed, and knew there was a dispute over the position of the line and the ownership of the spring. It was found that all false statements were made for the purpose of defrauding the plaintiff, and that she did not discover the falsity of these until July, 1918; that she was in possession of the ranch from October 1, 1917, to September, 1918, and made no complaint until after the defendant had demanded the payment of interest on her mortgages. In reference to the inspections made by the plaintiff prior to the exchange, it was found that she made three trips to the ranch, but that they consumed short periods of time, and covered only such matters as were pointed out to her. As to her opportunity to discover, during her year of occupancy of the ranch, whether any of the representations were true or false, no finding was made, and likewise upon the issue of whether she would have consummated the exchange had these representations not been made there is no finding.

[1-3] In respect to the complaint, it is argued that it is insufficient, because there is no allegation that any of the representatives alleged to be false induced the contract, or that without them the contract would not have been made, and also that it is insufficient because there is no allegation that the plaintiff suffered any injury or damage by reason of the exchange. Though the complaint is immaturely drawn, we think it sufficient to raise the issue that without the alleged false representations the contract would not have been made, when it alleges that these representations were the inducing cause of the contract and that it was made on ac-

count of them. In the matter of pleading damages, it is true that no express allegation of pecuniary damage is necessary, but it should be pleaded that the plaintiff by reason of the fraud has suffered injury to her property rights. Though the plaintiff here has not expressly pleaded any injury, we are satisfied that the judgment should not be reversed upon this ground, particularly when there was no demurrer to the complaint, and the action was tried without objection, and upon the theory that the complaint was sufficient.

[4-7] The serious question presented here is that the findings do not support the judgment. In an action of this kind it is not necessary to prove that all the specifications of fraudulent representations are true. "The judgment may be sustained upon evidence supporting any one material misrepresentation. *Davis v. Butler*, 154 Cal. 623, 98 P. 1047; *Thomas v. Hacker*, 179 Cal. 731, 178 P. 855. It matters not that there may have been included in the allegations and findings representations which are not actionable." *Scott v. Delta Land, etc., Co.*, 57 Cal. App. 320, 324, 207 P. 389, 391. Though the complaint is full of allegations of a great number of misrepresentations, many of which were found not to have been made, while others were found to be true in fact, there were certain material representations charged in the complaint and found to be untrue which are sufficient to sustain the judgment. It was found that the representations that there were several large springs upon the ranch and a vast supply of gravity water to be had; that the soil was very productive, being 60 acres of good bean land, and 50 acres of bottom land, nearly all irrigable or sub-irrigated; and that the side hills were very dark loam—were all untrue. Each one of these representations was a representation of a material fact within the knowledge of the appellant, and was sufficient to support the rescission of the contract.

[8] Excepting the representation relating to the location of what is termed the large spring, all the others could be proved false only by a thorough examination of experts in the use and development of water for irrigation purposes and of experts in the use of soils for farming purposes, or by personal experience gained by actually farming the land over a considerable period of time. Such being the case, we are unable to say upon the record before us that the respondent delayed an unreasonable time in making her discovery of the falsity of any of these representations. There is some uncertainty in the finding as to when the respondent discovered the falsity of the representation as to the location of the large spring. There is certainly evidence in the record to show that she was at least notified before the transaction was closed that the location of this spring was in dispute, that the line of the

ranch at that place had not been surveyed, and that the appellant was in doubt as to whether the spring belonged on the ranch or to the adjoining property owner. The meaning of the finding seems to be that, though this information was conveyed to the respondent, she did not take it seriously, and that she did not in fact discover that the spring was not upon the ranch until July, 1918. This being so, the rule of the cases that an unreasonable delay in making a rescission after the discovery of the falsity of the representations should bar a recovery is not applicable.

[9-12] The appellant criticizes the ruling of the trial court in refusing to permit him to make proof that the agent who conducted the transfer was financially interested with respondent in the transaction, and received a profit other than the commission therefor, and also the ruling refusing to permit the appellant to cross-examine respondent regarding certain oral representations which she alleged to have been made by the appellant. We are satisfied that error was committed in both of these rulings, but cannot say that either was prejudicial, because, the matter being before the court in equity sitting without a jury, the relationship of the agent which the appellant sought to prove was assumed by the court to have been proved when it made its ruling, and the inquiry directed to the respondent was covered at another period of the trial, and the trial court in respect thereto found for the appellant.

[13] The error committed in permitting the respondent, in the course of her examination before the referee, to refer to the bill of particulars which had been prepared by her counsel, is of a different character. When the respondent gave her notice of rescission of the contract, she included a demand upon appellant that he pay the sum of \$3,860 to reimburse her for the moneys expended by her in the care and maintenance of the ranch, which sum she alleged to be in excess of all moneys which she had received from the proceeds of the operation of the ranch. Her complaint was filed October 8, 1918, and on November 6, 1918, the appellant served upon her a demand for a bill of particulars covering such items. This demand was ignored, and the cause went to trial on December 20, 1918; the first trial resulting in a judgment for the appellant herein. Thereafter, and on the 18th day of June, 1920, a new trial having been granted, the cause again came on for trial and the matter of adjustment of accounts of operation of the respondent's properties was ordered heard before a referee.

At this hearing a bill of particulars dated June 12, 1920, was offered by the respondent and the objection of the appellant that it was inadmissible, because a copy had not been delivered within the time required by law, was overruled. Exception to this ruling was certified to the trial court, and the rul-

ing was sustained. This was error. Section 454, Code of Civil Procedure, provides that, when a party demands a bill of particulars covering the items of an account in suit, a copy thereof must be delivered within five days after the demand; otherwise, evidence thereof is to be precluded. In *St. John v. Consolidated Construction Co.*, 182 Cal. 25, 28, 189 P. 276, 277, the Supreme Court held that it was within the power of the trial court to relieve a party from his default in complying with the demand for a bill of particulars, and we assume that what was meant by this decision is that, when timely application is made under section 473, Code of Civil Procedure, for relief from the mistake, inadvertence, or neglect of the party, the court may grant the relief as if some order or proceeding had been taken against the party in default. There is, however, no uncertainty in the meaning of section 454 of the Code that, when the demand is not complied with within the prescribed time, the party is thereby precluded from giving evidence on the subject-matter of the account. As the record stands here, no application for relief from this default was requested or granted, and all evidence touching the subject-matter included in that demand was improperly admitted.

[14] Another question arises as to the use of this bill of particulars by the respondent in the course of her examination before the referee. It appears that when she left the ranch in the fall of 1918 she delivered to her attorney a copy from a statement made from memoranda which she had kept during the year when she had resided upon the ranch, showing items of expense incurred by her in its operation. From this information, and from information received through another source, her attorneys made up the bill of particulars, including therein items upon which they had no information from either source. This bill was dated June 12, 1920. This was two years after these memoranda had been prepared by respondent and delivered to her counsel—memoranda which, her counsel testified, he had lost immediately following the first trial in 1918. While she was a witness before the referee she was asked to refresh her memory from this bill of particulars, and objection was made on the ground that it had not been prepared by her or through her direction or advice. This objection was overruled, and on this appeal the respondent practically concedes that the ruling was error, and stipulates that the judgment might be modified to the extent of eliminating therefrom the sum of \$1,151.70. The original demand made by the respondent upon the appellant was \$6,860. The bill of particulars filed about two years later showed a claim of \$4,923.56. On the hearing before the referee this amount was reduced to the

sum of \$3,120.40, but when the matter was returned to the trial court and objections made to the referee's report by the appellant this sum was again reduced to \$1,884.45.

The sum of \$1,151.70, which the respondent consents may be stricken from the judgment, is arrived at by eliminating from the amount found due by the referee such items alone as respondent now insists were testified to by her without reference to the bill of particulars. This however, does not appear in the bill of exceptions, and respondent concedes that to support her claim it is necessary to go outside of the record. We are satisfied from what has been said that, because of the failure to file a bill of particulars within the time required by law, the respondent is not entitled to recover for moneys expended in the care, operation, or maintenance of the property, and, as the parties agree that the amount allowed for this purpose by the trial court was the sum of \$1,884.45, it is ordered that the judgment be modified, by eliminating that amount, and that, as so modified, it is affirmed, with costs to appellant.

We concur: KOFORD, P. J.; STURTEVANT, J.

32 Cal. App. 542

PEAVEY et ux. v. MUTUAL REALTY CORPORATION et al. (Civ. 4839.)

District Court of Appeal, Second District, Division 1, California. April 26, 1927.

1. Municipal corporations ⇨706(5)—Evidence held to sustain recovery for injuries by runaway car.

In pedestrian's action for injuries sustained by collision with runaway car, alleged to have resulted from driver's failure to set emergency brake or from defective condition of brakes, evidence held sufficient to sustain plaintiff's recovery.

2. Appeal and error ⇨1033(5)—Defendant in action for injuries could not complain on appeal of instruction favorable to him.

In action for injuries defendant could not complain, on appeal from judgment allowing plaintiff recovery, of instruction that fact of accident was no evidence of negligence.

3. Trial ⇨296(3)—Instruction that violation of Motor Vehicle Act, if sole cause of injuries, warranted recovery held not prejudicial, where jury were required to find failure to exercise care (Motor Vehicle Act 1915, § 14).

In action for injuries caused by runaway car, instruction that, if jury found defendant violated Motor Vehicle Act, § 14 (St. 1915, p. 406) and that such violation was sole proximate cause of injuries, they should find for plaintiff, held not prejudicial where other instructions required jury to find defendant had been wanting in exercise of due care to keep automobile in good condition, and where instructions were required to be considered together.

4. Trial $\Rightarrow$ 260(1)—Refusal of instruction is not error, where matters requested are otherwise covered.

Refusal of requested instruction is not error, where matters are fully covered by other instructions given jury.

5. Appeal and error $\Rightarrow$ 170(9)—Judgment will not be reversed for error in instruction not affecting appellant's substantial rights (Code Civ. Proc. § 475).

Under Code Civ. Proc. § 475, judgment cannot be reversed by reason of error in instruction or ruling unless appellant sustains substantial injury and different result would have been probable if error had not occurred.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by James Peavey and wife against the Mutual Realty Corporation and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Culver & Nourse, of Los Angeles, for appellants.

E. B. Drake, of Los Angeles, for respondents.

YORK, J. This is an appeal by defendants from a judgment rendered upon a verdict by a jury. The action was prosecuted by plaintiffs to recover damages alleged to have been sustained by the plaintiff Laura Peavey, and to recover resulting damages alleged to have been suffered by her husband, James Peavey, the other plaintiff, by reason of the alleged negligence of the defendants in the operation of an automobile. The complaint alleges that the accident which caused the injuries was caused alone by the negligence of the defendants, by their failure to properly or at all adjust or set the brakes on said automobile, and by negligently permitting the brakes on said automobile to become and remain old, defective, and unsound to such an extent that, when the said brakes were attempted to be set, they did not hold said automobile "from rolling down a decline in the street."

The answer of defendants denies these allegations and all the material allegations of the complaint, and pleads affirmatively that, if the brakes were defective, the defect was unknown to defendants, and by the exercise of reasonable care could not have been discovered by them.

Van Horne avenue (a public highway in the city of Los Angeles) runs north and south, and at the place of the accident declines to the south on a grade of approximately 2½ per cent. On the day of the accident, defendant De la Guardia drove said automobile to a point on the easterly side of the avenue and about 100 feet north of the home of plaintiffs. At that point he stopped said automobile and with a companion who was with him entered a house then in the

course of construction. A short time after, which defendant De la Guardia estimates to be 5 or 6 minutes, said car coasted down the street and struck the plaintiff Laura Peavey, who was standing in front of her home purchasing vegetables at a peddler's wagon. She did not see or hear the approach of the driverless car which caused injuries to her, and for which plaintiffs have sued to recover damages. The defendant De la Guardia testified that before leaving the automobile, he pulled on the emergency brake and set it, and that after the accident he found that it was "horizontal" or "vertical"—or one-half on or set. But he testified positively that the position of the brake lever had been changed since he left the machine. He had not noticed that there was any down grade when he left the automobile and could not account for its moving. He said the brake was strong enough to hold the car.

[1] The condition that the emergency brake was in after the accident, without any explanation of its alleged changed position, is sufficient evidence to justify the jury in finding that the brake was in the same position after the accident as when the car was left by De la Guardia. This conclusion is strengthened by the fact that he did not know that there was any decline in the grade of the avenue. The fact that the automobile did not start down the decline immediately may have been as explained by the witness Hinkley, who said he had been in the business of repairing and examining and driving automobiles for more than 20 years continuously. He stated that the brakes would hold the car if they were properly set. That they would stay in a proper condition to hold the car until someone releases them. He said:

"If they were in proper condition, there would not be any contact that would release them except by hand."

[2] It appears from his testimony that if the brake bands were heated when set only sufficient to hold the car, and should then cool off, that this might release the brakes sufficiently to allow the car to start down hill. De la Guardia's testimony was the only testimony that the brakes were pulled entirely on. We find on a review of all the testimony that it was sufficient to justify the verdict. Plaintiffs' case did not depend on the doctrine of *res ipsa loquitur*, and the court instructed the jury that the fact that the accident in question occurred is, of itself, no evidence that it was caused by any carelessness or negligence of the defendants. We are not called upon to approve or disapprove this instruction, but surely defendants cannot complain of it. In fact, a contrary doctrine seems to have been invoked on behalf of the defendants, who would have the court consider that the brakes had held the auto-

mobile in the same or a similar place a short time before. Horcasitas did testify that the brakes were set, but not that they were sufficiently set. There was no direct evidence that the brakes were defective.

[3] The instruction as to the terms of the Motor Vehicle Act (section 14; Stats. of 1915, p. 406), in which the jury were instructed that if the jury found that the defendants violated the provisions specified, and that such violation, if any, was the sole proximate cause of any injuries to plaintiff, then they will find damages in favor of the plaintiffs and against the defendants, is criticized by appellants, who insist that the instruction is defective in that it leaves out all elements of reasonable care to keep the automobile in good condition. But the court specifically instructed the jury that it was their duty to consider not one of the instructions, but all of them together, and to construe them together for the purpose of definitely ascertaining what the law is upon the various questions submitted to them. The court thereafter gave a correct instruction fully covering the matter referred to in the instruction above mentioned. The court instructed as to ordinary care, negligence, proximate cause, and thereafter instructed:

"You are instructed that in this case, before the plaintiffs can recover, they must prove by the preponderance of the evidence either that the defendants negligently permitted the brakes upon their car to be defective and unsound, or that they carelessly failed to properly set the brakes. These two matters are the only matters with which the defendants are charged with being negligent, and no other acts of negligence which you may believe they may have committed can be considered by you."

And thereafter the court instructed the jury that before they could find that the defendants were negligent in failing to have the brakes on the automobile in question in effective and sound condition, they must find from the preponderance of the evidence not only that the brakes were defective, but that they must further find that the defective condition of the brakes was known to the defendants, or that the defect in them, if any there was, was such that it could have been discovered by them by the exercise of that degree of care which an ordinarily prudent man would use under the circumstances. The court also instructed the jury in regard to reasonable care in keeping the automobile and its brakes in sound condition, and that the defendants were not liable for injuries caused by latent or hidden defects such as an ordinarily prudent man would not have discovered under the circumstances, and that an automobile driver or owner was not an insurer of the safe condition of its brakes, and that the law only requires him to use reasonable care to maintain them in an efficient condition; and then said:

"And if you believe from the evidence that the defendant De la Guardia did properly set his brakes when he left the car just prior to the accident in question, and further believe from the evidence that the brakes were in good condition, or that they were defective but that the defect was unknown to the defendants and could not have been discovered by them by the exercise of reasonable care, then your verdict must be in favor of the defendants."

The court further instructed the jury that the fact that the accident occurred did not even raise a presumption of negligence—an instruction most favorable to the defendants. The court, in an evident desire to prevent the jury from considering the accident in itself as any evidence of neglect, even went so far as to instruct the jury:

"And you might each ask yourselves, Did the defendants do anything under the circumstances I would not have done, or failed to do anything in regard to the brakes upon their car or to the care of the same, which I would have done? If your answer is 'No' to this question, your verdict must be in favor of the defendants."

The record does not disclose whether the above instruction was given at the request of defendants, but its apparent substitution of each juror as a psychological defendant in the case might be deemed sufficient to cover a multitude of technical errors such as appellants contend were favorable to plaintiffs. Considering all of the instructions together as the court directed the jury to do, the instructions with regard to the Motor Vehicle Act are not in conflict with the instructions that follow, and the following instructions explain the meaning of the Motor Vehicle Act instructions as clearly as though the instructions had contained the clause introducing them with "provides that." In the case of *Mora v. Favilla*, 186 Cal. 204, 199 P. 17, cited by appellants, an erroneous instruction was left to stand without giving instructions asked by the defendant, which the Supreme Court said would have cured the error in the instructions given. It should have been apparent to any reasonable juror that the instructions, which appellants claim to have been conflicting, were, when construed together, explanatory to each other, and they produced no prejudicial error.

[4] Appellants also except to the court's neglect or refusal to give their requested instruction, which was as follows:

"You are instructed that the plaintiff is only entitled to recover for such injuries as she may have received as were a proximate result of the accident. It is incumbent upon the plaintiff to prove by a preponderance of the evidence that the injuries which she now complains of were proximately caused by the negligence of the defendants."

This instruction was amply covered by several instructions given to the jury. The jury was specifically instructed as follows:

"Negligence on the part of the defendants is of no consequence, however, unless it is the proximate cause of the injuries complained of."

And they were further instructed:

"You are further instructed that, while the plaintiff is entitled to recover for disability or pain that she may suffer in the future, she can only recover for such pain or disability as she is reasonably certain to suffer, and you are not entitled to guess or speculate on these or any other matters."

And they were instructed further:

"If you find for the plaintiff Laura Peavey, you should find such reasonable sum as will compensate her for the injuries which were the proximate result of the accident and for the pain and suffering she has experienced by reason of such injuries or is reasonably certain to suffer therefrom in the future, but you have no right to speculate or guess as to that. And so far as suffering in the future is concerned, such suffering must be reasonably certain to occur. * * * The amount sued for by plaintiff Laura Peavey is not, however, the slightest criterion or guide for you to go by."

[5] This court is required by section 475 of the Code of Civil Procedure to disregard any improper instruction, which, in our opinion, did not affect the substantial rights of the parties, and not to reverse any judgment by reason of any instruction, error, or ruling unless it shall appear to us that by such instruction, error, or ruling the appellants sustained or suffered substantial injury, and that a different result would have been probable if such instruction, error, or ruling had not occurred. It is also provided that there shall be no presumption that error is prejudicial or that injury is done if error is shown.

We therefore find no prejudicial error in the record, and the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

82 Cal. App. 525

WHITING v. DELOZIER et al. (McDONALD et al. Interveners). (Civ. 5316.) ★

District Court of Appeal, First District, Division 1, California. April 26, 1927.

Hearing Denied by Supreme Court June 23, 1927.

1. Brokers ⇨8(3), 37—Evidence held to support findings of agency and fraud of brokers sued by principal for accounting.

In action against real estate brokers for accounting, their testimony and written agreement with plaintiff, and offer of apartment house owner to plaintiff, held to support trial court's findings that they were plaintiff's agents to negotiate exchange of bank stock for apartment house, and represented that it could not be procured for less than 141 shares, which plaintiff placed subject to their order, but acquired it for 100 shares, and retained rest without plaintiff's knowledge or consent.

2. Brokers ⇨34—Brokers retaining part of stock, placed subject to their order for exchange after completing exchange for remaining shares without principal's knowledge, must account therefor.

Brokers withdrawing from escrow 41 of 141 shares of bank stock, placed subject to their order by their principal, to be exchanged for apartment house, after completing exchange for 100 shares, without disclosing either party's proposition to other, must account to principal therefor.

3. Brokers ⇨21—Brokers, without option to purchase stock received for exchange, must report to principal more advantageous terms obtainable.

Brokers, without option to purchase shares of bank stock, placed subject to their order to be exchanged for other property, must report to principal any more advantageous terms of sale obtainable than required by their instructions.

4. Brokers ⇨34—Agent cannot retain fruits of fraud on plea of principal's willingness to pay more rather than not obtain property.

Agent will not be permitted to justify violation of his trust and retain fruits of his fraud from principal on plea that latter was willing to give greater price for property rather than not obtain it.

5. Brokers ⇨34—Principal may recover from agent obtaining secret profit difference between price of land purchased and amount paid agent by principal.

In action against agent for breach of trust and secret profit obtained, principal may recover difference between price of land purchased for, and amount paid agent by, principal.

6. Appeal and error ⇨843(2)—Defendants' objections to intervention by parties not appealing from judgment for plaintiff, nor recovering judgment against defendants, raise mere moot questions.

Where no judgment was entered on interveners' complaint against defendants, and interveners did not appeal from judgment for plaintiff, defendants' objections against right to intervene raise simply moot questions, which will not be considered.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by D. G. Whiting against J. G. DeLozier and another, in which William E. McDonald and another intervened. From a judgment for plaintiff against defendants and interveners, defendants appeal. Affirmed.

E. A. Lane, of Los Angeles (Edw. F. Crawford, of Los Angeles, of counsel), for appellants.

James S. Bennett, of Los Angeles, for respondent.

W. H. Evans, and E. R. Baskerville, both of San Diego, for interveners.

CAMPBELL, Justice pro tem. This is an appeal by appellants from a judgment entered

in favor of respondent and against appellants and interveners. The interveners have not appealed.

On August 1, 1919, the appellants Delozier and Colvin, being real estate brokers located in Los Angeles, but formerly located in Imperial Valley, where they had known, and had business dealings with, respondent, received a letter from one Francisco inviting them to come to San Diego, saying, "I have a real big trading proposition for you." This Francisco was a real estate dealer in San Diego, and was either an agent for, or jointly interested with, the interveners McDonald and Evans. He introduced appellants to the interveners, and proposed that appellants make some kind of a trade with the interveners for a large partially constructed apartment house in San Diego known as the Winchell Apartments. The interveners had, according to the evidence, acquired this apartment house for practically nothing. The former owner had died after expending considerable money upon the building. There were a number of judgments against the building, and the interveners had bought it at the sale. They had promised to protect these judgment creditors, but had not done so. It did not cost them very much money, and they said they could offer a big deal to turn it quick.

The interveners were brothers-in-law. McDonald was a real estate agent who had acted in many deals as such, but who handled practically his own properties and occasionally employed other brokers. Evans was an undisclosed partner or co-owner with his brother-in-law, and a practicing attorney. At the trial they testified, first, that they two were sole and equal owners and solely interested except for the lien or mortgage holder in the amount of \$16,600, but later admitted that Francisco had bought the property for them, and owned a one-fourth interest in the net profits they should make.

Prior to the transaction here in question, the appellants had acted as agents for the respondent in exchanging an apartment house in Los Angeles for 251 shares of the capital stock of the First National Bank of San Jacinto, and respondent had complained to appellants that they had misrepresented the facts to him, and it was to adjust this complaint that appellants agreed to act as respondent's agents in exchanging the bank stock for the San Diego apartment house. According to the testimony of respondent appellants told him that they would get him a trade for the bank stock that would enable him to recover the loss and more, and would ask him no commission. Appellant Delozier prepared a written contract by which respondent employed appellants to make the exchange. Appellant Delozier testified:

"I wrote up the agreement there at the desk at the Maryland Hotel. Then I just drew a line through the commission part. Then he went to sign it, and he said, 'You haven't got

net in here,' and I had to write that in before he signed it, and I think, by looking on the agreement which you have here in your files, that you will see it is a little different colored ink, as Mr. Colvin handed me his fountain pen then."

The agreement itself provides:

"This agreement witnesseth that I, D. G. Whiting, of El Centro, Cal., the owner of the following described first piece of property, situate, lying, and being in the city of —, county of —, state of —, particularly described as follows, to wit: 141 shares of bank stock of the First National and the Savings Bank of San Jacinto, Cal., which I agree to exchange for the following described second piece of property, situated, lying, and being in the city of San Diego, county of San Diego, state of California, particularly described as follows, to wit: One apartment house known as the Winchell Apts., located on lots 5, 6, 7, and 8, in block 239 of University Heights in the city of San Diego.

"It is further agreed and understood that all principals to this agreement have investigated the respective properties, and this exchange is being made on representations of the owners only, and the agent is hereby released from all liability regarding the same.

"And J. G. Delozier & B. E. Colvin is hereby authorized to act as my agent in negotiating said exchange.

"And it is further agreed with said J. G. Delozier & B. E. Colvin that when he has secured an acceptance of the proposition to exchange the above-described properties on the above terms, or such other terms which may hereafter be accepted by me, I will then pay the sum of nothing dollars, making it a net proposition, as commission for such services."

With this authority from the respondent, Whiting, the appellants went to the owner of the apartment house, and received from him a proposition addressed to the respondent, Whiting, as follows:

"I, William E. McDonald, hereby make the following proposition to D. G. Whiting, for a transfer of all my right, title, and interest in and to the following described property situated in the county of San Diego, city of San Diego, state of California: Lots 5 to 8, inclusive, in block 239 of University Heights, improved with a 4-story building known as the Winchell Apartments, the said property being free of all incumbrances, with the exception of a mortgage in the sum of \$16,600, and state and county taxes for the year 1920. The consideration for said transfer to be 100 shares of the capital stock of the First National Bank of San Jacinto, Cal."

When the construction of the contract was put squarely to the defendant Delozier, he testified:

"The Court: I want to know how you considered yourself operating at that time, as to whether you were agent for either of these parties, or whether you were a free lance, making what you could in this deal. A. In this case I suppose it would be agent for Mr. Whiting, a net proposition. In other words, it would be about the same as an option."

Mr. Lane, attorney for the defendants, cleared the matter up for the trial judge when he said:

"Mr. Lane: Mr. Delozier's evidence has scarcely died from our ears, his testimony that in this document that they charged a commission, but, after he had seen Mr. Whiting they came back, and told Mr. McDonald and Mr. Evans that the deal would be made on a net proposition, and no commission. Now, there is one ground upon which that instrument may be material. I want to call your honor's attention to that. The preliminary instrument shows they did contemplate acting as agent for Mr. McDonald in this matter, and it so recites, but the later instrument, which is the final agreement between the parties, recites just exactly the opposite; namely, that Mr. Delozier and Mr. Colvin were to be the agent of Whiting."

The offer of the interveners to transfer the apartment house to respondent for 100 shares of stock was admittedly concealed from respondent by appellants.

[1] The written agreement for exchange, the written offer of the interveners, and the testimony of appellant Delozier recognize that appellants were the agents of respondent, as also does the testimony of respondent establish such fact, and amply support the findings of the trial court:

"That within two years prior to filing his complaint herein, and on or about the 1st day of August, 1919, plaintiff being then the owner of two hundred and fifty-one (251) shares of the capital stock of the First National Bank of San Jacinto, employed the defendants as his agents to negotiate for the purchase of an apartment house in the city of San Diego, then owned by interveners, to be paid for with shares out of said shares of the capital stock of said First National Bank of San Jacinto so owned by plaintiff.

"That defendants, and each of them, represented to plaintiff that said apartment house could not be procured for plaintiff for less than one hundred and forty-one (141) shares of said capital stock, and plaintiff, relying upon said representations of defendants, as his agents aforesaid, placed one hundred and forty-one (141) shares of said capital stock and the certificates representing the same, all properly indorsed ready for transfer on the books of said corporation, subject to the order of the said defendants.

"That on or about October 1st, 1919, defendants acquired said apartment house for plaintiff for and in consideration of one hundred (100) of said shares of the capital stock of said First National Bank of San Jacinto, and without the knowledge or consent of plaintiff said defendants took, retained and converted to their own use the remaining forty-one (41) shares of the capital stock of said First National Bank of San Jacinto so owned by plaintiff and so placed subject to the order of defendants. That defendants so conducted said negotiations as to hinder and prevent plaintiff and interveners consulting together during said negotiations.

"That plaintiff did not at any time consent that defendants might purchase his said one hundred and forty-one (141) shares of the capi-

tal stock of said bank in consideration of their acquiring for him the said apartment house."

[2] As has been said, the evidence supports the findings. The evidence shows that, with an offer from the plaintiff to give 141 shares of bank stock for the apartment house, and an offer from McDonald to take 100 shares of the bank stock for the apartment house, and with the principals separated from each other, with neither proposition disclosed to the person to whom the offer was made, the appellants open the escrow at El Centro and obtain respondent's instruction, placing the 141 shares subject to the order of the appellant Delozier. The exchange being completed between the principals, Delozier withdrew the 41 shares, for which he received. If appellants were respondent's agents, then they must account. *Calmon v. Sarraile*, 142 Cal. 638, 76 P. 486; *Great Western Gold Co. v. Chambers*, 153 Cal. 308, 95 P. 151; *Id.*, 155 Cal. 366, 101 P. 6.

The case of *Robinson v. Easton*, 93 Cal. 80, 28 P. 796, 27 Am. St. Rep. 167, on which counsel for appellants rely, has been sufficiently explained in the case of *Smith v. Blodget*, 187 Cal. 235, 240, 201 P. 584, 587, as follows:

"The written instrument in the case at bar contains no express provision that plaintiffs shall retain that portion of the purchase price which exceeds the specified selling price. * * * It may mean that all net proceeds above the specified price belong to him, the owners of the property agreeing to part with all interest in the property, whatever the price may be, provided they receive the sum of one hundred dollars per acre free from all deductions, in which case Smith would be in the position of a vendor selling on his own account; it may mean that the owners of the property are entitled to receive all of the net proceeds of the sale and that Smith cannot look to them for any compensation for services unless he obtains for them a net price in excess of one hundred dollars per acre, and in that case he would be a mere agent. *Ford v. Brown*, 120 Cal. 551 (52 P. 817); *Wolverton v. Tuttle* (51 Or. 501) 94 P. 961, 963."

[3] The evidence introduced to clear up the ambiguity clearly shows that the offer of the respondent was to the interveners, and that the offer of the interveners was to the respondent. The appellants had no option to purchase either from the respondent or from the interveners. The reason respondent was to pay no commission to appellants is clearly explained. The testimony of all parties was to the effect that the appellants were acting as the agents of the respondent, and counsel for the appellants so represented to the trial court in presenting an objection to the introduction of testimony. On this evidence the trial court solved the ambiguity by a specific finding that respondent did not at any time consent that defendants might purchase his shares of bank stock. Under such circumstances it is the duty of the agent to report to his principal

any more advantageous terms of sale he can obtain than that required by his instructions.

Plaintiff placed 141 shares of bank stock subject to the order of appellants with which to purchase the apartment house from interveners. They used but 100 shares in making the purchase. The judgment requires them to account to respondent for the remaining 41 shares which he had placed subject to their order for a specific purpose.

[4] "An agent will not be permitted to justify the violation of his trust and retain from his principal the fruits of his fraud upon the plea that the principal was willing to give a greater price for the property rather than not to obtain it." *Calmon v. Sarraile*, 142 Cal. 642, 76 P. 486.

[5] In an action against an agent for breach of trust and to recover a secret profit obtained by such agent as the result of the agency relationship, the principal should have from the agent the difference between the price of the land purchased by him for the principal and the amount paid him by the principal. *Langford v. Thomas* (Cal. Sup.) 252 P. 603; *King v. Wise*, 43 Cal. 628, 634.

[6] Appellants urge a number of points, all of which have to do with the insufficiency of the evidence to support the findings and to errors in rulings on the right of the interveners to intervene. We have disposed of the question of the insufficiency of the evidence to support the findings, and, while we are of the opinion that the rulings of the trial court on the objections raised against the interveners' right to intervene are correct, it is not necessary to distinguish the authorities cited, as the judgment is in favor of respondent and against both appellants and interveners. No judgment having been entered on the interveners' complaint against appellants, and the interveners not having appealed, these objections raise simply moot questions.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

82 Cal. App. 605

BELL v. KELLY. (Civ. 4606.)

District Court of Appeal, Second District, Division 1, California. April 29, 1927.

1. Libel and slander $\Rightarrow$ 112(1)—Evidence not showing utterance of words charged, that plaintiff "had committed perjury," held insufficient to support verdict for slander.

In slander suit, based on statement that plaintiff "had committed perjury," testimony that defendant submitted to district attorney evidence of perjury and demanded issuance of criminal complaint against plaintiff, but not proving alleged statement directly or indirectly, held insufficient to support verdict for plaintiff.

2. Trial $\Rightarrow$ 335—Verdict in libel and slander suit, not segregating damages, will be set aside on insufficiency of evidence as to one count.

In libel and slander suit, a verdict specifying amount awarded for compensatory and for punitive damages but not segregating the damages as to each count of the complaint, will be set aside where evidence is insufficient to support one of the several counts.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action for damages for libel and slander by Mary Jane Bell against Mike Kelly. Judgment for plaintiff, and defendant appeals. Reversed.

John L. Richardson, Anderson & Anderson and T. E. Parke, all of Los Angeles, for appellant.

Weber & Crawford, of Santa Monica, for respondent.

HOUSER, J. This is an appeal from a judgment entered on a verdict in an action for libel and slander.

The complaint contained four counts; each of the first two thereof being for both compensatory and punitive damages on account of an alleged libel published by defendant, and each of the last two counts of the complaint being likewise for similar damages alleged to have been occasioned to plaintiff by reason of certain slanderous remarks made by defendant—all of and concerning plaintiff.

The verdict was general in form, and, without segregating the damages (if any) as to each count or as to any of the counts of the complaint, awarded to plaintiff for actual damages the sum of \$2,500 and for punitive damages the sum of \$3,500, making a total damage of \$6,000.

The principal attack of appellant regarding the judgment is directed to the fourth count of the complaint, the gravamen of which was that, with the intention of injuring plaintiff in her good name and reputation, and with actual ill will, malice, and hatred toward plaintiff, defendant stated to one McClelland that plaintiff had committed perjury in the trial of a certain action and sought to have plaintiff arrested and charged with the commission of such offense.

In effect, the sufficiency of the evidence to support the verdict is the question presented—for a determination of which it becomes necessary to examine the evidence in the case which pertains to the point at issue.

In substance, the witness, McClelland, testified that he was a deputy district attorney of the county of Los Angeles in charge of the issuance of complaints in that office against persons charged with the commission of criminal offenses; that some time during the month of September, 1921, defendant called to see the witness in his official capacity as such deputy district attorney. In reply to a

question as to what conversation occurred at that time between the deputy district attorney and defendant, the witness stated:

"He came in to make a complaint against some one who had been a tenant of one of his buildings, I think, over the tenancy of which there had been some litigation in the superior court of this county. He wanted to lay the facts before the office with a view to having a complaint issued against his tenants for perjury in connection with that litigation. * * * I think he produced at that time, or at a later conversation, a transcript of the testimony of the party against whom he stated that he wanted a complaint to issue."

A few days later a second conversation took place between the deputy district attorney and the defendant, in which defendant stated that he wished a complaint against the defendant in a certain action, who the deputy district attorney "thought" was the plaintiff in the instant case. The witness further testified:

"He demanded a complaint against the woman for perjury. * * * He told me about this lawsuit that he had had with this woman over a piece of property down at the beach somewhere, produced a record of her testimony showing that the case had been pending before Judge Valentine on an ouster proceeding of some kind—ejection proceeding—and he also showed me a copy of a newspaper article reflecting upon the integrity of Judge Valentine, which I think he told me he has inserted in the newspaper himself. * * * He asked if I would issue a complaint for perjury upon that testimony. I told him I would not."

No criminal complaint was issued for perjury against the plaintiff herein.

In substance, defendant testified that, when he went to see the deputy district attorney, he "threw him over those nine affidavits, * * * or ten," which constituted the "facts" which defendant presented to the deputy district attorney, and which affidavits theretofore had been prepared by defendant from statements made to him by each of the persons, respectively, who made the affidavits—at the same time making the statement to the deputy district attorney that "here are some papers which I think will show that the party has violated the law," and that, prior to presenting the matter to the deputy district attorney, he consulted a private attorney who advised him to take it up with the district attorney.

Reduced to some what lower terms, the total evidence regarding the charge, that defendant stated to the deputy district attorney that plaintiff had committed perjury, is that defendant went to the office of the deputy district attorney for the purpose of having a criminal complaint issued against plaintiff; that at said time defendant produced a transcript of testimony given by plaintiff in a certain case; gave the deputy district attorney nine or ten affidavits of different persons which tended to establish the

commission of the crime of perjury by plaintiff; and asked or demanded that a criminal complaint be issued.

The case of Haub v. Friermuth, 1 Cal. App. 556, 82 P. 571, is an authority in point. That was an action for slander, in which the defendant was charged with having spoken of and concerning the plaintiff the following defamatory words:

"I have a man to prove that George Haub struck Richard Schwartz in front of his place of business, that he had two witnesses who had tracked the bloodstains from Haub's shop to the place where Schwartz fell unconscious, and that he had proof that Haub was guilty of the murder of Schwartz."

On cross-examination, which differed from the direct examination in no material respect, one of the witnesses gave the language of the defendant as follows:

"He stated that 'they' or 'we' had a witness that had seen Mr. Haub strike Mr. Schwartz; he said he was struck in the butcher shop and that they had a witness that saw Mr. Haub strike this man. He said there was a witness that had followed Mr. Schwartz up the block and saw him stagger all the way and fall at the corner; and also that there were two witnesses that had traced the blood back to the butcher shop."

A second witness testified that in a certain conversation the defendant stated:

"No, I don't believe he had heart disease; somebody hit him because he had a hole in the back of his head. * * * You know that Mr. Haub and Mr. Schwartz had some business troubles and it is George Haub that hit him; * * * he did not say 'killed' or 'murdered,' but he said 'hit' him."

A third witness testified that the defendant said to him, "Mr. Haub might have killed him anyhow;" and a fourth witness testified that defendant said:

"If you will follow up Haub pretty close you will find that this man's death came that way; * * * he might have something to do with it."

In ruling upon the question of the sufficiency of the evidence to support the judgment, the court said that the gravamen of the cause of action was that the defendant falsely charged the plaintiff with the murder of Schwartz; that to authorize a recovery it was necessary to prove that defendant *had spoken the words set out in the complaint*; that, if the complaint had not set out those words or contained an allegation that they were spoken by the defendant, it would have failed to state a cause of action, since the other words did not of themselves or by reason of any averments in the complaint charge the plaintiff with the commission of a crime, and proof that the defendant had spoken only *those other words* was equally insufficient to authorize a recovery; and that there was nothing in the testimony which indicated

that the defendant had said that he had proof that Haub was guilty of the murder of Schwartz, or that he had uttered any words *substantially the same*.

[1] The facts in the instant case are much weaker than are those in the case just cited. In the case here under consideration, to summarize the evidence, it is disclosed that defendant submitted to the deputy district attorney evidence of the commission by plaintiff of the crime of perjury, and demanded that a criminal complaint be issued charging her with that offense. He made no statement, either directly or indirectly, that plaintiff "had committed perjury," as charged against him, but to all intents and purposes left the question of the probabilities of whether she had done so to the determination of the deputy district attorney.

There was nothing other than a surmise which would indicate that defendant had spoken the words regarding plaintiff which are set forth in the fourth count of the complaint; nor is there even a suggestion that he used language which would be the equivalent of that with which he is charged. So far as appears from the record, all defendant did was to intimate that plaintiff had "violated the law," which is a far cry from a direct or indirect statement that she had committed perjury. It is therefore apparent that as to the fourth count of the complaint the evidence was insufficient to support the verdict.

[2] It will be remembered that the verdict was general as to the amount of damages awarded; that is to say, the damage sustained by plaintiff as to each count of the complaint was not segregated from either or any of the other counts thereof, but, with the exception of specifying the amount awarded for compensatory damages and for punitive damages, respectively, was aggregated into one lump sum. The effect of the joinder in the verdict of damages not specified in amount which were unwarranted in law is obvious. This court cannot determine the amount of the damages which the jury included in its verdict on a cause of action which was not supported by the evidence. It may have been insignificant as compared to the damages which the jury had in mind as a proper recompense to plaintiff for the wrong caused her by the libelous or slanderous remarks concerning plaintiff, contained in the other three counts, of which the jury found the defendant guilty; or, on the other hand, it may have comprised the greater part of the total amount of the verdict. As was said in the analogous situation in the case of *Lewis v. Hayes*, 165 Cal. 527, 534, 132 P. 1022, 1024 (Ann. Cas. 1914D, 148):

"It is not within our power or province to segregate the general verdict of the jury into its component elements of an award for compensatory and an award for punitive damages."

Appellant specifies several other alleged errors occurring at the trial, but, as the point hereinbefore considered is determinative of the question as to whether a new trial should be granted, it becomes unnecessary to devote further attention to the appeal.

The judgment is reversed.

I concur: CONREY, P. J.

Mr. Justice YORK, deeming himself disqualified, takes no part in the decision.

82 Cal. App. 480

M. C. THRELKELD COMMISSARY et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5839.)

District Court of Appeal, First District, Division 1, California. April 22, 1927.

1. Master and servant ⇨375(1)—Injuries to assistant cook, sent by head cook for laundered aprons for commissary car crew, held to arise in "course of employment" (St. 1923, p. 375, amending Workmen's Compensation Act, § 6 [a], as amended).

Injuries to assistant cook on commissary car, returning from express office, to which head cook had sent him to procure aprons which members of crew wore and which were laundered apparently at head cook's expense, held to have occurred in "course of employment," under St. 1923, p. 375, amending Workmen's Compensation Act, § 6 (a), as amended.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Master and servant ⇨375(1)—That injury to commissary car employee, without regular hours or definite work, occurred outside car did not make it noncompensable; "course of employment" (St. 1923, p. 375, amending Workmen's Compensation Act, § 6 [a], as amended).

That employee was engaged as assistant in commissary car did not prevent accident outside car from being injury in "course of employment," under St. 1923, p. 375, amending Workmen's Compensation Act, § 6 (a), as amended, where employee had no regular hours of labor nor definite character of work to perform, being subject at all times to head cook's orders.

3. Master and servant ⇨375(1)—Injury outside usual duties arises "out of employment," where work was ordered by one authorized (St. 1923, p. 375, amending Workmen's Compensation Act, § 6 [a], as amended).

Though injury to employee occurs in performance of work outside scope of his usual duties, injury may nevertheless be considered as arising out of and in "course of employment," under St. 1923, p. 375, amending Workmen's Compensation Act, § 6 (a), as amended, where ordered by one authorized to give directions.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Ong Thlu Lem, known as Kee Ong, against the M. C. Threlkeld Commissary and the Ocean Accident & Guarantee Corporation. From an award of the Industrial Accident Commission in claimant's favor, the employer and insurer apply for certiorari. Award affirmed.

Redman & Alexander and R. P. Wisecarver, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

KNIGHT, J. Petitioners seek by this proceeding in certiorari to have annulled an award made by the Industrial Accident Commission in favor of respondent Ong Thlu Lem, known also and referred to in the record as Kee Ong, who suffered injuries on May 29, 1926, which resulted in the amputation of his right arm at the shoulder.

The Industrial Accident Commission found that the injury occurred in the course of and arose out of Kee Ong's employment (section 6 [a], Workmen's Compensation Act [Stat. 1923, p. 375]), and the question presented by this proceeding is whether such finding is supported by substantial evidence. Petitioners contend that it is not, claiming that Kee Ong was injured while on a personal errand for the benefit of himself and another employee.

The record discloses the following facts: The injured man had been employed for about six months as assistant cook on a commissary car located on a siding at a construction camp named Norden, on the lines of the Southern Pacific Company, which car was being operated by M. C. Threlkeld Commissary, a copartnership, as a "short-order" boarding house for the accommodation of the men employed by said railroad company in its maintenance of way and construction department. Sam Dong, as head cook, was in full charge of the crew of said commissary car, having absolute power to "hire or fire" any member thereof and being given unrestricted authority to direct their services. He had hired Kee Ong, whose entire time and services were subject to Sam Dong's orders. The hours of labor were irregular, the work being assigned by Sam Dong as the volume of business demanded. The wages of the men employed on said car were paid by said copartnership. As was customary in such employment, the members of the cook's crew wore aprons while performing their work which were supplied by the crew and were laundered apparently at the expense of the head cook. Kee Ong had worked through the night preceding the accident, and when Sam Dong came on relief duty in the morning he found there were no clean aprons to wear, whereupon he directed Kee Ong to go down

to the express office at Soda Springs, a station about a mile away, to fetch the kitchen laundry which Sam Dong had sent to a Chinese laundry in Sacramento to be washed, and telling Kee Ong that when he returned he could go to sleep. In order to reach Soda Springs from the car, it was necessary for pedestrians to follow the railroad right of way. Complying with Sam Dong's orders and accompanied by another Chinese employee, Kee Ong started immediately, before eating his breakfast, and walked along the railroad track to Soda Springs, but upon reaching there ascertained that the laundry was not there. Kee Ong and his companion then started on their return to the car, and after proceeding some distance along the track were overtaken by a freight train traveling in the same direction. They stepped to one side of the track, but after the engine and several cars had passed them, started forward, walking along the side of the track, when Kee Ong, who was behind his companion, stumbled and fell in such a manner that his right arm fell across the rail and under the wheels of the moving train, with the result that his arm was crushed, necessitating amputation at the shoulder.

[1] We are of the opinion that the foregoing evidence supports the commission's conclusion that said injury occurred in the course of and arose out of Kee Ong's employment, and therefore its findings must be sustained. As said in *Dearborn v. Industrial Accident Commission*, 187 Cal. 591, 203 P. 112:

"At the outset of this inquiry we may repeat what was said by the present Chief Justice in *Southern Pac. Co. v. Industrial Acc. Com.*, 177 Cal. 378, 380, 170 P. 822 [823]: 'This court, in reviewing awards of the commission, is not acting as a court of appeal. It has no power to weigh the effect of positive evidence. It must assume that the commission believed all the evidence given which tends to sustain the award made. * * * Section 84 (section 67 of the present act) of the Workmen's Compensation Act, which gives us the power we are now exercising over this award of the commission, authorizes us to annul an award only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it. The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof. The review of the findings, even in such cases, is not based on the theory that they are not supported by the evidence, and that we are weighing evidence to determine that proposition, but upon the theory that the commission has no jurisdiction to make a finding where there is no evidence to support it.'"

Appellant contends that because Kee Ong was sent to bring back a package of laundry containing articles of apparel, which the employees themselves furnished in their employment, Kee Ong was on a personal errand,

and consequently was not performing any service for his employer. We find no merit in the point. The sole purpose of his trip to Soda Springs was to procure articles to be used in the operation of the business of his employer, and, that being so, it would seem to be immaterial whether those articles consisted of kitchen laundry which the employees furnished or articles supplied by the employer, such as a carving knife which might have been left at Soda Springs to be sharpened or some kitchen utensil sent there to be mended. Petitioners appear to have assumed that the package also contained personal articles of apparel belonging to Sam Dong, but we think this assumption is not borne out by a fair construction of the evidence. Although Sam Dong, in reply to one question, did say that the package of laundry contained "apron and my other clothes," he doubtless meant by the latter phrase his other kitchen clothes, because later on he testified clearly that the laundry consisted of "all kitchen material," and Kee Ong also testified that the package contained "kitchen laundry." If the laundry had consisted entirely of articles of common wearing apparel not particularly identified with a cook's employment, or if Kee Ong had been sent on an errand to obtain a supply of tobacco or other merchandise for the personal use of the cook's crew which had no connection with the operation of the commissary car, a different case would be presented. But the undisputed evidence here shows that the only purpose in sending Kee Ong to Soda Springs was because, when Sam Dong came on duty that morning, he found there were no clean aprons to wear in carrying on the work. If clean aprons had been available that morning, Kee Ong would doubtless not have been required to make the trip.

[2] Petitioners further contend that Kee Ong's duties required his presence only in and around the commissary car; that when Sam Dong arrived at the car on the morning of the accident Kee Ong was relieved from further duty for the day and was then on his own time; that consequently it cannot be said that in complying with Sam Dong's instructions to go to Soda Springs for the laundry Kee Ong was acting within the scope of his employment. The evidence before the commission proved, however, that Kee Ong had no regular hours of labor, nor was there any definite character of work which he was obliged to perform. He was at all times subject to Sam Dong's orders. This point was made clear by the sworn statement of one of the employers to the effect that Kee Ong took his orders directly from Sam Dong, and that if Sam Dong sent Kee Ong to Soda Springs it was his duty to go. The testimony of both Sam Dong and Kee Ong was substantially to the same effect.

[3] Even granting that the task of going for the laundry was not strictly within Kee Ong's duties as assistant cook, such fact alone would not excuse the employer from compensating the injury, for it has been held that, when an employee is injured in performing work outside the scope of his usual duties, the injury may yet be considered as arising out of and in the course of his employment if he was expressly ordered to do the work by some one authorized to direct him. *Engels C. Min. Co. v. Industrial Accident Com.*, 183 Cal. 714, 192 P. 845, 11 A. L. R. 785; *Burian v. Los Angeles Café Co.*, 173 Cal. 625, 161 P. 4; *Oakland v. Industrial Acc. Com.*, 35 Cal. App. 484, 170 P. 430.

We do not deem it necessary to differentiate the facts of this case from those of the numerous ones cited by petitioners. The legal principles stated in those cases are well settled, but the facts upon which they are grounded are materially different from those of the one before us, as respondents have pointed out in their briefs, and for that reason those principles are not applicable here.

The award is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

82 Cal. App. 503

MCCARTHY v. PACIFIC ELECTRIC RY. CO.
et al. (Civ. 3143.) ★

District Court of Appeal, Third District, California. April 22, 1927.

Hearing Denied by Supreme Court June 20, 1927.

1. Railroads ⇨320—Motorman operating railway car may presume autobus driver approaching crossing will use due care, and need not check speed.

Motorman operating railway car may presume that autobus driver approaching railway crossing will use due care, and need not check the otherwise rightful speed of his car in passing such crossing until he has reason to believe that the bus driver is neglecting to use care.

2. Trial ⇨168—Rule for granting new trial is not applicable to directing verdict.

The consequences following from a directed verdict and a new trial are so different that the rule applicable in the two instances is not the same.

3. Trial ⇨178—Court should direct verdict only for clear insufficiency of evidence in its most favorable aspect, determined without weighing opposing evidence.

Court should direct verdict for defendant only when, disregarding conflicting evidence and giving plaintiff's evidence all reasonable value, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in plaintiff's favor should such verdict be given.

4. Appeal and error $\S$ 927(7)—Appellate court, in determining propriety of directed verdict for defendant, should disregard conflicts in evidence and indulge every reasonable inference from plaintiff's evidence.

In determining the correctness of court's action in directing a verdict for defendant, appellate court will disregard all conflicts with testimony on plaintiff's behalf and resolve in plaintiff's favor every reasonable inference that may be drawn from testimony in his behalf.

5. Railroads $\S$ 350(12)—Whether railway motorman seasonably attempted to warn bus driver, or could have stopped car and avoided accident, held for jury.

It was for the jury, and not for the trial court, to pass on conflict in testimony as to whether railway car motorman seasonably attempted to warn bus driver, and as to whether he could have stopped car and avoided collision with bus.

6. Evidence $\S$ 77(1)—Autobus driver not testifying held presumed to have seen railway car approaching crossing just before collision.

In action following collision between bus and railway car at crossing, where evidence of passengers on bus showed that railway car could easily have been seen, and bus driver did not testify, held that he was presumed to have seen the railway car approaching the crossing.

7. Carriers $\S$ 300—Autobus driver approaching railway crossing coincidentally with railway car must presume car motorman would continue over crossing without slowing.

Autobus driver approaching railway crossing coincidentally with railway car must presume that the motorman of the car, in reasonable probability, would continue up to and over the crossing without slowing down.

8. Carriers $\S$ 300—Autobus driver approaching railway crossing coincidentally with railway car has continuing duty to use caution in protecting passengers from collision.

Where autobus driver approaches railway crossing coincidentally with railway car, the continuing duty rests upon him to use reasonable caution in protecting his passengers from collision.

9. Carriers $\S$ 320(21)—Evidence held to justify directed verdict against bus owner for driver's negligence in approaching railway crossing.

Evidence held sufficient to justify directing verdict against bus owner, where driver approached railway crossing coincidentally with a railway car without using due care to avoid a collision.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by W. J. McCarthy against the Pacific Electric Railway Company and A. B. Watson, doing business under the fictitious name and style of Crown Stages. From a judgment for plaintiff against defendant Watson, he appeals. From a judgment for defendant Pacific Electric Railway Com-

pany against plaintiff, plaintiff appeals. Judgment against defendant Watson affirmed. Judgment in favor of defendant Pacific Electric Railway Company reversed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Sarau & Thompson, of Riverside, and B. P. Gibbs, of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for defendant Pacific Electric Ry. Co.

Kaye & Siemon, of Bakersfield, for respondent.

BUCK, Justice pro tem. Action to recover damages sustained by plaintiff while a passenger on an autostage, operated by defendant Watson, which collided at a railroad crossing with an electric railway car operated by defendant Pacific Electric Railway Company.

On behalf of the plaintiff it was alleged that the collision resulting in plaintiff's injuries was caused by the concurrent negligence of the defendant. The case was tried with a jury, and at the close of the evidence offered on behalf of all parties, the trial judge directed the jury to return a verdict against the plaintiff and in favor of the defendant Pacific Electric Railway Company, and a verdict in favor of the plaintiff and against the defendant Watson for such sum as they should assess as damages. The jury followed these directions and assessed damages against the defendant Watson in the sum of \$7,500. From the judgment rendered against him Watson has appealed, and the plaintiff also has appealed from the judgment rendered in favor of the defendant Pacific Electric Railway Company and against plaintiff. By stipulation of counsel these appeals are heard together, and upon the same transcript prepared and certified under $\S$ 953a, Code of Civil Procedure.

First, as to the appeal of plaintiff, wherein plaintiff claims that the court erred in directing a verdict against plaintiff and in favor of the defendant Pacific Electric Railway Company.

The accident occurred at a place on the highway where the highway is 24 feet wide and crosses a double track of the defendant railway company. The highway crosses at an oblique angle, extending from the southeast to the northwest, so that although the distance between the outside rails of the two tracks, measured perpendicularly, is only 19 feet, the distance traveled by the autostage in a northwesterly direction in passing over the tracks would be 53½ feet. The evidence is that the stage was 22 feet long, with a seating capacity of about 20 passengers, and, before undertaking to cross the tracks as it was approaching them, stopped at a distance of from 15 to 25 feet from the southerly rail of the first, or southerly, track. The electric car weighed 69,600 pounds, was 50 feet 10

inches long and 9 feet 8 inches wide, and was approaching the crossing from the east, and collided with the autobus on the north rail of the northerly track while the bus was attempting to cross.

[1] Under the rule laid down in the case of *Billig v. Southern Pacific Co.*, 192 Cal. 357, 219 P. 992, it may be assumed that at least up to the time the bus stopped at a distance of about 20 feet from the southerly track, and while it was stopping there the motorman operating the railway car had "the right to presume" that the bus driver would exercise his faculties of observation and caution and would not essay a crossing until the danger due to the approaching car had passed, and that therefore the operator of the car up to that time was not bound to check the original speed of his car in approaching the crossing. Consequently, on this appeal the whole controversy touching the degree of care exercised and required to be exercised by the motorman pertains solely to the conduct of the railway motorman during the time while the bus was traveling on the highway a distance of about 75 feet from the place where it stopped on the highway up to the place where it was struck by defendant's approaching railway car on the north rail of the north track. Therefore, it does not seem that the above rule applied in the *Billig* Case and cases cited therein would foreclose the following inquiries in the case at bar. But, on the contrary, taking the language of the decision in that case as a whole, they are quite pertinent. First, after the bus had stopped, did the railway motorman see the bus as it started up and see it as it continued to approach the railroad track on which his car was moving towards the crossing at the rate of 35 or 40 miles an hour; and did he continue to see the bus as it crossed the first track, going at the rate of about 5 miles per hour; and did he see the bus in its progress arrive at a point where it would reasonably appear that a collision with his approaching car was reasonably likely to occur unless something should be done by him to prevent it? Second, if the motorman did see all the foregoing, was he, when and if he saw the dangerous situation of the bus as it was so approaching the track, himself in a position and situation effectively to warn the driver of the bus of the imminent danger, or himself slacken the speed of his car so as to avoid the collision? Third, if the foregoing was the fact, did the motorman, as a matter of fact as a prudent man, exercise ordinary care in the use of the appliances at his command to warn the driver of the bus or to otherwise avert the collision?

At the close of the evidence offered by the plaintiff in support of plaintiff's contentions upon the foregoing propositions, the trial judge denied the defendant railway's motion for a nonsuit, giving as his reason therefor "that the inferences that must be in-

dulged under the familiar rule respecting nonsuits were such in the circumstances as to require the court to deny the motion." But, as already noted, after the defendants had presented their testimony, much of which was in persuasive conflict with the testimony offered on behalf of the plaintiff, the court gave the instruction complained of herein, directing the jury to return a verdict in favor of the defendant railway company. Upon a review of the testimony, it is apparent that this action of the court was based to a large extent upon the views entertained by the court as to the law covering his duty and power in the matter, as stated by the court as follows:

"I did not permit full presentation of arguments pro and con on the motion for nonsuit, for the reason that I felt that the inferences that must be indulged under the familiar rule respecting nonsuits were such in the circumstances as to require the court to deny the motion. The case has reached a different stage. All of the testimony is in. A different rule prevails. The rule which guided the court in determining whether or not a new trial should be granted is the rule that guides the court at the present juncture of the case, all of the evidence is in. You all are familiar with the rule. It has been stated and restated time and time over. So that is what I have in mind at the present time."

[2, 3] It is true that there are a number of cases whose language may be susceptible of the foregoing construction. But, on principle, it is evident that the consequences which follow from a directed verdict and from a new trial are so different that the rule applicable in the two instances should, in reason, not be the same. This is clearly expressed by our Supreme Court, in the case of *Estate of Caspar*, 172 Cal. 147, 155 P. 631, where the question was directly involved, and the court stated as follows:

"It is beyond controversy that the right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. It may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. Of course, if in such a case no motion for nonsuit has been made and the issues have been turned over to the consideration of the jury, and that jury has rendered a verdict in favor of plaintiff, such verdict being unsupported by any substantial evidence, it becomes the imperative duty of the court to set it aside. *Estate of Arnold*, 147 Cal. 583, 82 P. 252; *Estate of Chevallier*, 159 Cal. 161, 113 P. 130; *Marron v. Marron*, 19 Cal. App. 326, 125 P. 914. But when, and only when, the evidence of the proponent is thus insufficient, the court may and should, as has been said, grant a non-

suit, and may and should on motion direct a verdict. * * *

"The rule as to directed verdicts is not that a verdict may be directed whenever the evidence is such that upon motion the court would grant a new trial. The court may grant a new trial even when there is substantial evidence to sustain the verdict if it believes that the evidence preponderates against the verdict. It is under compulsion to order a new trial, and may do this of its own motion when the evidence is wholly insufficient to sustain the verdict. This is the meaning of the language in *Estate of Baldwin*, 162 Cal. 471, 123 P. 267, where it is said that a directed verdict is proper 'whenever upon the whole evidence the judge would be compelled to set a contrary verdict aside as unsupported by the evidence.' For a detailed and satisfactory discussion of this proposition reference may be made to *McDonald v. Metropolitan Street Ry. Co.*, 167 N. Y. 66, 60 N. E. 282."

See, also, *Kohn v. National Film Corporation of America*, 60 Cal. App. 112 at page 116, 212 P. 207.

[4] Therefore, in the case at bar, in determining the correctness of the court's action in directing a verdict, we should follow the rule indicated above and disregard all conflicts with testimony on behalf of the plaintiff, and resolve in plaintiff's favor every reasonable inference that may be drawn from testimony in his behalf.

And, first, as regards the knowledge of the motorman of any reasonable likelihood of peril attaching to the occupants of the motorbus after the bus left its position of safety and was approaching the crossing toward which the motorcar was moving at the rate of 40 miles per hour: One witness testified that when the bus stopped, as just stated, defendant's car was approaching the crossing at the rate of about 40 miles per hour, and when the motorbus stopped, defendant's car was at a distance of from 1,000 to 1,200 feet from the crossing. While another witness testified that at the time referred to defendant's railway car was at a distance of about 800 feet from the crossing. Defendant's motorman testified that he was at a distance of about 500 feet from the crossing when he saw the autobus stop at a place about 15 feet from the south rail of the south track, and that he continued to approach the crossing at that rate of speed until he was distant about 150 feet from the crossing, when, as he testifies, he blew a number of short blasts of the whistle and applied his emergency brakes, his testimony being as follows:

"Q. You didn't blow the whistle and you didn't apply the emergency brakes until you got about 150 feet? A. Yes, sir; about that distance.

"Q. You say you saw the bus stop when you were at a distance of about 500 feet? A. Well, between 4 and 5. I could not give the exact distance. Between 400 and 500.

"Q. You saw him start up immediately? A.

No, sir; not immediately. It may be a second or so.

"Q. Well, you saw him start? A. Yes.

"Q. And you had your eyes on him all the time? A. Yes, sir.

"Q. And you went from where you saw him—you got to 150 feet before you blew the whistle or applied the emergency? A. Yes, sir.

"Q. And, as a matter of fact, didn't you think all that time it was going to stop again? A. I didn't know whether he would stop a second time or not.

"Q. You didn't know whether he would? A. No; I didn't know what he was going to do.

"Q. Didn't you know, as soon as you saw him start again, that he was attempting to go ahead across in front of you? A. No; I figured he would hear the whistle, and that he would stop."

[5] From the foregoing, the jury could have believed that the motorman did, as a matter of fact, see the bus stop when he was at a distance, not of 500 feet, but 800 or 1,000 feet from the crossing. And, so believing, the jury could have drawn a reasonable inference not only that the motorman was in doubt, as he seemed to have been, as to whether the bus would stop again, but they could also have reasonably inferred that, as a prudent man, the motorman should and could have acted thereon by giving immediate warning, or by bringing his car to a stop before it was too late. And in this connection it was within the power of the jury, and not the trial court, to pass on the conflict in the testimony as to whether the motorman sounded the warning bell or as to whether he could have stopped within 250 feet or 125 feet. As stated in the case *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748 at page 752, 134 P. 709, 711:

"We think it must be held that there was enough in the evidence to justify the jury in finding that the motorman was negligent in not giving proper warning, by bell or whistle, of his approach. It is true that the only evidence that he did not give such warning was negative, consisting of the statements of the people in the automobile that they heard no signal. But, if they were so situated, as they undoubtedly were, as to have been able to hear a bell or whistle sounded from the motorcar, their failure to hear is some evidence that no such signal was given [citing cases]. That there was positive testimony to the contrary does not conclusively establish that a warning was given."

It would therefore seem from the foregoing, irrespective of what the opinion of the trial court or the appellate court might be as to the weight of the testimony, that in this case there was sufficient evidence to go to the jury to enable the jury to pass upon the conflicts in the testimony and the conflicting inferences that might be drawn therefrom, and that it should be for the jury to determine, after hearing the testimony, whether the defendant was within the qualification of the rule laid down in the *Billig Case*, as follows:

"And it has accordingly been held that the operator of such train or car was not bound to check the otherwise rightful speed of his train or car in approaching and passing such crossing until at least he has reason to believe that such person so approaching such crossing is not performing, or is not likely to perform, his duty in the foregoing regard."

And as regards the appeal of the defendant Watson from the judgment entered against him on the directed verdict:

In the case of *Forbell v. Pac. Electric Railway Co. et al.* (Cal. Sup.) 254 P. 890 (decided March 28, 1927), the Supreme Court passed upon an instructed verdict given against the defendant Watson in an action arising out of this accident on behalf of another passenger in the bus. In that case the Supreme Court held that the trial court erred in instructing the jury that the defendant Watson was liable. But in the case cited it would seem from the opinion that the evidence relied upon by the court is not the same as the evidence in the case at bar. In the first place, the driver of the bus testified in the case cited, as stated by the court, that he was "unable after glancing to the right and left, to see the approaching car of the defendant Electric Railway Company." But he fails to testify at all in the case at bar. And as regards the statement of the court to the effect that "a passenger sitting directly behind the driver testified that he was unable, after glancing to the right and left, to see the approaching car of the defendant Electric Railway Company," the court evidently refers to the witness Phillips, who testified in the case at bar that he occupied the second seat directly behind the driver, and when the bus stopped he stopped reading and looked at the driver, and when he started up, "I looked both ways, east and west. When I first looked up the driver was looking to the east. I looked to the east. I did not see any car. I did not look to the east before the bus started up. I looked to the east after the bus started up. When I was looking to the east, the bus was crossing the first two rails, that is, what we would call the east-bound track." From the foregoing it would appear that the passenger did not look to the east while the car was stopped, as it was stopped about 15 feet from the track. But he does testify that when the car stopped, "the driver was looking to the east." Furthermore, the witness testified that when he did look to the east, which was not at the point from which he says the driver looked to the east, he "did not see any street car approaching." Furthermore, the witness Phillips testifies, in effect, that what interfered with his vision when he was on the crossing were the poles of the electric car wires in between the two tracks. But he does not testify that these poles interfered with his vision, or any one's vision, at the time the bus was stopped 15

feet from the crossing. Also, in the case cited, as indicated in the opinion of the court, "the plaintiff himself testified that he was sitting on the second from the rear seat of the bus and that he did not see the approaching car until the position of the bus placed him practically on a direct line therewith, thus tending to indicate that the electric car was not discernible until the bus was well upon the tracks of the defendant railway company."

In the case at bar, Mr. Forbell, who was the plaintiff above referred to in the case cited, testified that he was riding in the bus in the next to the rear seat; that the bus stopped approximately 15 or 20 feet before it reached the railroad tracks:

"I looked toward the east; the bus had started when I looked east. It was going over the first tracks on the south side. I saw a street car toward the east."

The witness then indicated on the map where the car was, and pointed to a place about 350 feet from the crossing.

"Just as soon as the bus started I looked to the west. I then turned around and looked to the east. And by that time the bus had started, and that is when I saw the car."

It therefore fails to appear from the testimony in the case at bar, so far as Forbell's testimony is concerned, that the car was not discernible as it approached from the east before Forbell was crossing the track and while the bus was at a standstill. For he distinctly states that he did not look to the east until he was in a position on the track where he did see it.

Furthermore, in the absence of the testimony of the driver of the bus in this case, there is no evidence whatever in the record that the bus driver could not or did not see the approaching railroad car during the time when he had stopped the bus and the bus was standing within 15 to 25 feet from the crossing, and at the time when other witnesses stated the driver did look to the east and in the direction where the car was approaching. But, on the other hand, there is affirmative evidence, without conflict, that during the time while the bus was standing still within 15 to 25 feet of the crossing, passengers in the bus could and did see the approaching railway car, and passengers in the approaching railway car could and did see the bus at that time.

Admiral Barr was a passenger upon the bus, sitting in the second seat from the driver on the right-hand side. He testified that the bus stopped more than 15 feet, "possibly 20 feet, maybe 25 feet," from the first track; that he looked to the east to see whether there was a car coming, and that, when he first saw the car:

"It was something near 1,000 to 1,200 feet below the crossing from the place where the accident happened.

"Q. Were there any objects of any kind between where you were sitting looking to your right the way this car was coming from to prevent the driver from seeing this electric car if he had looked? A. I don't see what it would be. There was nothing to hinder me from seeing.

"The Court: The question is, Were there any? Did you see any? A. I did not.

"Q. (By Mr. Morris): You saw those poles along there, didn't you? A. Yes, sir.

"Q. Did they bother you about seeing this car? A. No, sir. * * *

"Q. After the bus had stopped and started up to go across the track, how fast did it go? A. Very slowly; 2 or 3 miles an hour. There is quite a raise there. He had to go up grade there.

"Q. You knew the car was coming? A. Yes, sir; I watched it almost continuously.

"Q. And you knew the bus was going? A. Yes, sir.

"Q. When the front of the bus had just passed the north rail of this lower track, where was the street car? A. Well, as I remember, it was about 2½ poles away.

"Q. 250 feet? A. Something like that.

"Q. Did you see the driver look before he started the car? A. Yes, sir; I did.

"Q. Did he look in both directions? A. Well, he seemed to."

H. P. Shipman was a passenger on the railway car. He testified that he saw the bus stop at the crossing, and at that time he was at a point which was shown to be approximately 890 feet from the crossing, and that he did not notice the bus again until after the accident.

Samuel Moore, the motorman on the railway car, testified that he saw the bus stop approximately 15 feet from the crossing, and at that time that he was about 500 feet away from the crossing, and he also saw the bus after it started up.

"Q. As a matter of fact, you saw him stop and start up, both, didn't you; you saw him stop and start up immediately, didn't you? A. I did.

"Q. Your eye was on him continuously, wasn't it? A. He was always in front of me. I could not help but see him."

[6-9] As already noted, though the driver did not testify, other witnesses testified that when the driver stopped he looked to the east. And, as already noted, there is no evidence in the record that he could not see the approaching car at that time, but the evidence is to the contrary, that the car at that time was visible to any person looking for it in the direction and at the time that the testimony shows the driver did look towards it. It will therefore, in the absence of any evidence to the contrary, be presumed that he did see what was visible. Also, it was his duty to presume that the motorman of the car, in reasonable probability, would continue up to and over the crossing without slowing

down. Therefore, the continuing duty rested upon the driver of the bus to use reasonable caution in the protection of his passengers from the further approach of the car, which it will be presumed he saw when he looked for it at the time he stopped. And that the bus driver neglected to perform this duty appears without conflict in the evidence.

This case is, so far as the evidence is concerned, not within the facts appearing in the Loftus and Tousley Cases in 166 Cal. at pages 465 (137 P. 34) and 457 (137 P. 31), respectively. In each of those cases the driver himself of the automobile testified he could not see the approaching railroad car. Consequently, the evidence in those cases did not, as in the case at bar, show conclusively that the driver, with an apparent willingness to take a chance, did leave a place of safety where he could see, as others saw, the approaching railway car a few seconds before the collision.

The judgment, therefore, in favor of the defendant Pacific Electric Railway Company and against the plaintiff, is reversed, and the judgment against the defendant Watson and in favor of the plaintiff is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

WHITWORTH et al. v. FERNANDEZ. ★
(Civ. 4466.)

District Court of Appeal, Second District, Division 2, California. April 26, 1927.

Hearing Granted by Supreme Court May 26, 1927.

1. Adverse possession §89—Claimants by adverse possession must prove payment of taxes by them for five consecutive years.

Persons claiming title by adverse possession must prove payment of taxes by them for at least five consecutive years during time of their possession.

2. Deeds §121—Quitclaim deed transfers title as effectively as grant, bargain, and sale deed.

A quitclaim deed is as efficient to transfer title as a grant, bargain, and sale deed.

3. Quieting title §44(1)—Where neither party to action to quiet title introduces evidence, neither is entitled to judgment.

Where no evidence as to title to strip of land is introduced by either party in action to quiet title, neither is entitled to judgment as to such strip.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by James C. Whitworth and another against Michael M. Fernandez. Judgment for plaintiffs, and defendant appeals. Reversed.

J. H. De La Monte and Walter J. Little, both of Los Angeles, for appellant.

C. L. Kilgore, of Los Angeles, for respondents.

CRAIG, J. The plaintiffs and respondents instituted this proceeding against the appellant and several fictitious defendants for the purpose of quieting title to real property situated in the city of Los Angeles, and described in the complaint as all of lot 13 of of the Whitworth tract, and those portions of the Preuss road on the west and Pico street on the south, within the present fence lines, which lies south of a line described by metes and bounds, and all of lot 13 of said tract and that portion of Preuss road on the west lying within the present fence line of such street line. The plaintiffs alleged that they and their predecessors in interest had been in actual, open, notorious, exclusive, and adverse possession of all of said lot 13, including the land embraced within the present fence lines, continuously for a period of 20 years next preceding the commencement of their action, and that they had paid all of the taxes of every kind and nature levied or assessed thereon continuously for a period of five years last past immediately preceding the filing of the complaint.

Defendant Fernandez, by answer and cross-complaint, denied the foregoing allegations upon the ground of lack of knowledge or information sufficient to enable him to answer as to ownership of portions of lot 13, and denied the payment of taxes on the whole of said land, or any part of it, for a period of five years, or that the plaintiffs or their predecessors in interest had been in actual, open, notorious, exclusive, or adverse possession thereof. The defendant affirmatively alleged that by a good and sufficient deed of conveyance from Christopher Greve, dated February 15, 1915, he acquired title to, and that he had ever since been the owner and entitled to possession of, lands in the Rancho de las Aguas, consisting (1) of those portions of lot No. 1 lying north of Pico street, not included in tract No. 470, or in that portion of lot No. 1 theretofore deeded by Greve to Joseph Whitworth, defendant's parcel being the easterly 42.1 feet of lot No. 13 described in the complaint; and (2) a parcel consisting of a portion of lot No. 13 described and claimed by the plaintiffs, and commencing at the northeasterly corner thereof, which also was described by metes and bounds. By cross-complaint Fernandez alleged that these two parcels had been owned continuously by Christopher Greve and himself for a period of 35 years, and prayed a decree quieting title thereto. The land in controversy consists of a strip 42.1 feet wide on Pico street, and extending northerly therefrom a distance of 298.32 feet. No evidence appears to have been offered concerning the second parcel described

by the defendant, and it therefore should not have been made the subject of a finding on behalf of the plaintiffs.

The case was tried by the court, without a jury, and findings and judgment were rendered in favor of the plaintiffs. The defendant appeals from such judgment, upon the alleged grounds that the uncontradicted evidence showed plaintiffs' land under their purchase from Greve to have been 42.1 feet westerly from the line upon which the judgment awarded them was erroneously based; that defendant's property lay between the "three acres, more or less," belonging to the Whitworths, and the westerly line of the lands of Greve, their common grantor; that the plaintiffs had paid no taxes upon appellant's 42.1 feet, except as hereinafter noted, and that the latter's line had never been disputed.

[1] The plaintiffs' only claim to the strip of land in dispute is that of adverse possession. Without stating the evidence in detail, it is sufficient to say that the finding of the court to the effect that they had been in actual possession for a period of 20 years has sufficient support in the record to be sustained. The defendant has record title to the same property, and it is essential to the respondents' success in maintaining their claim that they prove payment by them of the taxes for a period of at least five consecutive years during the time that they had possession.

It appears that in 1883 Greve conveyed to respondents certain lands lying westerly of and adjacent to the westerly line of the 42.1 feet in controversy, but that for a period of about 30 years they occupied and cultivated all of the land lying between their westerly line and the easterly line of said strip. Public records, including the tax assessments, described the respondents' property as "three acres," or, at times, "three acres, more or less." It further appears that in 1915 Greve entered into an agreement with Fernandez, whereby the latter contracted to survey and quiet title to said 42.1 feet, and conveyed the same by quitclaim deed to appellant. Previously thereto, and in 1910, a new tract embracing Greve's easterly lands, and known as lot A, tract 470, was recorded. The tax records tend to show that all of the lands lying easterly of respondents' "three acres" were assessed to Greve from 1901 to 1911, and that he paid the taxes thereon; and that from 1911 to the date of the filing of this suit, the strip of 42.1 feet, lying between said "three acres, more or less," and tract 470, was assessed to, and the taxes thereon paid by Christopher Greve or his surviving widow.

[2] We are unable to find in the record evidence tending to show that the respondents paid taxes upon the strip of land in controversy, except during the years 1916, 1917, and 1918, when they had also been paid by the Greves. They contend that appellant's quitclaim deed of 1915 was without considera-

tion. While this would not mitigate against its validity, the contrary has been shown, and appellant testified that he spent time and money in surveying, negotiating with the Whitworths, and endeavoring to clear the title, according to his agreement with Greve. "A quitclaim deed is as efficient to transfer title as a grant, bargain, and sale deed. *Graff v. Middleton*, 43 Cal. 341, 344; *Myers v. City of Oceanside*, 7 Cal. App. 87, 93, 93 P. 686," *Biaggi v. Ramont*, 189 Cal. 675, 209 P. 892. It appears that the respondents in 1922 obtained from the heirs at law of Christopher Greve a quitclaim deed to appellant's 42.1 feet of real property, but from what has been said it becomes obvious that they had no title thereto, and could convey none.

[3] The judgment and findings below are not supported by the evidence. As to the strip of 42.1 feet, the judgment should have been for the defendant. As to the other portion, no evidence having been introduced, neither party was entitled to judgment.

The judgment is therefore reversed.

We concur: WORKS, P. J.; THOMPSON, J.

82 Cal. App. 548

MAGUIRE v. LONG-HURST. (Civ. 3219.)

District Court of Appeal, Third District, California. April 26, 1927.

Sales  77(1)—Under agreement requiring sale of traded-in car, dealer could not deny buyer credit because of result of series of trades.

Automobile seller, agreeing to credit buyer on purchase-money note for excess over \$1,300 of sum of his commission, less \$100, and selling price, not less than \$1,100, of traded-in car, could not deny credit because series of trades, less discount on note, failed to show excess over \$1,300.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action for money by Charles J. McGuire against George H. Long-Hurst, doing business under the name and style of Long-Hurst & Russell Motor Company. Judgment for defendant, and plaintiff appeals. Reversed.

Horace W. B. Smith, of San Francisco, for appellant.

K. D. Robinson, of Auburn, for respondent.

FINCH, P. J. The complaint alleges that the plaintiff purchased from the defendant a Flint sport roadster for \$2,245 and delivered to defendant in payment therefor a Flint touring car and the plaintiff's promissory note for \$945; that "defendant agreed to give plaintiff a credit upon the purchase price of said Flint sport roadster of \$1,300 on ac-

count of said Flint touring car, and defendant further agreed that in the event he (defendant) was able to dispose of said Flint touring car for \$1,300, he (the defendant) would pay to plaintiff the sum of \$500 out of the proceeds of said sale, less \$100 to be retained by the defendant for possible service charges which might accrue upon the Flint sport roadster above mentioned; and the defendant further agreed that in no event would he sell the said Flint touring car for less than \$1,100, in which event he (defendant) would pay to plaintiff the sum of \$300, less \$100 for possible service charges as above set forth"; that the defendant sold the touring car for \$1,300, and that he performed no services on the roadster; and that the plaintiff had fully paid the amount due upon his promissory note. The prayer is for judgment in the sum of \$500.

The answer admits the alleged sale and that defendant agreed to give plaintiff a credit of \$1,300 on account of the touring car, but "denies that defendant further agreed that in the event he (defendant) was able to dispose of said Flint touring car for the sum of \$1,300, he (said defendant) would pay to plaintiff the sum of \$500 out of the proceeds of said sale, less \$100 to be retained by defendant for possible service charges which might accrue upon the Flint sport roadster in plaintiff's complaint mentioned; defendant denies that he (defendant) further agreed that in no event would he sell the said Flint touring car for less than \$1,100, in which event he (defendant) would pay to plaintiff the sum of \$300, less \$100 for possible service charges as set forth in plaintiff's complaint, and in this connection defendant avers that he did agree and would give a credit to plaintiff upon the purchase price of said Flint sport roadster of \$1,300 on account of said Flint touring car, and that defendant agreed with plaintiff that upon the receipt by him (defendant) of said Flint touring car, he would put said Flint touring car in a marketable condition and repair the same, and if upon a resale of said Flint touring car there should be or remain any profit to the defendant, that he (defendant) would pay said amount to plaintiff, less the sum of \$100 to be retained by the defendant for service charges; that there was no profit to defendant by reason of said transaction, and that there was nothing, nor is there now anything, due plaintiff from defendant by reason of such transaction."

The defendant's commission, or profit, on the sale of the roadster was \$511. It is clear from his testimony given at the trial and the admissions and allegations of his answer that he agreed that if, after deducting \$100 from such commission, the remainder thereof, added to the amount for which the touring car might be sold, should exceed the sum of \$1,-

300, then the defendant would give the plaintiff credit for the excess. The defendant sold the promissory note shortly after he received it, and the plaintiff paid the amount thereof before this action was commenced. At the time of the transaction the defendant signed and delivered to the plaintiff an instrument reading as follows:

"Auburn, California, December 17, 1924.

"We agree to sell to C. J. Maguire one Flint sport roadster, model 55. * * * We agree to allow C. J. Maguire the sum of \$1,300 on Flint touring car that is to be repaired and put in shape and sold for the highest possible amount. *This amount to be at least \$1,100.* We agree to retain the sum of \$100 from our commission of \$500 that we obtain from the sale of said roadster. This amount is to be used in the form of service on sport roadster if any should occur. All other money obtained from resale of Flint touring car is to be applied on note of \$945 held by us as balance due on Flint roadster."

The italicized words were inserted by the defendant at the plaintiff's request. The court found that:

The defendant "agreed that in the event that he (defendant) was able to dispose of said Flint touring car for the sum of \$1,300, he (said defendant) would pay to plaintiff the sum of \$500 out of the proceeds of said sale, less \$100 to be retained by defendant for possible service charges which might accrue upon the Flint sport roadster; * * * that defendant did not further agree that in no event would he sell the said Flint touring car for less than \$1,100, in which event he, defendant, would pay to plaintiff the sum of \$300, less \$100 for possible service charges; * * * that defendant agreed with plaintiff that * * * he would and did put said Flint touring car in a marketable condition and resell the same, and if, upon a resale of said Flint touring car, there should be or remain any profit to the defendant, that he (defendant) would pay said amount to plaintiff, less the sum of \$100 to be retained by the defendant for service charges; that there was no profit to defendant by reason of said transaction, and there was nothing, nor is there now anything, due plaintiff from defendant by reason of such transaction."

Judgment was entered in favor of defendant for costs of suit, and the plaintiff has appealed therefrom.

The finding that "defendant did not further agree that in no event would he sell the said Flint touring car for less than \$1,100" is contrary to the express terms of the written agreement. The agreement is perfectly clear in that respect, although it is ambiguous in other particulars. The finding is also contrary to the testimony of the defendant, who testified:

"I told him (plaintiff) I did not know I could sell the car for cash, and he said he wanted to get at least \$1,100, and through his suggestion he had me insert that \$1,100, to sell for at least that much."

The defendant further testified that it cost him "\$54.63 to put the Flint touring car in condition," and a commission of \$33.75 for selling it. The testimony is conflicting as to whether the price of \$1,100 referred to in the agreement was to be the net price or the gross price from which the cost of repairs and the expense of making the sale were to be deducted. If such cost and expense were to be deducted, the least amount for which the defendant was authorized to sell the touring car is \$1,011.62 net. The addition thereto of \$411, the amount of defendant's commission on the sale of the roadster, less \$100, gives a total of \$1,422.62, for which sum, at least, plaintiff was entitled to credit on the purchase price of the roadster, or \$122.62 in addition to the credit of \$1,300 originally given. Instead of selling the touring car for "at least \$1,100" as agreed, the defendant pursued a course outlined in his written statement to the plaintiff as follows:

"Our cost on the Flint roadster was \$1,734, which we retailed at \$2,245, leaving a profit of \$511. Trading in on Flint 55 touring car at \$1,300, which cost us \$54.63 to put in selling shape, selling at \$1,300 with a commission of \$33.75, our total loss on the sale of the Flint touring car being \$88.38. We took in trade, then, a Durant 4 touring car at \$600, and, owing to a wreck the car had through a defective spindle and a paint job, with four new tires, the complete service cost on this car was \$271.68. The interest on the flooring of the roadster cost \$10.50, and on your note of \$945 the interest was figured at 7 per cent. or \$33.12. We cashed this note with the Finance Corporation, of Sacramento, and they in turn charge 1½ per month, which leaves a balance of \$51.93. We sold this Durant 4 touring car for \$600, paying a commission of \$25, making the total cost of the Durant \$959.11. * * * We took a Ford trade-in of \$100 on the Durant sale, which is in our possession at the present time. * * * If we are fortunate enough to obtain the full \$100 out of the Ford touring the loss will stand at \$447.49; if not it will be even more than that; but as the statement stands at the present time with a profit of \$511 and a loss of \$447.49, this leaves only a clear profit of \$63.51, while the original agreement called for \$100 to be retained by us."

This course of trading was not a compliance with the defendant's agreement to sell the Flint touring car "for the highest possible amount. This amount to be at least \$1,100." Neither does it appear that the defendant had the right to charge the plaintiff with the cost of discounting the latter's promissory note. It is clear that the plaintiff is entitled to judgment, but the evidence is conflicting as to the amount thereof, and further discussion of such conflicting evidence would serve no useful purpose.

The judgment is reversed.

We concur: HART, J.; PLUMMER, J.

82 Cal. App. 269

CRAMER et al. v. JENKINS. (Civ. 3017.)★

District Court of Appeal, Third District, California. April 11, 1927.

Rehearing Denied May 11, 1927.

1. Animals ⇐100(4)—Evidence held to justify finding that owner permitted sheep to graze on lands of another (St. 1861, p. 523; St. 1919, p. 464, § 1).

In action for damages from pasturing sheep, evidence that defendant's herders a few days before had brought sheep near plaintiff's land and knew that they could get under fence and had done so, and with such knowledge afterward brought sheep near fence, and that sheep entered thereunder and grazed on plaintiff's lands, held to justify finding that defendant permitted sheep to graze on plaintiff's lands within St. 1861, p. 523, and St. 1919, p. 464, § 1.

2. Appeal and error ⇐1170(3)—Failure to allege premises were inclosed by lawful fence, or that defendant unlawfully permitted sheep to be herded on premises, held not cause for reversing judgment for plaintiff (St. 1861, p. 523; St. 1919, p. 464, § 1; Const. art. 6, § 4½).

In action for damages to land from permitting sheep to graze thereon by herders bringing sheep near fence through which they knew sheep could go, lack of allegation in complaint that premises were inclosed by lawful fence, or that defendant wrongfully or unlawfully permitted sheep to be herded thereon contrary to St. 1861, p. 523, or St. 1919, p. 464, § 1, in absence of demurrer to complaint, under Const. art. 6, § 4½, is not reversible error, in view of showing by record as whole that defendant was not misled or prejudiced thereby.

3. Animals ⇐97—Owner voluntarily permitting animals to be herded on another's lands, whether inclosed or not, without consent, is liable (St. 1861, p. 523; St. 1919, p. 464, § 1).

Under St. 1861, p. 523, and St. 1919, p. 464, § 1, whether premises are inclosed or uninclosed, if owner of live stock voluntarily herds or permits to be herded on premises of another without consent, he is liable therefor.

4. Animals ⇐97—"Permit," in statute making owner liable for permitting sheep to graze on lands of another, means to allow after notice (St. 1861, p. 523).

"Permit," as used in St. 1861, p. 523, prohibiting owner of sheep to permit them to be herded on land or possessory claims of others, means to allow after notice or knowledge; to allow or suffer to be done; to allow to be done by consent, or by not prohibiting; to suffer or allow without prohibition or interference; to allow by silent consent or by not offering opposition or hindrance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Permission—Permit.]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Edward G. Cramer and another against Reese T. Jenkins for damages. From

a judgment for plaintiffs, defendant appeals. Affirmed.

Barry & Barry, of Susanville, for appellant.

R. M. Hardy, of Susanville, for respondents.

PLUMMER, J. Plaintiffs began this action to recover damages suffered by reason of trespass on lands leased by plaintiffs of certain sheep and cattle belonging to the defendant and recovered damages in the sum of \$259.

The complaint is in three counts. No question is raised as to the judgment of the trial court awarding the plaintiff the sum of \$34 on account of damages inflicted upon the premises leased to the plaintiffs by cattle belonging to the defendant. The argument of the appellant and all questions raised upon this appeal are directed to the alleged error of the trial court in awarding damages to the plaintiffs in the sum of \$225 for pasturage destroyed upon the premises leased to the plaintiffs, by reason of the defendant permitting 600 head of sheep belonging to him to graze thereon.

The third count of the plaintiffs' complaint involved in this appeal, so far as pertinent hereto, is as follows:

"That on or about the 9th day of May, 1924, defendant permitted about 600 ewes, together with lambs following them, to graze upon the S. W. ¼ of said section 9, without having first obtained the consent of said owner or of the tenants in possession, Edward G. Cramer and John C. Cramer."

The premises described are premises previously alleged in the complaint to be under lease to the plaintiffs. The damages recovered under this allegation are the sum of \$225. No demurrer was filed by the defendant, and no question as to the sufficiency of this allegation of the complaint appears to have been raised in the trial court. The answer of the defendant, so far as pertinent to the issues involved herein, contains the following:

"As a further, separate, and distinct defense, * * * defendant alleges that on the 9th day of May, 1923, defendant, through his agents and employees, was driving a band of sheep owned by the defendant on lands not owned or controlled by the plaintiffs, bordering lands then owned by the Cramer Live Stock Company, a corporation of the state of California, and leased by the plaintiffs; that said lands of plaintiff were fenced with a wire fence and that the wires of said fence were so high that sheep could easily pass thereunder; that while defendant was so driving his sheep on said lands not belonging to, or leased by, the plaintiffs, about 600 head of ewes and lambs went under said fence and onto a corner of said lands leased by said plaintiffs."

It is further alleged that the defendant attempted to drive his sheep from said premises, but that said sheep were driven by the plaintiffs therefrom and placed in a corral by the plaintiffs.

Upon the basis of this allegation it is argued that as the testimony shows that plaintiffs' lands were not inclosed by a lawful fence, as described by an act of the Legislature of 1855 (Stats. 1855, p. 154), no liability rests upon the defendant for any injuries inflicted by his sheep upon crops growing upon the leased premises occupied and cultivated by the plaintiffs. Considerable testimony was introduced as to the character of the fence, constituting the inclosure of the plaintiffs' premises, sufficient to show that the fence so existing failed to comply in many particulars with the act of the Legislature just referred to, but from the views herein expressed, the condition of the fence, or its failure to comply with the specifications set forth in the act of 1855, become immaterial.

[1] The record shows that the plaintiffs and the defendant had leased from the Cramer Live Stock Company adjoining premises; the plaintiffs leased premises suitable for cultivation, or which they were cultivating; the defendant had leased adjoining premises suitable for pasturage purposes, and which were being used by him for such purposes. The record shows that on or about the 7th day of May, 1924, the defendant's herders had herded and driven a band of sheep to and upon the premises adjoining the lands and premises belonging to the plaintiffs, and that while so doing, about 200 sheep passed under the fence in question onto the premises belonging to the plaintiffs, but the trial court held that no damage resulted from this incursion of the defendant's sheep. Following this, the record shows that on or about the 9th day of May, the herders employed by the defendant had in charge a band of sheep numbering some 1,200, brought them to within the vicinity of the plaintiffs' premises, where 200 from said band of sheep had made an incursion upon the lands leased by the plaintiffs two days previously; that the herders were moving said sheep over the premises leased by the defendant for pasturage purposes and in the direction of where the sheep might obtain water; that while so doing, about 600 of said sheep, in the language of the defendant's answer, "got away from the herders, went under said fence and onto the lands and premises leased and occupied by the plaintiffs," causing the damages found by the trial court. From this it is argued that the defendant is not liable on the grounds: First, that the plaintiffs' premises were not inclosed by a lawful fence; and, second, that the court had nothing before it justifying a finding that the defendant permitted his

sheep to graze upon the lands and premises leased by the plaintiffs. The recital of the facts, as above set forth gleaned from the record, shows that the defendant was herding his sheep upon adjoining premises; that two days previous to the infliction of the damages ascertained and assessed by the trial court, 200 of said band of sheep passed under the fence in question and onto the leased lands occupied by the plaintiffs; that the herders went upon the lands and premises and drove the sheep from the lands and premises belonging to the plaintiffs, under the wire fence referred to in this action; that notwithstanding this knowledge of the condition of the fence thus acquired on the 7th day of May, 1924, the herders employed by the defendant brought the same band of sheep to the same vicinity, where 600 of them went under the same fence and inflicted the damage complained of.

We feel that these facts show that the defendant's herders had full knowledge of the condition of the fence, of the propensity of sheep to forage upon the lands of the premises, and that when they voluntarily brought a large band of sheep to the same vicinity on the 9th day of May, 1924, the trial court was justified in finding that the defendant permitted said sheep to graze upon the lands and premises leased by the plaintiffs, within the intent of the act of the Legislature herein referred to. Knowing the condition of the fence, knowing what the sheep had previously done, the defendant's herders voluntarily brought the defendant's sheep to the same vicinity. It has been held in this state that when a band of sheep is in charge of herders the sheep are not considered as running at large. *Spect v. Arnold*, 52 Cal. 455; 2 Cal. Jur. p. 47, § 31.

[2] It is argued upon appeal for the first time that the complaint in this action does not state facts sufficient to constitute a cause of action, in that there is no allegation that the premises leased by the plaintiffs were inclosed by a lawful fence, or that the defendant wrongfully or unlawfully permitted the sheep to be herded upon the premises leased by the plaintiffs or permitted them to be grazed upon the premises leased by the plaintiffs. As stated, no demurrer was interposed to the complaint, and if technically insufficient as against a demurrer, the record, taken as a whole, shows that the defendant has not been misled or suffered any prejudice on account thereof, and therefore, under the provisions of section 4½ of article 6 of the Constitution, it cannot be held grounds of reversal.

[3] By the act of the Legislature approved May 18, 1861 (Stats. 1861, p. 523), it is provided as follows:

"It shall not be lawful for any person, or persons, owning, or having charge of, any sheep, to herd the same, or permit them to be herded,

on the land, or possessory claims, of other than the land, or possessory claims, of the owners of such sheep."

This act contains four other sections, section 2 of which was amended by the act approved March 28, 1868 (Stats. 1867-68, p. 426). The amendment relates only to recovery of damages and does not limit or modify any of the language contained in section 1 of the act of 1861, which we have just quoted. By act approved May 11, 1919 (Stats. 1919, p. 464), the Legislature, in relation to the herding of sheep, further enacted (section 1):

"It shall be unlawful for any person or persons to herd or graze any live stock upon the lands of another in the counties of Plumas, Lassen and Modoc without having first obtained the consent of the owner or owners of the land so to do; provided, that the person claiming to be the owner of said lands has the legal title thereto, or an application to possess the same, with first payment made thereon."

This act does not purport to repeal any of the sections of the previous act of 1861, but is supplemental thereto in that, instead of being limited to the grazing or herding of sheep, it includes "any live stock," thus being broadened in its scope and not in conflict. The act of 1861 and the act of 1919 do not limit the application thereof, or of either of them, to lands inclosed by a lawful fence, as specified by the act of 1855, *supra*. Whether premises are inclosed or uninclosed, if there is anything in the case showing that the owner of sheep, or of any live stock, has voluntarily done or permitted to be done any acts from which the trial court may conclude that the live stock has, within the intent and meaning of either statute, been herded or permitted to be herded upon the lands and premises of another, without such person's consent, then and in that case, the owner of the animals so herded, or permitted to be herded, is liable. Our attention is called to the case of *Logan v. Gedney*, 38 Cal. 579, as conclusive upon the questions involved on this appeal and necessitates a reversal of the judgment of the trial court. In that case the complaint was founded upon the act of the Legislature of 1861, as shown by the opinion of the court, and alleged as follows:

"Defendants wrongfully and willfully permitted said sheep to be herded, and did herd the same upon the lands of which the plaintiff then was, ever since has been, and still is the owner."

It was held by the court that the complaint was sufficient, and that if the defendants had been guilty of the acts charged, a cause of action would have been stated, but that the evidence showed that the defendants' sheep without "their agency, knowledge, or consent, while ranging at large, at night strayed

into plaintiff's barley field, which was not protected or inclosed by a lawful fence, or any sufficient fence to obstruct the free ingress or egress of sheep and hogs."

These facts readily distinguish the case of *Logan v. Gedney* from the case at bar. There the court held that the sheep strayed without the agency, knowledge, or consent of the defendants while running at large. In the case at bar the sheep were not running at large. They were being herded upon pasture lands adjoining the lands and premises leased and occupied by the plaintiffs, were taken to the place from which they made their incursion upon the crops owned by the plaintiffs voluntarily by the defendant's herders, after knowledge acquired two days before of what the sheep would do, and what they might anticipate the sheep would do, which brings into operation the agency, knowledge, and practical consent which the court held wanting in the case of *Logan v. Gedney*. To hold that the owner of sheep may be permitted to drive his band of sheep and herd his band of sheep to and alongside the premises belonging to another, having knowledge of what said band of sheep had done two days previously, is not, within the intent of the law, herding said band of sheep upon the premises of another, when 600 of said sheep, brought in such close proximity to the premises of another, go upon such premises and proceed to graze, or are grazing without the permission, consent, or agency of the defendant within the true intent and meaning of section 1 of the act of 1861, would be to hold that the act of the Legislature is without force or vitality, and all that a defendant has to do is to drive his sheep up to the line dividing his lands and premises from the premises of another, and then and there quit and abandon his duty as a herder and let the sheep wander at will. Such is not the meaning of either the act of 1861 or the act of 1919. If the agency of the defendant places the sheep in that position alongside of the premises belonging to another, following their natural instincts, of which the owner of the sheep, or herder thereof, must be held to have knowledge, the sheep will proceed to graze the land and forage upon the premises of another. We think that, under such circumstances, the trial court is justified in holding that the sheep are being herded and are being permitted to graze upon the lands of another, in violation of the acts of the Legislature which we have quoted, and that unless previous consent has been obtained so to graze the sheep belonging to him, the defendant, under such circumstances, is liable for the damages inflicted. The question of a lawful fence does not enter into this case.

[4] In answer to the argument of counsel as to the meaning of the word "permit," it is sufficient to refer to 30 Cyc. 1461. Un-

der the definitions there given, we find the following applicable to this case:

"To allow or suffer to be done; to allow to be done by consent or by not prohibiting; to suffer or allow without prohibition or interference; to allow after notice or knowledge; to allow by silent consent or by not offering opposition or hindrance."

Other definitions are given, but one of the above stated, to wit, "to allow after notice or knowledge," is pertinent here, as the defendant's agents had notice and knowledge of what might be expected from driving and herding the sheep to within such close proximity to the lands and premises owned by the plaintiffs.

The judgment of the trial court is affirmed.

We concur; FINCH, P. J.; HART, J.

32 Cal. App. 515

WINSLOW v. WINSLOW. (Civ. 4409.)

District Court of Appeal, Second District, Division 2, California. April 23, 1927.

1. Divorce ⚭37(8)—In divorce suit for willful neglect, defendant must show utmost good faith in offers to wife requesting return to him.

In suit for divorce on ground of willful neglect, burden was on defendant to show utmost good faith in any offers made to wife requesting her to return to him.

2. Divorce ⚭49(6)—Wife held entitled to divorce for willful neglect, notwithstanding refusal of husband's overtures, made after cause of action for nonsupport matured.

Wife held entitled to divorce on ground of willful neglect, notwithstanding that, after cause of action for nonsupport matured, she refused overtures of husband requesting return to him, since she was within her rights in such refusal.

3. Husband and wife ⚭3(1)—Wife living away from husband with his consent need not rejoin him until he offers suitable abode, but she retains conjugal rights.

Where husband and wife were living apart with husband's consent, it was not incumbent on her to rejoin him till he, in good faith, had offered abode suitable to family station, but while living away from him she retained all her conjugal rights, one of which was right to continuing support.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Rose F. Winslow against Hoyt A. Winslow. Interlocutory decree for plaintiff, and defendant appeals. Affirmed.

Turnbull, Heffron & Kelley, of Los Angeles, for appellant.

Collier & Laberere, of Los Angeles, for respondent.

JOHNSON, Justice pro tem. This is an appeal by defendant from an interlocutory decree of divorce, granted to plaintiff on the ground of willful neglect.

The parties were married in Chicago, in 1887, and for some years prior to 1916, they had been making their home in Milwaukee, though Mrs. Winslow had been in the habit of spending the winters near Los Angeles, where she had sisters and could be near a daughter attending Pomona College. In September, 1916, with the consent of defendant, who provided the traveling expenses for his wife and daughter, they journeyed to California; and neither Mr. nor Mrs. Winslow regarded their separation at the time as permanent, though a letter written in August, 1916, by defendant to inquire about a house for his wife in Pasadena indicated that defendant expected the wife to be with the daughter in California for the next four years. At the time of Mrs. Winslow's departure in September, 1916, the defendant was employed by an insurance company and earned \$200 a month. That employment ceased not long after the wife left Milwaukee, and for about a year defendant found employment only at irregular intervals and his earnings were small. In November, 1918, however, he obtained regular employment as a salesman with the Aladdin Products Company, afterwards merged into the Channel Chemical Company, with which his employment continued to the time of the trial. In 1919 his average earnings were \$400 a month, and they increased in 1920, and again in 1921. It was stipulated that from 1918 defendant was in receipt of sufficient income to provide properly for his wife, but that he did not make contributions sufficient for her necessities. Certain checks which he sent were dishonored for lack of sufficient funds in bank, and as neither party kept an accurate account of remittances, they do not agree as to the totals. But even if credit be given defendant for all that he claims to have supplied, the total from 1916 to 1920 did not exceed about \$900. Plaintiff testified that in the year 1919 she received from defendant only about \$20, and that no money was received by her in 1920 except the sum of \$40 in July; and that between that time and the commencement of the action, on December 16, 1921, she received nothing at all. Plaintiff had help from her sister, who provided her with a home in which were a few additional apartments, the rents from which were applied to plaintiff's use.

In defense of the action defendant contended that, though he had requested his wife to return to him on several occasions, and had repeatedly offered to provide her with a home, she had refused without cause. After his employment in Milwaukee ended, he lived in Chicago for a short time, then was in Louisville for two years, afterwards in Baltimore

for three months, and from May, 1920, onward he resided at Dallas, Tex. In all these places defendant was domiciled at hotels. Letters introduced in evidence showed that in July, 1920, defendant asked plaintiff to rejoin him at Dallas, and that she positively refused to resume domestic relations, either in Dallas or elsewhere, saying in her letter:

"You do not seem to realize that it is hard for a woman to overlook four years' neglect."

Defendant testified that he had asked his wife to return when he was stationed at Louisville in 1918 and 1919, also when he was at Baltimore, but there was no request to come to him at Dallas until July, 1920. Mrs. Winslow denied specifically any request from Baltimore. She was not questioned in particular as to whether Mr. Winslow asked her to join him in Louisville, but both parties unite in saying that the first time Mrs. Winslow ever refused to resume domestic relations was in the year 1920. That was when, as she admitted, her husband proposed to establish a home at Dallas. In reference to that request, the court has found that for more than one year prior to the commencement of the action, and for more than one year prior to July 19, 1920, the defendant, though able, had failed to provide his wife with the common necessities of life, and that at no time between September, 1916, and the time of suit had defendant ever established a matrimonial domicile anywhere, or chosen a reasonably suitable place for a family abode, or provided plaintiff with the means to defray traveling expenses to defendant's place of residence, and that defendant had not offered, in good faith, to support, or make a home for, plaintiff.

[1-3] Defendant contends that he was justified in his failure to furnish support by his wife's refusal to re-establish matrimonial relations. Yet he admits that the first time she refused was in 1920. The burden was upon defendant to show the utmost good faith in any offers made (*Kenniston v. Kenniston*, 6 Cal. App. 657, 664, 92 P. 1037), a burden that, to the mind of the trial judge, was not sustained. The record as a whole shows great indifference on the part of defendant toward his wife, and justifies the findings in her favor. After a cause of action for nonsupport had matured, the wife was within her rights in refusing the overtures made in July, 1920. *Benkert v. Benkert*, 32 Cal. 467-472; *Vosburg v. Vosburg*, 136 Cal. 195, 204, 68 P. 694; *Walker v. Walker*, 14 Cal. App. 487, 492, 112 P. 479. Until defendant, in good faith, had offered a new abode, suitable to the family station, it was not incumbent on the wife to rejoin her husband, and though living away from him she retained all her conjugal rights, one of which was the right to continuing support.

Wagner v. Wagner, 104 Cal. 293, 296, 37 P. 935.

The interlocutory judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

82 Cal. App. 519

HENRY COWELL LIME & CEMENT CO. v.
SANTA CRUZ COUNTY NAT. BANK
OF SANTA CRUZ.*

SAME v. FARMERS' & MERCHANTS' NAT.
BANK OF SANTA CRUZ.

(Civ. 5423, 5424.)

District Court of Appeal, First District, Division 1, California. April 25, 1927.

Hearing Denied by Supreme Court June 23, 1927.

1. Principal and agent ⇨99—Principal conferring "ostensible authority" on agent cannot, as against third persons, assert he did not so intend (Civ. Code, § 2317).

Principal conferring ostensible authority on agent by acts cannot assert, as against third persons relying thereon in good faith, that he did not intend to confer such power, "ostensible authority" being such as principal intentionally or by want of ordinary care causes or allows third person to believe agent to possess, in view of Civ. Code, § 2317.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ostensible Authority.]

2. Principal and agent ⇨120(6)—Evidence showing extent of agent's dealings with those having business transactions with principal held admissible to show agent's ostensible authority to cash checks.

In order to establish ostensible authority of plaintiff's agent to cash checks payable to plaintiff, evidence of agent's dealings with those who had business transactions with plaintiff held admissible.

3. Principal and agent ⇨123(9)—Evidence showed banks were justified in believing plaintiff's agent had authority to indorse and cash checks payable to plaintiff.

Evidence held to show that banks were justified in believing plaintiff's agent had authority to indorse and cash checks payable to plaintiff, notwithstanding plaintiff's direct testimony that agent had no such authority.

4. Principal and agent ⇨137(1)—Principal held estopped by conduct to deny authority of agent in charge of business to cash checks (Civ. Code, § 2300).

Where plaintiff put agent in charge of business as apparent manager, banks cashing checks for agent, acting in good faith and without notice of or reason to suspect any limitation of agent's authority, held not liable for amount of checks, in view of Civ. Code, § 2300, since plaintiff is estopped by conduct to deny agent's authority.

5. Principal and agent — 137(1) — Loss through confidence placed by principal in agent should not be borne by those led to deal with agent by principal's acts.

Loss through trust and confidence placed by principal in agent should not be borne by those who were led to deal with agent through principal's acts.

Appeal from Superior Court, Santa Cruz County; Harry C. Lucas, Judge.

Actions by the Henry Cowell Lime & Cement Company against the Santa Cruz County National Bank of Santa Cruz, and against the Farmers' & Merchants' National Bank of Santa Cruz. Judgments for defendants, and plaintiff appeals. Affirmed.

J. H. Morris, of San Francisco, for appellant.

Charles B. Younger and W. P. Netherton, both of Santa Cruz, for respondents.

TYLER, P. J. The above two cases were tried together before a jury in the superior court of Santa Cruz county. The causes of action in both are identical in form, although different amounts are involved therein. In the action against the Santa Cruz National Bank it is alleged: That one A. S. T. Johnson was employed by plaintiff as a bookkeeper with authority to collect money and checks due and owing to plaintiff from its various customers in the city of Santa Cruz, but that he had no authority whatsoever to indorse or cash checks payable to plaintiff. That Johnson, acting in such capacity for plaintiff, collected from various persons named in the complaint, for the use and benefit of plaintiff certain checks payable to it. That the makers of said checks each had a commercial deposit in said bank, and that all said checks were drawn against such deposits respectively. That Johnson upon collecting the same at various times indorsed each of them as follows: "H. Cowell Lime & Cement Co., per A. S. T. Johnson, Mgr."—and cashed the same at the defendant bank. That Johnson retained the proceeds of these checks, used the same for his own purposes, and never turned the proceeds or any part thereof over to plaintiff. That plaintiff never had any deposit in said bank. That upon cashing such checks defendant bank stamped the same "Paid," with its name and the date thereon, and thereupon charged the amounts thereof to the account of the respective makers thereof. That the indorsing and cashing of the checks by Johnson were without the knowledge or consent of plaintiff and were entirely without authority. That upon discovery that Johnson had so indorsed and cashed the checks plaintiff made demand upon defendant that it repay to it the amount thereof, but that the bank has refused to do so and that Johnson has never paid the same to plaintiff. That the checks so indorsed and paid were

ten in number, aggregating the sum of \$1,007.44

[1-3] The allegations against the Farmers' & Merchants' National Bank were the same as above, excepting that the checks were five in number, aggregating the sum of \$965.83, and were drawn by persons having accounts in this particular bank. In both cases the wrongful indorsement and cashing of each check is made the basis of a separate count. There is also a common count for money had and received covering each check. Defendants, answering, admitted that each of the checks referred to in the complaint was drawn, made payable to plaintiff, collected, indorsed, and cashed by Johnson as alleged; that the respective makers of each of said checks had a commercial deposit in the defendant bank upon which said check was drawn; that each of said checks was cashed by such bank respectively and charged against the maker's deposit and in due course of business returned by such bank to the respective makers thereof; that plaintiff made written demand upon defendants for the repayment of the amounts of these checks, and that defendants refused the same. The main issue raised and relied on by defendants in each case was that Johnson had ostensible authority to indorse and cash the checks. The verdict of the jury was for defendant in each case, and judgment was entered accordingly. Motion for a new trial was made and denied by reason of the court's failure to act upon the same within the time prescribed by law. It is here claimed that there is no evidence in the record to support the verdict or the judgment in either of the cases. This contention is based upon the premise that the facts, as presented, show no ostensible authority in Johnson to indorse and cash checks for plaintiff. Preliminarily, it may be stated that ostensible authority is defined to be such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Civ. Code, § 2317. Ordinarily, as an abstract principle of law, an agent authorized to receive checks in payment for his principal may not have authority to indorse and collect the same. On the other hand, however, the course of dealing may be such as to give to the agent apparent authority to do these very acts, in which case a bank cashing the same would not be compelled to pay again. The authority is implied, if at all, from the facts of the particular case. If, then, a principal by his acts has led others to believe that he has conferred this authority upon his agent, he cannot be heard to assert, as against third persons who have relied thereon, in good faith, that he did not intend to confer such power. The determination of this character of authority is not a matter that lends itself to any hard and fast rule. It is almost wholly a question of fact. The issue was presented

to the jury whether Johnson was permitted by appellant to conduct its business under such methods and for such a length of time as was sufficient to warrant the conclusion that he was authorized to indorse checks, and we are of the opinion that the evidence upon the subject supports the conclusion that Johnson had the authority. In other words, the conduct of the agent with reference to plaintiff's business was sufficient to establish, by implication, that such authority was given, notwithstanding the direct testimony of the principal that the agent had no such authority. In order to establish this fact, defendants called many witnesses to prove the nature and extent of Johnson's dealings with those who had business transactions with his company. This evidence was competent to prove such fact. *Aigeltinger v. Burke*, 176 Cal. 626, 169 P. 373. It appears therefrom that Johnson was employed for a long period of years by plaintiff corporation and that his duties were not confined, as alleged in the complaint, to those of a mere bookkeeper, but rather as a manager of plaintiff's extensive business, and that his acts as such manager were of a character sufficient to warrant those dealing with him in believing that he possessed authority to do the very acts in question.

[4, 5] We do not deem an extended recital of this evidence would answer any useful purpose. In substance it shows that while Mr. Harry Cowell testified that he was president and manager of the company, it appeared that he was seldom in Santa Cruz, and Johnson during his employment had almost exclusive management of plaintiff's business. He sold materials dealt in by the company and fixed the prices for the same and accepted checks in payment thereof. In these transactions, customers were referred by employees of the company to Johnson to transact the business. He placed advertisements in the local newspapers and paid for the same. He appeared in the city directory and upon the register of voters as manager of plaintiff. He took up all matters of county assessments in which his company was interested with the assessor. He appeared before the Chamber of Commerce as manager of the company in matters affecting the welfare of the county. While the company did not keep a banking account in Santa Cruz, Johnson attended to all banking transactions. He cashed checks and purchased drafts in favor of plaintiff, which he paid for by checks and money. The only fair inference to be drawn from these and other facts is that the officers of the bank knew and relied on the ostensible authority of Johnson to perform the acts in question, and they abundantly prove want of ordinary care on the part of plaintiff in the conduct of its business which was sufficient to

lead defendants to believe that Johnson was clothed with full and ample power and authority in the premises. Where a principal makes it possible, through his acts, for his own agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority. The law forbids the principal to deny authority in the agent which his own conduct has invited those with whom he was dealing to assume he possessed. In such a case a principal is bound by his acts and estopped by his own conduct from denying the authority of the agent to act. *Robinson v. American Fish & Oyster Co.*, 17 Cal. App. 213, 119 P. 388. So where, as here, an agent is by his principal put in charge of a business as the apparent manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of such business at that place, and third persons, acting in good faith and without notice of or reason to suspect any limitations on his authority, are entitled to rely on such appearance. *Leavens v. Pinkham*, 164 Cal. 242, 128 P. 399; Civ. Code, § 2300. Where one of two innocent persons must suffer, the loss should be borne by him whose act made the loss possible. A loss through the trust and confidence placed by a principal in his agent should not be borne by those who were led to deal with the agent through the acts of the principal. Upon this subject, therefore, we conclude that the evidence fully supports the conclusion reached. Respondents demurred to the complaints on the ground that they did not state a cause of action. At the trial they objected to the receipt in evidence of the checks in question, claiming that there was no privity of contract between Henry Cowell Lime & Cement Company and the defendants; that the obligation of the banks was to their respective clients; and that the bank's obligation was to their customers only. We are cited to *Elyria Savings & Banking Co. v. Walker*, 92 Ohio St. 406, 111 N. E. 147, L. R. A. 1916D, 433, Ann. Cas. 1917B, 1055; *State Bank of Chicago v. Mid-City Trust Co.*, 295 Ill. 599, 129 N. E. 498, 12 A. L. R. 989, and other cases in support of this contention. See, also, *Brannan's Neg. Ins. Law* (4th Ed.) § 137. There is a conflict in the authorities upon this subject. *Chamberlain Metal, etc., Co. v. Bank of Pleasanton*, 98 Kan. 611, 160 P. 1138. Considering the conclusion we have reached, a discussion or decision upon this subject becomes unnecessary.

The judgments are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

82 Cal. App. 499

**HANOVIA CHEMICAL & MFG. CO. v.
KELLER. (Civ. 3210.)**

District Court of Appeal, Third District, California. April 22, 1927.

1. Venue ⚡58—Demand and affidavit do not constitute motion for change of venue.

Demand and affidavit of merits *held* not to constitute motion for change of place of trial nor invoke action of the court in passing thereon.

2. Venue ⚡58—Motion for change of venue must be made in accordance with provisions of statute specifying contents and time of service (Code Civ. Proc. §§ 397, 1003, 1010).

Motion for change of place of trial authorized by Code Civ. Proc. § 397, must be made in accordance with requirements of sections 1003 and 1010 specifying contents and time of service thereof.

3. Venue ⚡37—Motion for change of venue must be made without delay (Code Civ. Proc. § 396).

Motion for change of place of trial must be made without delay, notwithstanding that Code Civ. Proc. § 396, requires only demand and affidavit to be served and filed with demurrer or answer.

4. Appeal and error ⚡1043(8)—Defendant making demand and affidavit for change of venue, but filing no motion, held not injured by order denying motion and not entitled to appeal.

Where defendant, after filing demand and affidavit for change of venue, failed to give notice of motion or make any motion invoking action of court in relation to removal, subsequent order, at time of overruling demurrer, purporting to deny motion which had never been made, *held* not to have injured defendant so as to authorize appeal therefrom.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the Hanovia Chemical & Manufacturing Company against Charles Keller. From an order purporting to deny defendant's motion for a change of venue, defendant appeals. Affirmed.

E. J. Talbott, of San Francisco, for appellant.

W. Coburn Cook, of Turlock, for respondent.

PLUMMER, J. On February 20, 1926, the plaintiff began this action to recover from the defendant the sum of \$322.88, balance alleged to be due on certain promissory notes. On the 30th day of March, 1926, the defendant filed a demurrer, a demand for a change of place of trial, and an affidavit of merits. The demand, omitting the title, is in the following words:

"I, the undersigned, defendant, in the above-entitled action, hereby demand that the place

of trial of this cause be changed to the proper county, to wit, the county of San Mateo, state of California." (Signed by defendant.)

The affidavit of merits, omitting the title, reads as follows:

"Charles Keller, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action:

"1. That said action was commenced on or about the 20th day of February, 1926.

"That I have fully and fairly stated the case in this cause to E. J. Talbott, attorney at law, whose office is at No. 704 Market street, San Francisco, my counsel, and after such statement I am by him advised and verily believe that I have a good and substantial defense on the merits to the action.

"That I now reside and did reside at the commencement of this action in the county of San Mateo, state of California."

No notice of motion for the removal of said cause was ever given or filed by the defendant, nor was any motion ever made by the defendant invoking the action of the court in relation to the removal of said cause. The case remained in statu quo until the 17th day of May, 1926, when the demurrer interposed by the defendant was overruled by the trial court and an order made purporting to deny the motion for a change of venue, the record showing that neither the defendant nor his counsel were in court. Under the rules of the court, the demurrer was placed upon the calendar for hearing on Monday, April 5th, but no action was taken thereon until, as above stated, on the 17th day of May. The appeal is from the order purporting to deny the defendant's motion for a change of venue.

[1, 2] It is apparent from the record that the order of the court purporting to deny the defendant's motion for a change of venue was inadvertently entered, for the simple reason that there was no motion before the court to be denied. The demand and affidavit, as hereinafter stated, did not constitute a motion, nor invoke the action of the court in passing thereon. Section 397, Code of Civil Procedure, provides for the making of the motion, and this motion must be made in accordance with the requirements of section 1003 and section 1010, Code of Civil Procedure, specifying the contents and the time of service thereof. In support of his appeal, the defendant cites section 395, Code of Civil Procedure, and the cases of *Powell v. Sutro*, 80 Cal. 559, 22 P. 308; *Wong Fung Hing v. San Francisco Relief, etc.*, 15 Cal. App. 538, 115 P. 331; *Bonestell Richardson & Co. v. Curry*, 153 Cal. 420, 95 P. 887; *Carter v. Broder*, 50 Cal. App. 69, 194 P. 527. These cases have to do with the contents of the affidavit of merits, and without reviewing the cases, it may be here stated that the affidavit of merits appears to be sufficient, but the real defect

in the defendant's efforts to secure a change of venue lies in his neglect to take the proper proceedings to authorize the court to order a transfer of the cause.

[3] While it is held that the notice of motion and the motion need not accompany the filing of a demurrer, affidavit, and demand, such motion must be made without delay. As stated in *Lundy v. Lettunich*, 50 Cal. App. 451, 195 P. 451:

"Section 396 [Code of Civil Procedure] requires only the demand and affidavit to be served and filed with the demurrer or answer. * * * The proceeding, it is true, must be prosecuted with diligence. (*Cook v. Pendergast*, 61 Cal. 79; * * * *Pearkes v. Frear*, 9 Cal. 642; *Jones v. Frost*, 28 Cal. 246.) If it is made afterward the applicant must explain any seeming lack of diligence on his part. (*Smith v. Pelton Water Wheel Co.*, 151 Cal. 401, 90 P. 932, 1135.)"

In *Hart v. Forgeus*, 184 Cal. 327, 193 P. 764; the Supreme Court, in relation to appeals from orders denying changes of venue, said:

"In accord with the well-settled rule, we must assume in support of the order that the superior court concluded that defendant did not act with due diligence in making his motion and that the motion should be denied for that reason."

In that case, on March 26, 1919, defendant's attorney served a demurrer, demand in writing, affidavits of merits, together with the notice of motion to be made on April 4th for a change of place of trial. It appears that this motion was not presented to the court for action thereon until June 20th, when it was denied. The court cited the cases relied upon in the case of *Lundy v. Lettunich*, supra, and held that the trial court was justified in denying the motion on the ground that it was not prosecuted with diligence. The further defect in appellant's procedure is the fact that no motion for change of venue was ever made.

In *Bohn v. Bohn*, 164 Cal. 532, 129 P. 981, this defect in procedure on the part of a defendant desiring to secure an order changing the place of trial is conclusively held to be fatal. In speaking of section 396, Code of Civil Procedure, the court there said:

"The filing of the demand and affidavit do not operate ipso facto to change the place of trial. They have no such force. The change can only be effected through an order of the court after its judicial action has been invoked, by bringing the matter on for hearing, where the right of the defendant to the transfer can be contested by the plaintiff. The court must be applied to for an order of transfer. Such application is a motion (Code Civ. Proc. § 1003), and under section 397, a motion for the change must be made in addition to the demand and affidavit, as one of the necessary steps in the procedure to obtain the order of transfer."

So far as this question is concerned it may be considered as now definitely settled.

[4] If no notice of motion is given and no motion is made by the defendant seeking a change of venue, there is nothing before the trial court, and no action of the trial court is called for by the filing of a demand and affidavit. While the order of the trial court appealed from was wholly unnecessary on the part of the court as it purported to deny a motion that had never been made, we have set forth the facts as they may be gleaned from the record, in order to show that the appellant has not been injured by the action of the trial court, as he has not shown himself entitled to any other order.

We may also add that the Supreme Court of Montana, in the case of *State v. District Court*, 72 Mont. 56, 231 P. 395, considering the provisions of the Code of Civil Procedure of that state similar to sections 395, 396, 397, of the Code of Civil Procedure, holds that a demand and affidavit of merits are insufficient to invoke the order of the court, and that a notice of motion must be given and a motion made in order to invoke the action of the court and secure an order directing a change of venue.

Upon the record it is somewhat questionable as to whether we should dismiss the defendant's appeal or enter an order affirming the action of the trial court, but as the effect upon the appellant will be the same in either case, we content ourselves with the latter course.

The order of the trial court is affirmed.

We concur; FINCH, P. J.; HART, J.

82 Cal. App. 572

SOULE v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 5735.)

District Court of Appeal, First District, Division 1, California. April 28, 1927.

1. Attachment —351—Only attorney's fees paid for dissolution are recoverable on attachment bond.

Measure of damages for recovery on attachment bond is the actual expense and loss resulting from the levy, and so as to attorney's fees includes only those paid for procuring dissolution of the attachment, and not those paid in defense of the principal suit.

2. Attachment —351—Expenditure for transcribing testimony in attachment suit held not recoverable in action on attachment bond.

Money paid for transcribing testimony in attachment suit has no direct relation to the attachment, is not an expense or loss resulting from the levy, and so is not recoverable in action on the attachment bond.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by G. R. Soule against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for appellant.

William Sea, Jr., of San Francisco, for respondent.

CASHIN, J. An appeal from a judgment in an action to recover damages against appellant as surety upon an undertaking on attachment.

The undertaking was filed and an attachment issued and levied on property owned by respondent in an action for money had and received, brought against him by one Collins, the trial of which resulted in a judgment for respondent. No proceedings were had to dissolve or vacate the attachment, which was discharged by virtue of the judgment.

[1] In the instant case there was included in the amount for which judgment was entered a sum paid as a counsel fee in defending the action mentioned and a further expenditure made in that action. It is claimed by appellant that these amounts were improperly allowed, and the first question presented by the appeal is whether the counsel fee was a proper element of damage.

The first California case in which the question was considered is *Heath v. Lent*, 1 Cal. 410, wherein it was held that counsel fees paid by the attachment debtor in defense of the suit were not recoverable in an action on the attachment bond.

In *Ah Thaie v. Quan Wan*, 3 Cal. 216, an

action on an injunction bond, a judgment for attorneys' fees paid to procure the dissolution of the injunction, was affirmed. The court in that case considered the effect of *Heath v. Lent*, supra, and held that, in so far as it might be said to decide that attorneys' fees paid to procure the dissolution of an injunction were not recoverable, the decision was erroneous. As was said in *Elder v. Kutner*, 97 Cal. 490, 494, 32 P. 563, 564:

"The case of *Ah Thaie v. Quan [Wan]* 3 Cal. 216, overrules the case of *Heath v. Lent*, 1 Cal. 410, to the extent of holding that fees paid to counsel to procure the dissolution of an injunction was a direct loss, consequent upon the wrongful issuing of an injunction, for which a recovery could be had upon the bond."

The rule in *Ah Thaie v. Quan Wan*, supra, was approved in *Prader v. Grim*, 13 Cal. 586; and it was held in *Bustamente v. Stewart*, 55 Cal. 115, that the amount recoverable on account of attorneys' fees in an action upon an injunction bond is limited to fees paid for procuring the dissolution of the injunction and does not extend to fees paid for defending the entire case. This rule was followed in the case of *Mitchell v. Hawley*, 79 Cal. 301, 21 P. 833, and *San Diego Water Co. v. Pacific Coast S. S. Co.*, 101 Cal. 216, 35 P. 651, in the first of which the court said:

"The allowance of counsel fees in suits on injunction bonds, and in one or two other actions of a kindred character, is exceptional; and it should not be carried beyond the point to which former decisions have taken it."

The case of *Elder v. Kutner*, supra, was an action upon an attachment bond, one of the counts being for the recovery of attorneys' fees, a liability for which was alleged to have been incurred in the defense of the action; no effort having been made to dissolve or vacate the attachment, which was discharged by the final judgment. It was held that the complaint as to this count failed to state a cause of action. In that case the right to recover fees paid for the defense of the action was not discussed, the sole question considered being the sufficiency of a count containing no allegation of payment; and it was decided that counsel fees in a proper case for their allowance could not be recovered until they had been actually paid, and that the fact of payment should be averred.

The foregoing are all the California cases in which the question of the right to recover attorneys' fees in actions on bonds of this character has been considered, but numerous cases from other jurisdictions have been collected in the notes to *St. Joseph Stockyards Co. v. Love*, 57 Utah, 450, 195 P. 305, 25 A. L. R. pages 569-586. While the decisions on the question are conflicting, the weight of authority, as there shown, is to the effect that

the measure of damages to be recovered on an attachment bond is the actual expense and loss resulting from the levy, including counsel fees for professional services rendered in relation to the attachment, but not counsel fees paid in defense of the principal suit.

We are of the opinion that in actions of the character of the instant case, as in analogous cases of suits on injunction bonds, the rule established by the weight of authority limits the recovery of attorneys' fees to those paid for procuring a dissolution of the attachment; and that, as said in *Mitchell v. Hawley*, supra, the allowance of such fees is exceptional, and the rule should not be extended to include counsel fees paid in defense of the principal suit.

[2] It appears from the findings that there was allowed, as part of the damage claimed, the sum of \$21 expended in defending the action brought by Collins, of which the sum of \$7 had already been paid. The judgment roll in that action is a part of the record in the instant case, and shows that judgment was entered therein "against said plaintiff for said defendant's costs and disbursements waived in this action amounting to \$7." According to the testimony of respondent, the expenditure claimed and allowed was incurred in resisting the attachment suit and paid for transcribing the testimony of Collins. It is clear that this sum, with that paid to counsel, had no direct relation to the attachment, and was not within the rule an expense or a loss resulting from the levy.

It is ordered that the judgment be modified by deducting therefrom the allowance for attorneys' fees in the sum of \$150 and the further sum of \$14 for transcribing, a total of \$164. As thus modified, the judgment is affirmed, and it is further ordered that appellant recover its costs on appeal.

We concur: TYLER, P. J.; KNIGHT, J.

82 Cal. App. 576

Ex parte PAGE. (Cr. 1406.)

District Court of Appeal, First District, Division 1, California. April 28, 1927.

1. Bail ☞43—Accused in capital case is entitled to bail, unless proof is evident or presumption great (Const. art. 1, § 6).

Under Const. art. 1, § 6, accused is entitled to bail, and it may not be refused, even in a capital case, unless the proof is evident or the presumption great.

2. Bail ☞49—One charged with capital offense should not be discharged on habeas corpus unless conviction could not stand on the evidence.

In habeas corpus, the court should not anticipate action of the jury by discharging one charged with capital offense with or without bail, on evidence which it cannot say is so in-

sufficient that a verdict requiring a capital sentence should not be permitted to stand.

3. Bail ☞49—To sustain refusal of bail in capital case, it is enough that evidence induces belief that accused may have committed the offense.

To sustain order refusing to admit one charged with capital offense to bail, it is not necessary that the evidence be so convincing as to justify verdict against accused, but it is enough if it points to him and induces belief that he may have committed the offense.

4. Bail ☞49—Evidence held sufficient to justify refusal of bail in capital case.

Evidence on habeas corpus by one accused of capital offense held sufficient to induce belief that accused may have committed the offense, and therefore to justify the refusal of bail.

Application by Frank E. Page for writ of habeas corpus to the sheriff of Modoc county. Writ discharged, and petitioner remanded.

A. K. Wylie, of Alturas, and Daly B. Robnett and J. R. Cunmyingham, both of San Francisco, for petitioner.

Oscar Gibbons, Dist. Atty., of Alturas, for respondent.

TYLER, P. J. Petition for a writ of habeas corpus. It is alleged therein that petitioner, Frank E. Page, is unlawfully imprisoned and restrained of his liberty by the sheriff of the county of Modoc, Cal.; that he is so restrained pursuant to an order and bench warrant issued out of the superior court of said county, charging him with the murder of one Pearl Connell; that prior to the filing of the information, and as the basis thereof, a complaint was filed before William Thompson, justice of the peace of Alturas township, county of Modoc, sitting as a committing magistrate, in which said complaint petitioner was charged with the crime of murder of the said Pearl Connell, and thereafter, and on the 18th day of March, 1927, a preliminary hearing and examination was held by such committing magistrate and at the close thereof said magistrate made an order holding petitioner to answer on the charge of murder; that at the time of the making of said order the attorney for petitioner moved the magistrate for an order fixing bail, which motion was denied and petitioner was committed to the sheriff of said Modoc county; that thereafter the district attorney of said county filed in the superior court of Modoc county the information referred to, and petitioner was duly arraigned before the superior court and entered a plea of not guilty to the charge contained therein, and at that time counsel for petitioner moved the court for an order fixing bail and allowing petitioner to be discharged upon giving such bail, which motion was denied; that the said imprisonment

and detention is illegal, such illegality consisting in this, that the proof is not evident, nor the presumption great against petitioner, for which reason he is entitled to bail.

[1-3] It is petitioner's contention that courts have no right to refuse a defendant bail even in capital cases, unless the proof is evident or the presumption of guilt is great. There can be no question as to the correctness of this rule. Under the Constitution all persons accused of crime are entitled to bail "unless for capital offenses when the proof is evident or the presumption great," Const. art. 1, § 6. In habeas corpus proceedings, however, the court ought not to anticipate the action of the jury by discharging a prisoner, charged with a capital offense, with or without bail, upon evidence which it cannot say is so insufficient that a verdict requiring a capital sentence, should not be permitted to stand. *Ex parte Curtis*, 92 Cal. 188, 28 P. 223. Accordingly, it has been held that to sustain an order refusing to admit a prisoner charged with a capital offense to bail, it is not necessary that the evidence should be so convincing as to justify a verdict against the accused, but it is sufficient if it points to him and induces the belief that he may have committed the offense charged. 3 Cal. Jur. p. 1030; *Ex parte Walpole*, 85 Cal. 362, 24 P. 657. Just what probative force evidence must have to bring the case within the rule mentioned in the Constitution and to exclude bail has been the subject of much judicial discussion. 6 Cor. Jur. p. 956.

[4] The character and extent of the proof to make the necessary sufficiency depends of necessity upon the circumstances of the particular case. Here the evidence taken upon the preliminary examination shows, in substance, that petitioner and Pearl Connell had been engaged as partners in conducting the Surprise Hotel in the town of Cedarville, county of Modoc, for a period of some three years. Their relations had become inharmonious, due to a difference of opinion concerning the manner in which the hotel should be conducted, and on one occasion petitioner had forcibly ejected her from the kitchen. In consequence of their differences, petitioner was anxious to acquire her interest in the property. He had made statements to the effect that he had some \$7,000 invested in the business, but that, as she had no funds, he would pay her the sum of \$1,500 only for her interest instead of \$3,000, the amount she was demanding. On the evening of July 6, 1926, petitioner left the hotel some time between the hours of 7 and 8 o'clock, and he

and one Mae Rhoades went for an automobile ride several miles out of the town of Cedarville. Some time after his departure Pearl Connell made inquiries as to his whereabouts, and she was informed that he was visiting Mae Rhoades. Upon receiving this information, she left the hotel and was never seen thereafter alive. Two days later, on July 8, 1926, her body was found in a cellar of unoccupied premises situated south of Ann street in the town of Cedarville. The condition of the street opposite the cellar indicated that a struggle had taken place and that there were marks of blood on certain objects near by. The autopsy revealed that the cartilage of her windpipe was crushed in and broken, and that death had been caused by strangulation. The evidence further shows that some time about 9 or 9:30 o'clock in the evening of July 6, 1926, Mary Seminario who resided about two blocks from where the body was found, heard screams and saw an automobile driving easterly on Ann street and witnessed the driver thereof turn the machine around and shut off the headlights of the car. Petitioner was interviewed by the sheriff of the county, and he admitted that he had driven down Ann street about 10 o'clock in the evening of July 6th, on his way from what is known as the Mabrier house, where Mae Rhoades resided. Other evidence showed that petitioner had arrived at the hotel about 10 o'clock. The place where Pearl Connell met her death was between the hotel and the Mabrier house. It further appears that subsequent to July 8, 1926, a criminal charge was sworn to and filed before the magistrate hereinabove referred to, charging petitioner with having murdered Pearl Connell, and that thereafter the then district attorney dismissed the charge without a hearing. It also appears that the grand jury investigated the matter, but failed to indict petitioner, and he was discharged from custody August 14, 1926. The pending charge was thereafter instituted with the result as stated. Under all these circumstances, we cannot say that petitioner is imprisoned without sufficient or probable cause, and that the evidence is of such a character that he is entitled to bail as of right. The evidence as a whole is sufficient to induce the belief that petitioner may have committed the offense charged, and, as above indicated, it is therefore sufficient to justify the refusal of bail.

The writ is therefore discharged, and the prisoner remanded.

I concur: CASHIN, J.

CITY OF LOS ANGELES v. PEDERSEN
et al. (Civ. 5269, 5456.)★

District Court of Appeal, Second District, Division 2, California. April 25, 1927.

Hearing Granted by Supreme Court June 23, 1927.

1. Eminent domain ⇨131—Market value of property in eminent domain action, must be determined as it is found, considering elements of value inclusive of all possible uses and purposes (Deering's Gen. Laws 1923, Act 6373).

In eminent domain action, under Deering's Gen. Laws 1923, Act 6373, market value of property must be determined as property is found, considering all of elements of value, inclusive of all uses and purposes for which land is or may become adapted.

2. Evidence ⇨142(1) — Admitting testimony of sales of other property in eminent domain action to prove value held error (Deering's Gen. Laws 1923, Act 6373).

In eminent domain action, under Deering's Gen. Laws 1923, Act 6373, admitting evidence of sales of other property and price at which property was sold to prove value of property, on direct examination, held error.

3. Eminent domain ⇨262(5)—Error in admitting evidence of specific sales to establish value of property was not cured by court's remark that perhaps they would not throw much light on question (Deering's Gen. Laws 1923, Act 6373).

In eminent domain action, under Deering's Gen. Laws 1923, Act 6373, error in admitting evidence of sales of other property to establish value of property on direct examination was not cured by court's remark that perhaps they did not throw very much light on question.

4. Evidence ⇨558(8) — Questions regarding sales of other property may only be asked on cross-examination to test expert.

Only purpose for which questions regarding sales of other property may be asked is on cross-examination to test familiarity of expert, testifying regarding value of property, with surrounding conditions and the investigation he may have made with respect thereto.

5. Appeal and error ⇨765—Owners could not attack finding of value of lessee's improvements in eminent domain action, where lessee was not served with owners' briefs and did not have opportunity to reply.

Owners could not attack finding of trial court in eminent domain action regarding value of lessee's improvements, where lessee was not served with owners' briefs on appeal, and was not given an opportunity to reply.

6. Eminent domain ⇨262(4)—Owners could not attack trial court's finding, in eminent domain action, of value of lessee's improvements, where cost was admitted without objection and court made personal inspection.

Owners could not attack finding of trial court, in eminent domain action, that improvements of lessee were of value of \$1,000, where testimony of cost of improvements aggregating

\$1,230 was admitted without objection and court made personal inspection of property and improvements.

7. Eminent domain ⇨240—Knowledge gained from view of premises in eminent domain action is independent evidence (Deering's Gen. Laws 1923, Act 6373).

Knowledge gained from trial court's view of premises in eminent domain action, under Deering's Gen. Laws 1923, Act 6373, is independent evidence.

8. Eminent domain ⇨107—Owners of business are not entitled, in eminent domain proceedings, to compensation for their business or damages thereto (Deering's Gen. Laws 1923, Act 6373).

In eminent domain proceedings, under Deering's Gen. Laws 1923, Act 6373, owners of business are not entitled to compensation for their business or damages thereto.

9. Woods and forests ⇨1 — Until converted into personal property by severance, trees remain part of land.

Until felled and converted into personal property by act of severance, trees remain a part of land.

10. Eminent domain ⇨82—In eminent domain proceedings, lessee nursery company held entitled to compensation for trees and shrubs actually growing in ground (Deering's Gen. Laws 1923, Act 6373).

In eminent domain proceedings under Deering's Gen. Laws 1923, Act 6373, lessees engaged in raising nursery stock planted in ground were entitled to compensation for trees and shrubs actually growing in ground and not severed therefrom.

11. Eminent domain ⇨202(1)—In eminent domain proceedings, excluding evidence of value of trees and shrubs of lessee nursery company held error (Deering's Gen. Laws 1923, Act 6373).

In eminent domain proceedings under Deering's Gen. Laws 1923, Act 6373, ruling excluding evidence of value of trees and shrubs of lessees engaged in raising nursery stock planted in ground held error.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action in eminent domain by the City of Los Angeles against Peder C. Pedersen and others. From the judgment, defendants appeal. Reversed.

Fred Mansur, of Los Angeles, for appellants Peder C. Pedersen and Catherine Pedersen.

L. B. Stanton, of Los Angeles, for appellants Ishikata and Inouye.

Jess E. Stephens, City Atty., and E. H. Delorey and Leslie K. Floyd, Deputy City Attys., all of Los Angeles, for respondent.

THOMPSON, J. In this proceeding in eminent domain, under the Park and Playground Act of 1909 (Deering's Gen. Laws

1923, p. 2665, Act 6373), two appeals are prosecuted from the judgment in which Peder C. Pedersen and Catherine Pedersen were awarded the sum of \$19,816, less the sum of \$3,945 awarded to the other defendants and appellants, and less the sum of \$3,000, together with interest and attorneys' fees to the mortgagee, who, of course, has not appealed. The appellants Peder C. Pedersen and Catherine Pedersen, sometimes referred to in this opinion as owners, for the sake of convenience, were the owners of lot 36 of Sunnyside tract, subject to a leasehold owned by the Hoover Nursery Company, composed of the other appellants, who may from time to time be called the lessees.

The owners complain of the judgment on three grounds, as follows: (1) That the court adopted an erroneous principle in arriving at the amount of compensation to be made; (2) the erroneous admission in evidence on direct examination of the selling price of various other pieces of property in the neighborhood; and (3) that the finding that the value of the improvements belonging to the lessees in the sum of \$1,000 is not supported by the evidence. We shall consider these objections before discussing the other appeal.

It appears from the testimony that the property consisting of some two or three acres had not been subdivided into city lots, but had a value by reason of the possibility of such a use. The owners are of the opinion that the court considered the property only as acreage—eliminating consideration of the possible subdivision purposes. We cannot, from a reading of the testimony, agree with counsel in this regard. The record discloses quite the contrary situation. After one of the witnesses had placed a value on the property, the trial judge asked this question:

"Was that (the potential value as a subdivision) taken into consideration in the estimate? A. The subdivision theory was taken into consideration, and the eventual best use of the property, but the value we set on it as it was, with the subdivision feature as a possibility, but like any other acreage, not an actuality."

And again the court went further in what was an apparent effort to consider the value from the standpoint of its highest available use. While appellants' counsel was examining a witness on redirect examination, he queried:

"Then, in speaking of the Hoover street land, you are speaking, not of its price to the subdivider, but the price it will bring on the market, subdivided, is that correct? A. Yes; it would be worth that if Mr. Pedersen wanted to build on it.

"Plaintiff's Counsel: I move that that be stricken out, the testimony of Mr. Davis, because he says he considers it as resale value, and your honor has already ruled that it is to be considered only as acreage.

"Appellants' Counsel: I did not understand

that the court ruled at all that this must be considered as acreage.

"The Court: I think that is all right; I will let it stand."

[1] We cannot agree with appellants that the concluding words of the trial judge indicated that he was considering the property without regard to its availability for subdivision purposes. As we view the remark, it was to overrule the objection, letting the testimony adduced by appellants stand. If there be error in this ruling, and we do not say there was, it was that the court went so far as to consider the price of the property as though it had been subdivided. The true rule is to determine the market value of the property as it is found, considering all of the elements of value, inclusive of all of the uses and purposes for which the land is or may become adapted. *Sacramento Southern Railway Co. v. Heilbron*, 156 Cal. 408, 104 P. 979; *Marin Water & Power Co. v. Railroad Commission*, 171 Cal. 706, 154 P. 864, Ann. Cas. 1917C, 114.

[2-4] The next objection presents a different situation. Evidence of sales of other property in the community and the price paid therefor was adduced, not on cross-examination, but as follows: Counsel for plaintiff on direct examination asked the question:

"Now have you a list of any sales there, that your figures are based on?"

"Defendant's Counsel: We again object to this evidence as to any specific sales tending to prove the value of this property, on the ground it is incompetent evidence.

"The Court: Well all these experts and sharps have been asked similar questions; I am not going to discriminate against Mr. Smith; he can tell what he knows about sales out there. I do not know that they throw very much light, perhaps, on it."

The answer follows, giving a list of sales and the prices at which the property was sold. Recognizing the rule that such testimony is not admissible as tending to prove value on direct examination for the reason that so many factors may enter into the selling price of property, such as financial embarrassment or other circumstances which may in fact force the sale (see *Reclamation District v. Inglin*, 31 Cal. App. 495, 160 P. 1098; *Estate of Ross*, 171 Cal. 64, 151 P. 1138), respondent attempts to avert the consequences of its consideration by saying that the court elicited the testimony as though on cross-examination. Just prior to the question quoted, counsel had asked the witness upon what he based his opinion of the market value, and was told that he based it upon the general conditions inclusive of the best use that the property might be put to and the sales of property in the neighborhood. There was no occasion for the question propounded by counsel as to whether or not the witness had a list upon which his figures were based, and the objec-

tion was pointed squarely at evidence of other sales, and the court so understood it, as is made apparent by his remark. A motion to strike would have been fruitless, for the reason that the court had already determined to admit testimony of other sales. The conclusion cannot be escaped that it was error. Nor was it saved by the remark of the court that "perhaps" "they do" not "throw very much light" on it. We have no measure by which to determine how much light the trial judge considered they did throw on the question other than the admission in evidence of the testimony. They should have thrown no light and in law they could throw none. The only purpose for which such questions may be asked is on cross-examination to test the familiarity of the expert with surrounding conditions and the investigation he may have made with respect thereto. *Reclamation District v. Inglin*, supra; *Estate of Ross*, supra.

The values placed upon the property by the expert witnesses were as follows: \$13,958, \$15,518, \$29,325, \$30,000, \$31,000. The value placed by the court was, as we have stated, \$19,816, from which it will be observed that the amount awarded more nearly agreed with the price fixed by the witness who gave this testimony and valued the property at \$15,518 than with any other witness. Under these circumstances we cannot say that the error complained of did not prejudice the rights of the defendants.

[5-7] The attack upon the finding of the trial court that the improvements of the Hoover Nursery were of the value of \$1,000 must fail for two reasons, either of which is sufficient. In the first place, the Hoover Nursery was not served with appellants' briefs, and therefore was not given an opportunity to reply, and in the second place we find that the testimony of the cost of the improvements was admitted without objection, aggregating \$1,230, and, further, the court made a personal inspection of the property and the improvements. Considering the fact that knowledge gained from a view of the premises is independent evidence (*City of Oakland v. Adams*, 37 Cal. App. 614, 174 P. 947), the finding is fully supported.

[8-10] The appeal of the lessees, the owners of the Hoover Nursery, which we shall now consider, also presents a very interesting question; i. e., whether the lessees, engaged in raising nursery stock planted in the ground, are entitled to compensation for the value of the nursery stock, or, in the event of severance, to the cost of its removal to other land. The court found that the nursery stock was personal property, and that the lessees were not entitled to compensation, although admittedly the young trees and shrubs were growing in the earth and attached thereto by roots. Undoubtedly, as between the lessors and lessees, the stock thus grown was capable of, and the lessees had the

right of, severance and sale thereof as personalty. This, however, does not conclude the question. It has been held that, although as between lessor and lessee the latter may have the right of removing fixtures or improvements, which, except for the agreement, would constitute a part of the realty, nevertheless as between the lessee or lessor and a third party it retains its natural character and may be subjected to the claim of a creditor as part of the realty. *McNally v. Connolly*, 70 Cal. 3, 11 P. 320; *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 38 P. 92. Also it has been held that, as between the seller of personal property, on a conditional sales contract of property which is subsequently attached to the land, and a bona fide mortgagee of the realty, the property so purchased and annexed is subject to the lien of the incumbrance, although as between the original parties "the contract may be such that the property would be deemed personalty, and * * * treated as such in law." *Oakland Bank of Savings v. California Pressed Brick Co.*, 183 Cal. 295, 191 P. 524. No one can doubt that, had the trees and shrubs been growing upon the property for the purpose of beautifying the land and the property were sought to be condemned, they would properly be considered as improvements pertaining to the realty. The question then resolves itself to this: Whether the business in which lessees were engaged can alter the natural character of the property in question. It is undoubtedly the rule in California that the owners of a business are not entitled, in proceedings in eminent domain, to compensation for their business or damages thereto. *Oakland v. Pacific Coast Lumber Co.*, 171 Cal. 392, 153 P. 705; *Morris v. San Francisco*, 59 Cal. App. 364, 210 P. 824. On the other hand, suppose the owners of such property were engaged in the lumber business, would it or could it be argued that the potential personalty standing upon the real property in the shape of trees was not a part of the realty? Until felled and converted into personal property by the act of severance, they remain a part of the land. Even growing crops are considered as part of the realty to such an extent as to pass with a grant thereof, and testimony of an oral understanding to the contrary will not be received if not mentioned in the written agreement. *Wilson v. White*, 161 Cal. 462, 119 P. 895. It seems from the discussion so far that the subject of intention has very often been given undue consideration, except as determinative of the question between the parties or their privies. Where, as here, the question of agreement cannot be taken into account, it would seem that the only line of demarcation that can logically be drawn is that of actual and not possible severance. To further illustrate—suppose that shortly before the service of summons these lessees had determined to sell

no further nursery stock then growing, but to change it into a Japanese garden (stranger things have happened) and to beautify it to such an extent as would permit them to charge admission. Would the trees and shrubs be a part of the realty or would they be considered personalty incident to a business? As between strangers, we think the true test must be held to be the nature of the attachment to the soil and whether severed or unsevered. Lessees were entitled to compensation for the trees and shrubs actually growing in the ground and not severed therefrom.

[11] In the instant case objections were made to the introduction by defendants of evidence of the value of the trees and shrubs; ruling was reserved, and the finding of the court that the stock was personal property was in effect a ruling excluding the evidence. *Citizens' Bank of Los Angeles v. Jones*, 121 Cal. 30, 53 P. 354. This ruling was erroneous.

The judgment, in so far as it concerns the award to appellants Peder C. Pedersen and Catherine Pedersen and T. Ishikata and S. Inouye, doing business under the firm name and style of Hoover Nursery, is reversed.

We concur: WORKS, P. J.; CRAIG, J.

82 Cal. App. 449

GOUCHER v. GOUCHER. (Civ. 5515.)★

District Court of Appeal, First District, Division 1, California. April 21, 1927.

Hearing Denied by Supreme Court June 20, 1927.

1. Divorce $\S$ 133(1)—Evidence held to sustain finding that wife's refusal to have matrimonial intercourse constituted "persistent desertion," within statute (Civ. Code, $\S$ 96).

Evidence in husband's cross-complaint for divorce held, in view of corroboration by circumstances, to sustain finding that wife's refusal to have matrimonial intercourse constituted persistent desertion, within Civ. Code, $\S$ 96.

2. Divorce $\S$ 37(8)—Where wife's separation from husband was result of settled determination, husband, to prove desertion, need not prove he urged her to return.

Where action of wife in separating herself from the marital bed was result of settled determination, husband, to prove her desertion, was not obliged to seek her out and endeavor to have her return, where, under evidence, his effort would have been unavailing.

3. Husband and wife $\S$ 264—Evidence held to sustain finding that land in wife's name was community property purchased with community funds.

In wife's action for divorce where husband filed cross-complaint, evidence held to sustain finding that part of real estate, title to which was in wife's name, was community property purchased with community funds.

4. Husband and wife $\S$ 249—Character of ownership of property, whether community or otherwise, is determined by mode of acquisition, rather than by declarations of parties.

Character of ownership of property, whether community or otherwise, is determined by proof of mode of acquisition, rather than by declarations of parties that it was or was not community property.

5. Husband and wife $\S$ 262(1)—Presumption, under statute, of wife's separate ownership of property, where she is sole grantee, is disputable (Civ. Code, $\S$ 164).

Presumption, under Civ. Code, $\S$ 164, of separate ownership of property by wife, where she is named as sole grantee in deed, is disputable.

6. Appeal and error $\S$ 1010(1)—Trial court's conclusion whether presumption of wife's separate ownership of property is rebutted, if supported by evidence, is conclusive on appeal (Civ. Code, $\S$ 164).

Whether presumption, under Civ. Code, $\S$ 164, of wife's separate ownership of property, where she is named as sole grantee in conveyances, is rebutted is question of fact, and trial court's conclusion, unless without support in evidence, is conclusive on appeal.

7. Husband and wife $\S$ 264—Evidence held to sustain finding that wife lulled husband into belief that her title to community property was for benefit of community.

Evidence in divorce action held to sustain finding that wife, having taken title to community property in her own name, lulled husband into belief that title was at all times for use and benefit of community.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Actions by Grace Coe Goucher against Samuel Grant Goucher, in which defendant filed cross-complaint, and action by Samuel Grant Goucher against Grace Coe Goucher. Actions tried together. From decrees for Samuel Grant Goucher in both actions, Grace Coe Goucher filed separate appeals. Appeals heard together. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.
Earle & McLaughlin, of Los Angeles, for respondent.

KNIGHT, J. The respondent, Samuel G. Goucher, and the appellant, Grace C. Goucher, are husband and wife. Each brought an action against the other, wherein the former recovered judgments and the latter appealed. The first action was commenced by respondent to obtain a decree adjudicating that certain property, real and personal, the former standing in appellant's name and being claimed by her as her separate estate, was community property. The second action was the instant one, commenced by appellant about two months later to secure a divorce upon the ground of extreme cruelty, wherein

respondent denied the charges of cruelty and filed a cross-complaint asking that he be granted a divorce upon the grounds of extreme cruelty and desertion, and raising the same issue as to the status of the title to the property as was raised in the first action. Appellant, answering said cross-complaint, denied the material allegations thereof relating to the grounds of divorce, and, as in the former action, claimed most of the property described therein as her sole and separate property.

On stipulation, the actions were tried together, but separate findings and judgments were entered in each action. In the first action the court found that all the property involved, except one lot of land hereinafter mentioned, was community property, and judgment was entered accordingly. In the divorce action the court found that neither party had established a case of extreme cruelty, but that respondent had produced sufficient evidence to justify the granting of a divorce upon the ground of desertion, and, regarding the property rights, made findings substantially the same as those made in the first action. The interlocutory decree in the divorce action, besides adjudging that respondent was entitled to a divorce and establishing the status of the title to the real and personal property, directed that appropriate conveyances be made conveying to each of the spouses an undivided one-half interest in the real property, with the exception of the one parcel above mentioned, and that the personal property be equally divided, or, upon failure of the parties to agree upon such division, that it be sold and the proceeds divided. From the decrees thus entered in said actions, Mrs. Goucher prosecutes separate appeals, which are presented in separate printed transcripts, but, under stipulation, are taken on a single bill of exceptions and are argued in one set of briefs.

[1] The charge of desertion pleaded by respondent as a second cause of action in his cross-complaint, and upon which the interlocutory decree of divorce was granted, consisted of allegations of appellant's persistent refusal to have matrimonial intercourse, when neither her health nor any other just cause made such refusal necessary (Civ. Code, § 96); and appellant contends that the evidence is insufficient to support the trial court's decision on that issue, claiming that the evidence proves respondent to have acquiesced in such refusal; that there was no proof showing the refusal on her part was persistent; and that the testimony of the parties to the action on the elements constituting the grounds of divorce was not sufficiently corroborated.

The bill of exceptions contains a large amount of the testimony, but most of it was given in support of the charges of cruelty, and apparently has only an indirect bearing

upon the cause of action upon which the decree was granted. The essential facts pertinent to the issue before us, briefly stated, are as follows: The parties were married in 1892 but for a number of years prior to the commencement of these actions had been having serious domestic differences. About 1913 appellant grew suspicious of respondent's conduct toward a young lady employed as saleswoman by a grocery firm handling products sold by the agency represented by respondent, and mainly because of those suspicions, quarrels between the two were almost continuous and grew exceedingly bitter, until May, 1917, when appellant, according to her testimony, "declared" herself to respondent, and thereafter "never occupied his room or his bed." That they did not subsequently occupy the same sleeping apartment or have marital intercourse was testified to by both appellant and respondent, and was corroborated by circumstances established by the testimony of several witnesses who had lived in the house with them during that period of time, with some of whom appellant discussed the matter, and who knew the circumstances under which the parties were living. Furthermore, one of the allegations of appellant's verified complaint was "that since May, 1917, said parties have not lived together as husband and wife"; and appellant concedes in her brief that "the foregoing testimony establishes without dispute that the parties, although occupying the same dwelling, did not have matrimonial intercourse." The only reason given by appellant for such refusal was the alleged intimacy between respondent and the young woman mentioned. But the trial court found with reference thereto, upon convincing evidence, that appellant's suspicions were groundless; that her accusations of undue intimacy were unreasonable and unjust, and that the accused saleswoman was "a young lady of high moral character," with whom respondent "was friendly in a business way, but no more so than he was with other salesladies in the same or similar stores" which were handling the products sold by respondent; and that, therefore, appellant's refusal to continue marital intercourse with respondent on that ground was without just cause.

The evidence further shows that, subsequent to 1917, appellant stated to one of her friends, who afterwards became a witness in the case, that she "never occupied the room with Mr. Goucher since she found him with a girl"; and, to another, that she had not "roomed with him * * * for a good many years, and did not intend to." While testifying in her own behalf, appellant stated that there was nothing in her physical condition to justify her refusal to have reasonable matrimonial intercourse with her husband, and that up to May, 1917, she had not refused to do so. Respondent testified

that "a year or two" subsequent to May 1917, appellant told him in effect that she was "tired living this way," and if he would confess to having had improper relations with the young woman mentioned she would "make up" with him, to which he replied that appellant had accused him of doing many things he had not done, and that he did not propose to "condemn an innocent girl" in order to make up with appellant; and that he furthermore said to her:

"You left this room and the door is open; you can come back any time you want to."

In this connection, however, he testified that he had never refused to live with her. The evidence furthermore discloses that, during the period of time between May 1917, and the commencement of this litigation, the parties lived in a continuous state of hostility and hatred toward each other, their associations being marked constantly by violent scenes during which, according to their own testimony, expressions of an exceedingly offensive nature were applied by appellant to respondent, and terms of the most sordid character were hurled by the latter at appellant. The record is replete with testimony of the kind mentioned, but we think it unnecessary to refer to it in greater detail, for no good purpose can be served thereby. It demonstrates beyond doubt, we think, that there were ample grounds for the trial court's conclusions that appellant's refusal to have matrimonial intercourse with respondent was constant and continuous, and therefore persistent, within the meaning of section 96 of the Civil Code; also, that when considered with the other evidence, was legally sufficient in the matter of corroboration to meet the requirements of the law. In *Vosburg v. Vosburg*, 136 Cal. 195, 68 P. 694, it was said that where a spouse without cause quits the marriage bed, and does not thereafter seek a renewal of matrimonial intercourse for more than a year, it is sufficient to show a persistent refusal; and that it is not required, in order to show such refusal, that the other spouse shall solicit a return to the marriage couch; and in *Mayr v. Mayr*, 161 Cal. 134, 118 P. 546, it was held that a finding to the effect that the wife persistently refused to have matrimonial intercourse, but that the husband at all times "acquiesced" in such refusal, will be construed as meaning that he submitted thereto, and not that he approved thereof.

[2] The evidence here shows that the action of appellant in separating herself from the marital bed was the result of a settled determination and not a sudden impulse, and therefore respondent, in order to prove desertion, was not obliged to seek her out and endeavor to have her return (*Hall v. Hall*, 65 N. J. Eq. 709, 55 A. 300), particularly in view of the evidence justifying the fair inference

that if he had done so his efforts would have been either unavailing (*Hudson v. Hudson*, 59 Fla. 529, 51 So. 857, 29 L. R. A. [N. S.] 614, 138 Am. St. Rep. 141, 21 Ann. Cas. 278), or would have resulted in strengthening appellant's determination to remain away (*Trall v. Trall*, 32 N. J. Eq. 231). The facts of the cases cited by appellant in support of her contention that the evidence is insufficient are so essentially different from those of the instant one that we think extended discussion of them is not required. The cases of *Hayes v. Hayes*, 144 Cal. 625, 78 P. 19, and *Ingraham v. Ingraham*, 40 Cal. App. 578, 181 P. 234, were unlike the instant one because one of the principal points upon which the decisions therein were grounded was that there was no testimony elicited tending to show that the health or physical condition of the defaulting party did not make her refusal to have reasonable matrimonial intercourse necessary, and it was held that the burden of establishing that fact rested upon the party seeking the divorce on the ground mentioned; and in *Lemberger v. Lemberger*, 55 Cal. App. 231, 203 P. 786, the circumstances referred to in the opinion clearly proved, as the wife therein claimed, that her condition of health was such as to make her refusal necessary, and that her husband so understood it.

In considering the question of corroboration we have given due application to the rule stated by the Supreme Court in its opinion denying a hearing before that court of the appeal in *Lemberger v. Lemberger*, *supra*, which is, in effect, that section 130 of the Civil Code requires "that there must be evidence in support of the cause of action upon which a divorce is granted, in addition to the evidence of either or both of the parties to the action, and that the testimony of one party cannot be taken in corroboration of that of the other for the purpose of proving a cause of divorce." The necessary corroboration of the positive and uncontradicted testimony of both parties to this action, upon the essential propositions involved, has been amply supplied by the numerous circumstances fairly arising from the mass of testimony given by other witnesses in the case in support of the causes urged for a divorce.

After reviewing the entire evidence, we are of the opinion that it is legally sufficient to sustain the decision of the trial court granting the divorce.

[3] With reference to the question of the property rights, the dispute arises only as to the real property, it being conceded that the personal property belongs to the marital community. All of the real property in dispute is situate in Los Angeles county and was acquired subsequent to the marriage, but title thereto was taken in appellant's name, and in some instances as her sole and separate property. It consists of lots 1, 36, and 54 of the West Ninth Street Heights tract; three

lots in the Electric Homestead Association tract, and one lot in the Silver Strand tract, Ocean Park. The court found that the whole thereof was community property, except lot 54 of the West Ninth Street Heights tract, which was declared to be appellant's separate property, respondent having conveyed his interest therein to her by a quitclaim deed. It further found that, notwithstanding that all of said property was purchased by appellant and title thereto taken in her name, "the funds used in said purchases were common and community funds belonging to the marital community of the spouses, * * * the same arising out of the joint earnings of the spouses after their marriage"; that no part of said funds "was derived by plaintiff or by defendant, either by gift, devise, bequest, or descent from any source whatever and no gift of any or either of said lots to plaintiff (appellant) was even intended by defendant."

The evidence adduced upon the issues above mentioned, although conflicting, supports the trial court's conclusions thereon.

[4] The character of the ownership of property, whether separate or community, is to be determined by proof showing the mode of acquisition, rather than by any declarations of one of the parties that the property was or was not community property. *Potter v. Smith*, 48 Cal. App. 162, 191 P. 1023; *Bias v. Reed*, 169 Cal. 33, 145 P. 516; *Hammond v. McCollough*, 159 Cal. 639, 115 P. 216. The proof in the instant cases shows that the nucleus in the acquisition of the real property in dispute was lot No. 101 of the Clark and Bryan Westmoreland tract, which appellant purchased on October 1, 1903, in her own name, making a down payment thereon of \$600, and afterwards selling said lot at a profit, which profit, the trial court found, was "invested and reinvested in the purchase of other lots which were sold; she at the same time using in said purchases community money of the spouses" received from the rental of rooms and the keeping of boarders in the home place, also, from the sale of animals and other personal property belonging to the marital community. In this connection the court further found, and the evidence proves:

"That at the date of the marriage of plaintiff and defendant they had but little money, all of which was consumed in household and living expenses, before any property * * * was acquired; * * * that plaintiff and defendant, since their marriage, have been economical, saving, hard, thrifty and industrious workers; that all moneys made by both or either went into the common or community fund of the spouses and the same was and did at all times remain community property."

In further support of these findings the evidence shows by fair inference therefrom, that appellant was the financial manager and banker. Respondent turned over his earn-

ings to her regularly, with the understanding, however, as he claims, that the same were to be conserved and invested for the benefit of the marital community. In due time following their marriage, when they became free from debt, she opened and afterwards maintained bank accounts in various places and under different names, one of which was a savings account in her name. Upon the sale of said lot No. 101 she continued to speculate in real estate with the profits from sales thereof, which were mingled with joint earnings, until she acquired the parcels of property now in controversy.

The determinative question as to the character of the ownership of said lot No. 101, and, consequently, the controlling question as to the nature of the title to the after-acquired property depends upon the source whence appellant obtained the \$600 with which she made the initial payment on said lot 101, and upon that point the evidence is in sharp conflict. The court found, upon substantial evidence, that the same "was purchased by and from money that the plaintiff had saved up from the household expenses and other expenses that belonged to the marital community, together with other money furnished to plaintiff by defendant to buy a cloak or coat which * * * she did not buy." In opposition to these facts, appellant testified that except for the small sum diverted from the purchase of said cloak the entire amount of said initial payment was cash received by her as a gift from her cousin and her mother. But on cross-examination on this and other points, as the trial court pointed out in its oral opinion, a number of inconsistencies and improbabilities were developed in her testimony, which doubtless affected her credibility as a witness, for the trial court declined to accept as true her testimony regarding the source of said purchase money and made an express finding to that effect. In that state of the record the decision of the trial court upon the issue mentioned is conclusive on appeal, and therefore must be accepted as final as to the adjudication of the property rights.

[5, 6] Appellant contends that, since she was named as sole grantee in the conveyances to the disputed property, the presumption of separate property, created by section 164 of the Civil Code, must determine the character of ownership thereof. We find no merit in the point for the reason that such presumption is a disputable one, in the form of evidence, and may be controverted by other evidence, direct or indirect (*Stafford v. Martinoni*, 192 Cal. 724, 221 P. 919); and whether or not it is so controverted is a question of fact for the trial court, its conclusions, unless manifestly without sufficient support in the evidence, being conclusive on appeal (*Stafford v. Martinoni*, supra; *Potter v. Smith*, supra; *Fanning v. Green*, 156

Cal. 279, 104 P. 308; *Gilmour v. North Pasadena Land, etc., Co.*, 178 Cal. 6, 171 P. 1066). Conceding that the burden of controverting said presumption was upon the respondent (*Lenninger v. Lenninger*, 167 Cal. 297, 139 P. 679; *Alferitz v. Arrivillaga*, 143 Cal. 646, 77 P. 657), and that he was required to do so by clear, convincing and satisfactory proof (*Estate of Nickson*, 187 Cal. 603, 203 P. 106), we think the trial court was warranted in concluding from all the circumstances that the same was so controverted.

[7] Appellant furthermore contends that, even assuming that said lot 101 was acquired with community funds, the evidence showing the mode of its acquisition was sufficient to establish a gift from respondent to her of such community property. This contention is based mainly upon the claim that respondent was cognizant of the manner in which title was being taken, and upon the admitted fact that the sale of said lot 101 by appellant was negotiated by respondent with appellant's consent, while she was absent from the state, and that he deposited the proceeds of the sale in the savings account maintained in her name. We are unable to sustain the contention. The character of the property must be determined as of the date of its acquisition (*Vandervort v. Godfrey*, 58 Cal. App. 578, 208 P. 1017), and under the doctrine appellant seeks to invoke, the establishment of a gift depends upon proof showing that the donor knew that title to the property was to be taken in donee's name, or that the former consented thereto or participated in the transaction (*Miller v. Brode*, 186 Cal. 409, 199 P. 531). The evidence here was to the effect that respondent did not know that the title to said lot No. 101 nor to the after-acquired property was to be taken exclusively in appellant's name, nor did he become aware that it had been so taken until some time after it had happened; that upon learning of the fact he demanded an explanation and was told by appellant that she had adopted this course in order to prevent a loss of the property in case a business disaster should befall respondent; and, moreover, that she repeatedly assured him, according to his testimony, that notwithstanding she had so taken title, the property was community property and in the event of her death he would succeed to the same to the exclusion of her relatives; and in pursuance of this understanding respondent exercised many acts of ownership over the property and continued to turn over his earnings to appellant, part of which was utilized in the payment of taxes and assessments levied against the property. In view of the foregoing evidence, we believe the court was warranted in finding, as it did that:

"Plaintiff at all times lulled the defendant into the firm belief that the title to the above-

mentioned lots and each of them, taken in her own name, was at all times for the use and benefit of the marital community. * * *

We find no error in denying appellant's motions for new trials. The legal questions presented thereby were substantially the same as those disposed of on the merits; and with reference to the matter of the newly discovered evidence, the counter affidavits filed by respondent show that the testimony of the witnesses appellant sought to produce would only have added to the conflict of evidence upon those issues already determined at the trial.

For the reasons above set forth, the decree appealed from herein is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

82 Cal. App. 797

Samuel Grant GOUCHER, Plaintiff and Respondent, v. Grace Coe GOUCHER, Defendant and Appellant. (Civ. 5516.) ★

District Court of Appeal, First District, Division 1, California. April 21, 1927.

Hearing Denied by Supreme Court June 20, 1927.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

W. I. Gilbert, of Los Angeles, for appellant.
Earle & McLaughlin, of Los Angeles, for respondent.

KNIGHT, J. This is a suit in equity, brought by plaintiff, Samuel G. Goucher, against his wife Grace Coe Goucher, to determine the status of the title to certain property acquired after marriage, most of which stood in defendant's name and which plaintiff claimed was community property. About two months after this suit was begun defendant commenced an action for divorce wherein plaintiff herein filed a cross-complaint raising the same issue as to the status of the property that was raised in the instant suit. Under stipulation the two causes were tried together, and a decree in each action was entered in favor of the plaintiff in the present suit, Samuel G. Goucher, from which decrees his wife took separate appeals. The appeal in the divorce action, which is numbered 5515 and entitled Grace Coe Goucher, Plaintiff, Cross-Defendant, and Appellant, v. Samuel G. Goucher, Defendant, Cross-Complainant, and Respondent (Cal. App.) 255 P. 892, has this day been determined, the decree appealed from therein being affirmed. Inasmuch as all questions relating to the property rights involved in the instant appeal were considered and decided in the opinion rendered in that appeal, it becomes unnecessary to discuss them here. For the reasons stated in that opinion, the decree appealed from herein is also affirmed.

We concur: TYLER, P. J.; CASHIN, J.

★Hearing denied by Supreme Court.

PEOPLE v. KEYS. (Cr. 1462.) *

District Court of Appeal, Second District, Division 2, California. April 28, 1927.

Rehearing Denied May 27, 1927.

1. Criminal law ⚡88—**Jurisdiction of high-grade misdemeanor in county, but outside city of Los Angeles, is in superior, not municipal, court.**

As to high-grade misdemeanors committed outside the territorial limits of the city, but within the county, of Los Angeles, jurisdiction is not in the municipal court of the city, but now, as before the establishment of such municipal court, is in the superior court.

2. Witnesses ⚡266—**Mere long and unnecessary cross-examination of defendant's witness by court held not prejudicial.**

For court to cross-examine defendant's witness at unusual length and without apparent necessity, the people being represented by counsel, held not alone to prejudice rights of defendant, disbelief of witness' testimony or bias against defendant not being displayed.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Stanley Keys was convicted of violation of the Wright Act, and, from judgment of conviction and order denying motion for new trial, he appeals. Affirmed.

Stanley Visel and Martin S. Ryan, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, J. Appellant was charged by information in the superior court of Los Angeles county with a violation of the Wright Act (St. 1921, p. 79), a high-grade misdemeanor, and was tried and found guilty. This appeal is taken from an order of the superior court denying his motion for a new trial, and from the judgment of conviction.

[1] Two grounds are urged, upon which it is claimed that the judgment should be reversed: First, it is said that the municipal court of the city of Los Angeles has exclusive jurisdiction of all misdemeanors committed in the county of Los Angeles and not within any incorporated city other than Los Angeles. This question was decided adversely to appellant's contention in *People v. Denault* (Cal. App.) 253 P. 151. It was there held that, as to high-grade misdemeanors committed in the county, and outside the territorial limits of the city in which the municipal court has been established, the jurisdiction now, as before the establishment of the municipal court, is in the superior court.

[2] The other point urged by appellant is that "severe and improper cross-examination" by the court of a defense witness tended to show that the court was biased and prejudiced against the defendant, and that the

court disbelieved the witness; that this bias and prejudice on the part of the court tended to prejudice the jury—all of which, it is said, constituted prejudicial error.

This examination of the witness by the court occupied about 18 pages of appellant's brief. No attempt is made to point out what questions asked were objectionable, or in what manner any portion of this examination shows prejudice upon the part of the court or is at all prejudicial to the rights of the defendant. It was said in *People v. Boggess*, 194 Cal. 212, 228 P. 448, that ordinarily the proper course is to allow counsel to first examine a witness, and for the court to intervene, if at all, only after they shall have finished, and that, should the court then examine further, it should do so with care, lest the jury indulge in inferences adverse to the defendant. It appears in the instant case that the court examined the witness at an unusual length, and that without any apparent necessity, as the people were represented by counsel. However, we are not prepared to say that this fact alone prejudiced the rights of the defendant. We have found no part of the examination in which the court displayed disbelief of the witness' testimony, or bias against the defendant; and, as we have said, counsel have made no attempt to call our attention to such an instance. We find no substantial error in the record.

The judgment and order appealed from are affirmed.

We concur: THOMPSON, J.; JOHNSON, Justice pro tem.

201 Cal. 201

**CALIFORNIA DELTA FARMS, Inc., v. CHI-
NESE AMERICAN FARMS, Inc.**
(Sac. 3987.)

Supreme Court of California. May 5, 1927.

1. Appeal and error  113(2)—Order denying motion to vacate and to enter different judgment is appealable, though appeal from judgment itself may present same questions; "special order made after final judgment" (Code Civ. Proc. §§ 663, 963).

Order denying a motion made under Code Civ. Proc. § 663, to vacate and to enter a different judgment, is appealable, since it is a special order made after final judgment within meaning of section 963 providing for appeal, notwithstanding that on appeal from the judgment itself the same matters may be reviewed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Order.]

2. Appeal and error  113(2)—Statutes permitting court to set aside its judgment and render substituted judgment and making order appealable provide cumulative remedy by appeal (Code Civ. Proc. §§ 663, 663a).

Code Civ. Proc. § 663, providing that a judgment rendered on findings by the court may be vacated by the same court for erroneous conclusions of law or because the findings do not support the judgment, and section 663a, providing that order granting the motion is appealable, were intended to provide a remedy in addition to the remedy by appeal existing before their enactment.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action for the cancellation of a contract by the California Delta Farms, Inc., against the Chinese American Farms, Inc., in which the defendant filed a cross-complaint. After judgment for plaintiff and against defendant, defendant filed a motion for an order vacating the judgment, which was denied, and defendant appealed. Plaintiff moves to

dismiss the appeal. Motion to dismiss appeal denied.

A. B. Bianchi, Manson & Allan, and Albert H. Elliot, all of San Francisco, for appellant. Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for respondent.

WASTE, C. J. Judgment, based upon findings, was entered in the court below, in favor of the plaintiff and against the defendant, in an action brought for the cancellation of a contract, possession of real property, and for equitable relief. The defendant did not appeal from the judgment, but made a motion, pursuant to the provisions of section 663 of the Code of Civil Procedure, to have the judgment vacated and set aside and another and different judgment entered, on the ground that the conclusions of law were incorrect and erroneous and not consistent with or supported by the findings of fact. The motion was denied, and the defendant appealed from the order denying the motion. The respondent now moves to dismiss the appeal upon the ground that the order appealed from is not an appealable order.

[1] Section 663 of the Code of Civil Procedure provides that a judgment, when based on findings of fact made by the court, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered when the conclusions of law are incorrect or erroneous, not consistent with, or not supported by, the findings. Section 663a provides that an order of the court granting a motion for a substituted judgment may be reviewed on appeal in the same manner as a special order made after final judgment. No provision is therein made for an appeal from an order denying the motion, but the decisions are to the effect that such an order is also appealable. *Rahmel v. Lehnendorff*, 142 Cal. 681, 76 P. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154; *Condon v. Donohue*, 160 Cal. 749, 118 P. 113; *Westervelt v. McCullough*, 64 Cal. App. 362, 221 P. 661; *Andreoli v. Hodge*, 71 Cal. App. 762, 766, 236 P. 333.

There should be no uncertainty on the question. The decisions hold that an order denying a motion to vacate and to enter a different judgment is appealable as a special order made after final judgment. The exact question here presented was raised in *Bond v. United Railroads*, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50, and the court said (page 273 [113 P. 367]):

"By section 963 of the Code of Civil Procedure, an appeal may be taken from any special order made after final judgment. This order [denying a motion to vacate, and to enter a

different judgment] is one of that kind. It is an order authorized by section 663 of the Code of Civil Procedure. Section 663a of the Code of Civil Procedure declares that an order 'granting such motion may be reviewed on appeal in the same manner as orders made on motions for a new trial.' This was intended either to authorize a review of such an order on appeal from the judgment afterward made in pursuance of it, or to authorize a direct appeal from the order itself. In either case it should not be construed so as to affect the right given by section 963 to appeal from an order denying the motion, as from an order made after judgment. Respondent's position in that behalf is untenable."

[2] Therefore, notwithstanding the obvious fact that on an appeal from a judgment which the court below refuses to set aside, the very same matters may be reviewed, and a reversal can be ordered and the court below directed to enter the judgment which the findings justify, it seems definitely settled that our law gives a separate appeal from an order made by the court on the motion referred to in sections 663 and 663a. *Spotton v. Superior Court*, 177 Cal. 719, 721, 171 P. 801. When conclusions of law are claimed to be erroneous and not consistent with or not supported by the findings, the moving party may proceed under sections 663 and 663a. When this course is not pursued there must be an appeal from the judgment, or the sufficiency of the findings to support the judgment cannot be considered. *Swift v. Occidental Mining, etc., Co.*, 141 Cal. 161, 165, 74 P. 700. These sections were not designed to affect the remedy by appeal existing before their enactment, but were intended to provide a remedy in addition thereto. *Patch v. Miller*, 125 Cal. 240, 57 P. 986.

The authorities relied on by the respondent in support of its motion are based on the well-established rule, generally applicable, that an order refusing to vacate a judgment or order does not present any facts for consideration other than those which are presented upon appeal from the judgment itself. *Reynolds v. Reynolds*, 191 Cal. 435, 216 P. 619; *Estate of Baker*, 170 Cal. 578, 150 P. 989; *Bell v. Solomons*, 162 Cal. 105, 121 P. 377; *Title Insurance & Trust Co. v. Calif. Dev. Co.*, 159 Cal. 484, 114 P. 838; *Lindgren v. Weaver* (Cal. App.) 252 P. 669. They have no application to the special motions authorized by section 663 of the Code of Civil Procedure.

The motion to dismiss the appeal is denied.

We concur: SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

82 Cal. App. 657

(255 P.)

MILLER v. MILLER et al. (Civ. 4411.)

District Court of Appeal, Second District, Division 2, California. May 2, 1927.

1. Trusts $\Leftrightarrow$ 89(2)—Purchase in name of son, with funds alleged to be owned jointly with mother, did not establish trust relationship for mother (Civ. Code, § 853).

In action to recover interest in land, purchased in name of son with funds alleged to belong jointly to mother and son, evidence was insufficient to establish trust relationship for mother under Civ. Code, § 853, but justified conclusion that property belonged to son alone.

2. Trusts $\Leftrightarrow$ 86—Conveyance taken in name of person other than one paying consideration raises presumption of trust only in transactions between strangers (Civ. Code, § 853).

Under Civ. Code, § 853, presumption of trust in favor of person paying consideration when conveyance is taken in name of another arises only in transactions between strangers to each other and not where conveyance is taken in name of person for whom there is a moral or legal obligation to provide.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Marietta R. Miller, an incompetent person, by Louis E. Miller, her guardian, against Grace S. Miller and others, in which Louis E. Miller as administrator of the estate of plaintiff named was substituted in plaintiff's stead. Judgment for defendants, and plaintiff appeals. Affirmed.

J. B. Holley and A. E. Garten, both of Long Beach, for appellant.

Daly, Daly & Todd and G. M. Spicer, all of Long Beach, for respondent Grace S. Miller.

THOMPSON, J. This action was commenced by plaintiff to recover from defendant Grace S. Miller an undivided one-half of two parcels of real property in the city of Long Beach, Cal. The complaint alleged the ownership by plaintiff of an undivided one-half interest, her incompetency, and the appointment of a guardian, and then alleged that for some time prior to the death of Willard E. Miller, a son of plaintiff, which occurred January 23, 1920, the record title to the properties was held by him for convenience and for the joint benefit of himself and his mother, the plaintiff. The complaint further alleges that as to one of the pieces of property, Willard E. Miller, while physically and mentally afflicted by reason of a stroke of paralysis, and on December 24, 1919, was unduly influenced and persuaded by his wife to execute to James H. Daly a deed, in order that Daly might, as he did, immediately convey the property to Willard E. Miller and his wife, the defendant here, as joint tenants with right of survivorship, and that as to the other piece of property Willard E. Miller,

without plaintiff's knowledge and because of the undue influence of the defendant, took the title in his own and his wife's name with the right of survivorship, although the funds with which it was purchased were the joint funds of the plaintiff and Willard E. Miller. Judgment was rendered for defendant, and plaintiff appeals.

Since the appeal was prosecuted Marietta R. Miller has died, and Louis E. Miller, as administrator of the estate of Marietta R. Miller, has been substituted in her stead.

[1, 2] The appeal is based on the assertion that the evidence is insufficient to support the judgment. No particular finding or portion of the findings is pointed out as being insufficiently supported. At the trial it developed that the title to the first parcel of property had been vested in Willard E. Miller since December, 1903; that it had been improved by him with money borrowed for that purpose; that he had also borrowed money from the same source to purchase the other property and pay for the building. There was testimony to show that some time prior to 1903 the plaintiff owned a property known as the "Kennebec property," which was sold November 30, 1903, for \$19,500, from which it is fair to assume must be deducted a mortgage of \$3,250 placed upon the property by plaintiff in September, 1900. Mrs. Grace S. Miller testified on cross-examination that her husband told her that title to this property was placed in his mother's name for convenience only and that he owned it in fact. Another son of plaintiff, George I. Miller, testified that the proceeds of this sale went into the American avenue property, which is the first parcel involved in this action, but, on cross-examination, he testified that he did not know how the money for the Kennebec property was paid, nor to whom it was paid, thus evidencing an unfamiliarity with the situation which greatly detracts from the weight to be accorded his statement that the money went into the American avenue property. It does not appear that, after the improvement of this last-named property, Mrs. Marietta R. Miller received any of the income, but rather that, from the year 1907 up to the time of Willard Miller's death, he and a brother, Louis E. Miller, regularly contributed to the support of their mother, the plaintiff, and that after Willard's death Louis and two other brothers and Mrs. Grace Miller, the defendant, contributed to her support. Under these circumstances the following question arises: Was the trial court justified in holding that plaintiff had failed to establish a trust relationship? It cannot be seriously argued that the proof relied upon by plaintiff was clear and convincing; in fact, taken at its greatest probative value, it could do little more than raise a suspicion of a trust. On the other hand, aside from the

oral testimony given by defendant's witnesses, the deeds themselves, which were introduced in evidence, together with the relationship of mother and son is sufficient to warrant the conclusion of the court. As has been said (*Hamilton v. Hubbard*, 134 Cal. 605, 65 P. 322, 66 P. 860):

"Ordinarily, indeed, where a conveyance is made to one and the consideration paid by another, a trust is 'presumed' in favor of the latter. Civil Code, § 853. But this presumption arises only in transactions between 'strangers to each other' (1 *Perry on Trusts*, § 126), and is not indulged where the conveyance is to the 'wife or child, or other person for whom [the person paying the consideration] is under some natural, moral, or legal obligation to provide.' In such cases the presumption is 'that the purchase and conveyance were intended to be an advancement for the nominal purchaser.' 1 *Perry on Trusts*, § 143; *Hill on Trustees*, 97, and note."

Judgment affirmed.

We concur: CRAIG, J.; JOHNSON, Justice pro tem.

2

201 Cal. 769

E. R. FOSTER, Petitioner, v. City Council of the CITY OF BERKELEY et al., Respondents. (S. F. 12342.) Supreme Court of California. April 28, 1927. In Bank. Application for writ of mandate prayed to be directed to the City Council of the City of Berkeley to compel reconsideration of a certain rezoning ordinance. Writ granted. Frank V. Cornish, of Berkeley, and J. S. Hutchinson, of San Francisco, for petitioner. E. J. Sinclair, of Berkeley, and James M. Koford, of Oakland, for respondents.

PER CURIAM. Application for a writ of mandate to compel the city council and other officials of the city of Berkeley to reconsider a certain ordinance relating to the rezoning of a certain restricted district within said city, and to either repeal the ordinance or submit the same to a referendum vote of the electors of the city at the next general election or at a special election to be called for such purpose. This proceeding differs in none of its essential aspects from the proceeding entitled *Dwyer v. City Council of the City of Berkeley*, etc., recently decided by this court and reported in 253 P. 932. Upon the authority of that decision, it is therefore ordered that the writ issue as prayed for herein.

CALIFORNIA REPORTER

256 PACIFIC REPORTER

201 Cal. 185

In re BUTTS' ESTATE.**BUTTS v. LISTER.**

(S. F. 12013.)

Supreme Court of California. April 29, 1927.

Rehearing Denied, with Modification, May 26, 1927.

1. Wills ⇨360—Objection that formal answer was not filed to amended contest of will held waived, where court and parties treated allegations as denied.

Where court and parties in will contest treated allegations of amended contest as denied and proceeded to trial thereon, objection that formal answer was not filed held waived.

2. Wills ⇨324(3)—Whether evidence rebutted presumption of undue influence by attorney drawing will in which he was sole beneficiary held for jury.

In contest of client's will, in which attorney who drew it was sole beneficiary, question whether disputable presumption of fraud and undue influence was overcome by evidence introduced by proponent held for jury.

3. Wills ⇨163(4)—In will contest, contestant held not required to establish all elements of fraud or undue influence where attorney drawing will was sole beneficiary.

In contest of client's will, in which attorney who drew it was sole beneficiary, burden of proof to establish all elements of fraud or undue influence was not on contestant, in view of proponent's burden to overcome presumption of unfair dealing, raised by law because of relationship of attorney and client.

4. Wills ⇨386—Jury's verdict on conflicting evidence in will contest will not be disturbed.

Where evidence was conflicting as to grounds of will contest, jury's verdict will not be disturbed, notwithstanding that reviewing court believed jury might have concluded otherwise.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Application by Henry B. Lister for the probate of the will of Florence Belmont Butts, deceased, contested by Herman F. J. Butts. From a judgment refusing probate, and from an order denying proponent's motion to enter judgment notwithstanding the verdict, proponent appeals. Affirmed.

Henry B. Lister and Gillogley, Crofton & Payne, all of San Francisco, for appellant.

Harry I. Stafford and W. F. Stafford, both of San Francisco, for respondent.

LANGDON, J. This is an appeal by the proponent and beneficiary under the will of Florence Belmont Butts, deceased, from a judgment and order refusing probate to the

will, and also an appeal from an order made after judgment denying the motion of proponent to enter judgment in his favor notwithstanding the verdict.

The original contest pleaded unsoundness of mind, lack of due execution, and undue influence. The defendant answered this original contest by traversing the same and also by setting forth an affirmative defense to the effect that at the date the will was executed the contestant had repudiated his marriage to the decedent and had brought an action to annul it as a cross-complaint to her action against him for divorce on the ground of extreme cruelty; that the parties were separated and bitterly antagonistic at the time the will was made; that the decedent and the contestant were joint tenants at the time the will was made of a fractional interest in a parcel of real property known as the Butts ranch, which, in the event of the death of the decedent before the contestant, would vest by operation of law in the contestant; that the entire estate the decedent had at the time of making the will consisted of some jewelry of the value of \$200 and a judgment for alimony against the contestant amounting to \$450.

It appears that the original contest was filed on August 1, 1925, and the answer was filed on August 11, 1925. On the latter date, which was the date of trial, an amended contest was filed which contained the allegation that the contestant had duly married the decedent in 1920, and that he remained her husband until the time of her death. The said amended contest then restated the counts of unsoundness of mind, lack of due execution, and undue influence at the time of making the will, substantially as they appeared in the original contest, and then added a new cause of contest, to wit, that the will was revoked by its destruction on the 29th day of June, 1925, by decedent, with intent and purpose on her part then and there to revoke, cancel, and destroy said alleged will. Defendant objected to the filing of this amended contest, which was, nevertheless, allowed by the court. Appellant contends that because no answer was filed to this amended contest, the cause was never at issue, and that the court erred in permitting the amended contest to be filed. Appellant does not contend that he was surprised or placed at any disadvantage by the filing of the amendment. On the contrary, it appears that he had taken and filed seven depositions relating to the hearing of the will by decedent. He asked for no continuance for the purpose of securing evidence upon this issue, nor to file an answer to the amended contest, but proceeded to trial. The evidence was directed to two issues, namely, undue influence and the revocation of the will by the decedent on June 29, 1925. The contestant introduced evidence of said revocation and that

at said time said decedent was of sound mind. The proponent introduced seven depositions, all to the effect that decedent was not of sound mind on said date, and in addition to that introduced the order of commitment of the superior court in and for the county of Los Angeles, committing said decedent to the asylum. The contestant offered evidence of the revocation of the will on June 29, 1925, and no objection was made to the introduction of the same.

In the case of *Kern Valley Bank v. Koehn*, 19 Cal. App. 247, 125 P. 358, a cross-complaint was filed by the defendant and a demurrer thereto was filed, but no answer was ever filed, and the trial proceeded to judgment. Both parties appeared to have deemed the allegations of the cross-complaint in issue, and evidence was offered touching the truth of the allegations thereof, without objection, as though there had been a formal denial of the same. The court said:

"The rule is well established that where both parties treat an affirmative defense as denied, the want of a formal answer thereto will be deemed waived."

[1] We think, under the circumstances of this case, the court and the parties having treated the allegations of the amended contest as denied and proceeded to trial thereon, the objection that a formal answer was not filed has been waived.

[2] The record presents a case wherein an attorney is the sole beneficiary under a will of his client, drawn by himself. It presents a case where there is a conflict between the presumption that the law raises, growing out of such relationship, and the testimony of witnesses offered by the proponent. The question as to whether or not the disputable presumption was overcome by the evidence introduced by the proponent was one to be determined by the jury. As was said in *Schurman v. Look*, 63 Cal. App. 359, 218 P. 629:

"The solution of that question was within the peculiar and final province of the trial court, for the presumption on the one hand and the testimony opposed to it on the other, presented but a conflict of evidence. The finding of the trial court on the subject is final."

[3] It was said in *Witt's Estate*, 198 Cal. 407, 245 P. 197:

"The burden of proof to establish all of the elements of fraud or undue influence was not, in the instant case, upon the contestant, as is the usual situation upon the contest of a will.

The burden was upon the defendant, by reason of his relationship of attorney to Mrs. Witt, to overcome the presumption of fraud and unfair dealing which is automatically raised by the law as a protection to a client against the strong influence to which the confidential relation naturally gives rise. All dealings between an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumptively invalid on the ground of constructive fraud, and such presumption can be overcome only by the clearest and most satisfactory evidence * * * that the transaction between himself and his client was fair and equitable and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length."

See *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Cooley v. Miller & Lux*, 156 Cal. 519, 105 P. 981; *Clark v. Millsap*, 197 Cal. 765, 242 P. 918.

[4] The jury saw and heard the witnesses, and, from an examination of the entire record, we cannot say they were not warranted in the conclusion they reached in the verdict rendered. While from the evidence we think they might have concluded otherwise, we are not triers of fact, and we think this case is one where there is a conflict in the evidence upon both grounds of contest. We have read the record with great care, but we feel that no useful purpose would be served in setting forth the evidence, as we are satisfied that the jury, if it chose to disbelieve the testimony of any of the witnesses produced, might conscientiously find that the presumption was not overcome. If the verdict had been the other way we would not be inclined to disturb it under the facts presented by the record.

Exception is taken to certain instructions given and refused by the trial court, but, when we consider the instructions as a whole, they fairly state the law to the jury. As to the alleged errors in ruling upon the admissibility of evidence, we think they were without prejudice to appellant.

The judgment is affirmed. As the appeal herein appears to have been prosecuted in good faith, it is ordered that the costs of the appellant be paid out of the assets of said estate.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

201 Cal. 194

STOCKTON SAVINGS & LOAN BANK v. MELLO et ux. (Sac. 3804.)

Supreme Court of California. May 4, 1927.

1. Homestead ⚡200—Burden of proof is on creditor, petitioning for appraisement of debtor's homestead, to show value exceeds exemption (Civ. Code, §§ 1245-1259).

On hearing of creditor's petition for appraisement of homestead, under Civ. Code, §§ 1245-1259, the burden of proof is on petitioner to establish by weight of evidence that the value of the homestead property exceeds the exemption.

2. Homestead ⚡200—Statutes relating to execution against homestead contemplate hearing on petition for appraisement, at which homestead claimant may be heard (Civ. Code, §§ 1245-1259).

Civ. Code, §§ 1245-1259, relating to proceedings on execution against homestead, contemplate hearing on the petition for the appointment of appraisers at the time and place designated by the statutory notice, at which the homestead claimant is entitled to be heard.

3. Homestead ⚡200—Homestead claimant need not file pleadings to creditor's petition for appraisement (Civ. Code, §§ 1245-1259).

In proceedings under Civ. Code, §§ 1245-1259, relating to execution against homestead, no pleadings to the petition for appointment of appraisers are necessary on the part of the homestead claimant.

4. Appeal and error ⚡77(1)—Order denying creditor's petition for homestead appraisal is final determination and appealable (Civ. Code, §§ 1245-1259).

Order of the court denying a creditor's petition for appraisement of a homestead in proceedings under Civ. Code, §§ 1245-1259, relating to execution, is a final determination from which appeal lies.

5. Appeal and error ⚡1011(1)—Trial court's denial, on conflicting evidence of homestead's value, of petition for appraisement, would not be disturbed on appeal (Civ. Code, §§ 1245-1259).

Trial court's denial of creditor's petition for homestead appraisement would not be disturbed on appeal in proceedings under Civ. Code, §§ 1245-1259, relating to execution, where evidence of homestead's value relative to exemption was conflicting, and due service and the truth of the other allegations of petition were stipulated.

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Proceedings by the Stockton Savings & Loan Bank, as judgment creditor, against John V. Mello and wife for appraisement of a homestead under Civ. Code §§ 1245-1259. From an order denying the petition, the petitioner appeals. Affirmed.

Nutter, Hancock & Rutherford, of Stockton, and Charles E. Watkinson, of Hanford, for appellant.

Clark Clement, of Lemoore, for respondents.

SHENK, J. This is an appeal from an order denying the petition of a judgment creditor for the appraisement of a homestead in a proceeding taken pursuant to sections 1245-1259, inclusive, of the Civil Code.

In the superior court in and for the county of San Joaquin, the petitioner on November 20, 1924, obtained a judgment against the defendant John V. Mello for the sum of \$4,818. On December 10, 1924, an execution was issued on said judgment and levied on certain real property in Kings county on which the defendant John V. Mello, as head of a family had, on February 15, 1924, duly declared a homestead. The said defendant thereupon demanded that the sheriff desist from selling the homestead property, and in an action commenced by him in the superior court in and for the county of Kings, obtained an injunction prohibiting such sale. On February 14, 1925, the petitioner filed its verified petition alleging the matters required to be shown by section 1246 of the Civil Code, including the allegation, on information and belief, that the said property at the time of the homestead declaration was and is of the reasonable value of \$15,000, and praying that the court appoint three disinterested persons to appraise the value of said homestead.

The petition came on regularly for hearing on March 2, 1925. It was stipulated that due service had been made on the defendants of the petition and of the notice of the time and place of hearing as required by section 1248 of the Civil Code. It was also stipulated that all of the allegations of the petition were true with the exception of the allegation that the homestead claimed by the defendants was and is of a reasonable value in excess of \$5,000, to wit, of the value of \$15,000. In support of the allegation of the petition that the said property was worth in excess of the homestead exemption of \$5,000, the petitioner produced two witnesses, each of whom testified that said property was of the market value of \$8,000. Petitioner then rested, whereupon the defendant produced six witnesses, each of whom testified that the market value of said property was \$4,500, and the matter was submitted for decision. On March 9, 1925, the court made and entered its order denying said petition, from which order, being a final determination of the matter so far as the superior court was concerned, this appeal is prosecuted.

[1] It is conceded by the petitioner that if on such a hearing the court may pass on the weight of conflicting evidence, there is no error in the record. It is the contention of the petitioner, however, that if on such a hearing

the petitioner produces evidence showing, *prima facie*, that the value of said homesteaded property is in excess of the statutory exemption, the court has no recourse but to appoint the appraisers notwithstanding the fact that it might be shown on behalf of the defendant by a preponderance of the evidence that the value of said property is less than the exemption. The argument is based on the language of section 1251 of the Civil Code relating to the duties of the appraisers wherein it is provided that, "They must view the premises and appraise the value thereof, and if the appraised value exceeds the homestead exemption they must determine whether the land claimed can be divided without material injury;" and also on the language of section 1254 of the Civil Code, which provides:

"If, from the report, it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under the execution."

We find nothing in the sections referred to which would preclude the court, after the filing and service of the petition and notice on the exemption claimant of the time and place of hearing pursuant to section 1249 of the Civil Code, from determining on the evidence produced on such hearing and in accordance with the rules of evidence that the petitioner had not made out a case entitling it to the appointment of appraisers. Said section 1249 provides that:

"At the hearing the judge may, upon proof of the service of a copy of the petition and notice, and of the facts stated in the petition, appoint three disinterested residents of the county to appraise the value of the homestead."

[2, 3] The determination of the court on the proof "of the facts stated in the petition" would seem to contemplate a determination on all the proof on the issue tendered by the petition and not merely the proof offered by the petitioner. The homestead claimant is entitled to be heard on the hearing of the petition, and no pleadings on the part of said claimant are necessary. *Stone v. McCann*, 79 Cal. 460, 462, 21 P. 863. If the court be limited to the proof on behalf of the petitioner, it would seem to be idle to provide in the statute, as it is provided by section 1248, for service of the petition and notice of the time and place of hearing on the homestead claimant. Such a limited proceeding would be *ex parte* in its effect. If, on the other hand, the claimant has a right to be heard at the time and place noticed, and the Code plainly provides for such hearing, it would be unreasonable to conclude that his evidence could have no weight in the determination of whether a showing had been made sufficient to entitle the petitioner to the appointment of appraisers. The provision of said section 1249 that at the hearing the judge may appoint the appraisers would seem to in-

dicating some discretion on the part of the court, at least on conflicting evidence, to grant or deny the petition as the proof should warrant. To accord to the homestead claimant the right to a hearing on the petition and at the same time to deny the court the right to consider the evidence then produced on behalf of the claimant would result in a manifestly anomalous proceeding contrary to the clear intention of the statute.

The petitioner relies on certain language in *Stone v. McCann*, *supra*, to the effect that when the report of the appraisers is filed a time should be fixed for the hearing thereon and due notice thereof be given to the claimant; that the questions whether the homestead exceeds in value the sum of \$5,000 and whether it can be divided without material injury should then be determined upon the evidence produced by the parties. The petitioner also relies upon *Brown v. Starr*, 75 Cal. 163, 16 P. 760, wherein it was held that it must be assumed that the intention of the statute was that the action of the appraisers as evidenced by their report was to be subject to the control of the court in proceedings on notice to confirm or reject the report. The defendants, on the other hand, rely on *Lean v. Givens*, 146 Cal. 739, 81 P. 128, 106 Am. St. Rep. 79, wherein it was stated, with reference to that part of the report of the appraisers that a division of the property could be made, at page 744 (81 P. 130):

"It may be that where the report is, that a division can be made and the excess set off for sale there should be further proceedings, hearings, and notices for the purpose of securing the right to a just division, as was held in *Brown v. Starr*, 75 Cal. 164 [16 P. 760]. * * * In any case, however, we perceive no good reason for holding that further notices must be given where the appraisers report that the property cannot be divided. Neither the court nor the judge is given power to revise or set aside the decision of the appraisers as to the possibility of making a fair division. The remarks in *Stone v. McCann*, 79 Cal. 462 [21 P. 863], with respect to further notice upon the hearing of the report of the appraisers, is merely a part of the argument upon another question, and the subject-matter of the notices was not before the court."

[4, 5] We find it unnecessary to resolve any alleged inconsistencies in these former decisions. The question now presented was not directly involved in any of them. It is sufficient to say that the statute contemplates a hearing on the petition for the appointment of appraisers at the time and place designated by the notice required by the statute. If the court on sufficient evidence denies the petition, its order to that effect would constitute a final determination of the matter, and an appeal would lie from such order. This course was followed in the present case. On such hearing the burden of proof was on the petitioner. *Demartin v. Demartin*, 85 Cal. 71, 74, 24 P. 594. As the court found on conflict-

ing evidence against the petitioner's claim, its finding may not be disturbed on appeal.

The order is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRES-
TON, J.; LANGDON, J.

201 Cal. 162

IN re MAGERL'S ESTATE.

MARTIN v. WARD.

(L. A. 9358.)

Supreme Court of California. April 29, 1927.

1. Wills $\S$ 384—Whether court erred in refusing jury trial in will contest must be determined from record touching that particular phase of case, not by evidence presented to court after refusal.

Question, as to whether trial court erred in making order refusing contestant in will case a jury trial, must be determined by state of record touching that particular phase of case, rather than by nature and extent of evidence presented on hearing before court after making and entry of its order refusing to submit contest to jury.

2. Jury $\S$ 25(1)—Contestant in will case could only procure trial by jury by compliance with statute regulating hearings on contested wills (Code Civ. Proc. $\S$ 1312).

Contestant, in proceeding to admit will to probate, triable in probate, wherein contestant was not entitled as of right to trial by jury, could only procure that right by compliance with terms of Code Civ. Proc. $\S$ 1312, regulating hearings on contested wills.

3. Jury $\S$ 25(9)—Where jury was had in first trial of will contest, contestant, not filing written request, was not entitled to jury in new trial (Code Civ. Proc. $\S$ 1312).

Where, in first trial of proceeding to admit will to probate, jury trial was had on one of asserted grounds of contest, contestant was not entitled to trial by jury in new trial, where he failed to file request in writing for jury trial in accordance with requirements of Code Civ. Proc. $\S$ 1312, since order granting motion for new trial set matter at large as fully as though no previous trial had been held.

4. Wills $\S$ 360—Alleged error in refusing jury trial in will contest held not reviewable, where no exception was taken (Code Civ. Proc. $\S$ 646).

Contestant's contention that trial court erred in refusing jury trial in contested will case held not subject to review on appeal, where no exception was taken or noted by contestant to ruling, and order of trial court in accordance with requirements of Code Civ. Proc. $\S$ 646, order complained of was not being within list of orders mentioned in section 647, to which no express exception is required to be taken.

5. Wills $\S$ 360—Prejudice of trial court held not reviewable, where motion for new trial on that ground was not supported by affidavits (Code Civ. Proc. $\S$ 658).

Appellant in contested will case could not have alleged prejudice on part of trial court reviewed on appeal, where his motion for new trial on that ground was not supported by affidavits, as required by Code Civ. Proc. $\S$ 658, relating to application for new trial on ground of irregularity in proceedings of court.

6. Wills $\S$ 337—New trial for newly discovered evidence in will contest held properly refused, where evidence was merely cumulative.

New trial, in contested will case, on ground of newly discovered evidence, held properly refused, where affidavits disclosed that evidence proffered was merely cumulative, and of same character as other evidence already produced at trial.

7. Wills $\S$ 337—New trial in will contest held properly refused, where there was no showing that newly discovered evidence could not have been produced at trial.

New trial on ground of newly discovered evidence in will contest held properly refused, where there was no showing, or attempted showing, that with reasonable diligence evidence could not have been produced on trial of cause.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Application by Berrilla Ward for the probate of the will of Grace Magerl, deceased. From a judgment admitting the will to probate, Herman L. Martin, contestant, appeals. Affirmed.

Martin E. Gelbel, of Los Angeles, for appellant.

Frank L. Muhleman and Hewitt & Crump, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment of the superior court of Los Angeles county admitting to probate the will of Grace Magerl, deceased, after a trial before the court, sitting without a jury, of a contest of said will by the appellant herein, who was a son of the decedent. The record upon this appeal is a very voluminous one, but the essential facts required for a determination of the appeal may be briefly stated as follows: The last will and testament of the decedent was executed by her on August 24, 1921, in Salt Lake City, of which city she was then a resident. By the terms of her will she devised and bequeathed to her son, Herman L. Martin, the appellant herein, a dwelling house in Salt Lake City, and a one-half interest in certain personal property. To her husband; Joseph E. Magerl, she bequeathed all of her real estate situate in San Diego, Cal. All of the rest and residue of her estate she bequeathed to her sister, Berrilla

Ward, and the husband of the latter, E. E. Ward, equally, share and share alike. She appointed Berrilla Ward executrix of her will and estate. Mrs. Magerl shortly thereafter left Salt Lake City for California, where she resided up to the time of her death, which occurred on April 21, 1924. On May 20, 1924, Berrilla Ward offered the will for probate, whereupon Herman L. Martin, the decedent's son by a former marriage, filed his contest and opposition to the probate of said will, wherein and also in his amended opposition thereto later filed he set forth two grounds of contest, namely, undue influence alleged to have been exercised upon his mother by Berrilla Ward and others, and unsoundness of mind. A trial was had upon such contest before the court sitting with a jury, at the conclusion of which a motion for an instructed verdict was granted by the judge as to the ground of undue influence, but was denied as to the ground of unsoundness of mind. The matter being then submitted to the jury upon the latter ground, it rendered its verdict in favor of the contestant upon the issue of the unsoundness of mind and in favor of the proponent upon the issue as to undue influence. The proponent moved for a new trial, which motion was granted by the court, whereupon the contestant sought and obtained leave to file a second amended ground of contest and opposition to the probate of the will, in which was included a new ground, namely, that the will was procured through the fraud of Berrilla Ward, her sister, Lydia Ward, and one S. P. Armstrong, the Salt Lake City attorney who drew the will. The proponent, Berrilla Ward, answered, denying all the allegations of the second amended contest, and the cause, being at issue, was transferred to another department of said superior court for trial. Thereupon counsel for the contestant served and filed a notice of motion to set the cause for trial, and in accordance therewith, after several transfers to different departments of said court, the cause came on for trial before the department thereof presided over by Hon. Charles S. Burnell on June 16, 1925. When the case was called for trial on that day, the proponent objected to a jury trial, and demanded a trial by the court upon the ground and for the reason that no written demand for a jury trial had been made by the contestant as provided by section 1312 of the Code of Civil Procedure. The trial court thereupon made an order sustaining said objection and excusing the jury, and thereupon proceeded to a trial of the cause without a jury, and, after a prolonged trial, made its findings of fact and conclusions of law adverse to the contestant upon all grounds of contest, and thereupon denied the contest and admitted the will to probate. A judgment to that effect was rendered and entered on August 1, 1925. The contestant in due course made a motion for a new trial upon all the statutory grounds, which motion

having been heard and denied, the contestant prosecutes this appeal.

[1-4] While the record on appeal is voluminous, embracing six bulky volumes of type-written transcript, the appellant makes no contention that the evidence adduced at the second trial was insufficient to justify the decision of the trial court. According to both the opening and closing briefs of his counsel, the only purpose for which such evidence is adverted to and extensively set forth in the appendix is in order to illustrate to this court the merits of his contention that he should have been accorded a trial of his contest before a jury. The question, however, as to whether the trial court was in error in making its order refusing the contestant a jury trial must be determined by the state of the record touching that particular phase of the case rather than by the nature and extent of the evidence presented upon the hearing before the court after the making and entry of its order refusing to submit the contest to a jury. This cause being one triable in probate, wherein the contestant was not entitled as of right to a trial by jury, he could only procure that right by a compliance with the terms of the statute regulating hearings upon the contest of wills. Section 1312 of the Code of Civil Procedure provides the statutory method for the presentation and trial of will contests, and, after providing for the filing and service by the contestant of written grounds of opposition to the probate of a will and for the answer or answers thereto, proceeds to provide that "any issues of fact thus raised, * * * must, on request of either party in writing (filed at least ten days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined." The record shows that upon the first trial of the contest no written demand for a jury trial was filed by the contestant, but that the cause nevertheless proceeded to a hearing before a jury upon one of the asserted grounds of contest; that the jury decided in favor of the contestant thereon; and that thereafter the trial court granted the proponent's motion for a new trial. The order granting said motion set the matter at large as fully as though no previous trial had been held. The contestant thereupon presented his second amended grounds of opposition to the probate of the will, wherein he included a new and further ground of contest. This action on his part further set the matter at large, since as to such new and added ground of contest no trial had theretofore been had. It was therefore incumbent upon the contestant, if he desired a trial by jury upon the issues tendered by his second amended grounds of contest, to have filed his request in writing for such jury trial in accordance with the requirements of section 1312 of the Code of Civil Procedure. The only document which he in fact filed relating to the second

trial was his notice of motion to set the same for trial, which under no reasonable interpretation of its terms could be held to amount to a request for a trial by jury. There is no merit in the appellant's contention that, because of the fact that the first trial of his original grounds of contest had been had before a jury, he was therefore entitled to have his second trial, upon issues involving new and other grounds of contest, had before a jury, in the absence of a request in writing therefor made and filed in conformity with the section of the Code above referred to. The trial court was not, therefore, in error in making its order sustaining the proponent's objection to the second trial of the contest before a jury, and in thereupon proceeding to hear and determine the issues joined upon said contest without a jury. But, even if the trial court had been in error in its ruling and order in that regard, the point would not be available to the contestant upon this appeal for another and sufficient reason as disclosed by the record. No exception was taken or noted by the contestant to the ruling and order of the trial court in that regard, in accordance with the requirements of section 646 of the Code of Civil Procedure. That section reads as follows:

"Exception Defined. When taken. * * * An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in section six hundred and forty-seven."

Section 647 of the Code of Civil Procedure contains a recital of the orders and proceedings of the trial court, to which no express exception is required to be taken, for the reason that, as provided in the last-named section, the matters enumerated therein "are deemed to have been excepted to." The order of the trial court complained of herein is not, however, within the list of those orders and proceedings of a trial court which are thus deemed to have been excepted to, and, this being so, it was essential to the contestant's right to have said ruling and order reviewed upon the motion for new trial or upon appeal that the same should have been expressly excepted to at the time such order was made, in conformity with section 646 of the Code of Civil Procedure above quoted. The following cases fully sustain this view: *Hendy Machine Works v. Pacific C. C. Co.*, 99 Cal. 421, 423, 33 P. 1084; *Craig v. Hesperia Land & Water Co.*, 107 Cal. 675, 40 P. 1057; *Williams v. Southern Pac. R. R. Co.*, 110 Cal. 457, 462, 42 P. 974; *Lee v. Murphy*, 119 Cal. 364, 367, 51 P. 549, 955; *Story v. Nidiffer*, 146 Cal. 549, 552, 80 P. 692.

It necessarily follows that the contention of the appellant that the trial court was in error in refusing a jury trial is not subject to review upon this appeal.

The appellant makes the further contention that the trial court erred in denying his motion for a new trial upon several of the grounds enumerated in said motion. His first insistence in this regard is that he is entitled to have reviewed the action of the trial court in refusing a trial by jury as an irregularity in the proceeding of the court by which he was prevented from having a fair trial. It is clear, however, that, if our reasoning heretofore indulged in is correct, the action of the trial court in that regard was not such an irregularity as was so reviewable, and for the like reason such action upon the part of the trial court was not "an error of law occurring at the trial and excepted to by the party making the application." This disposes of those two grounds of the contestant's said motion.

[5] The contestant makes the further contention that under the specifications of "irregularity in the proceedings of the court" he is entitled to have reviewed the alleged misconduct of the judge of the court evinced during the trial and indicating that he was prejudiced against the contestant, and that the findings of the court were so influenced by such prejudice that the contestant's substantial rights were materially affected thereby. The difficulty with the appellant's asserted right to have such alleged prejudice on the part of the trial court reviewed upon this appeal consists in the fact that his motion for a new trial upon that ground was not supported by any affidavits, such as are required by section 658 of the Code of Civil Procedure. Said section provides that, when the application for a new trial is made upon the ground of irregularity in the proceedings of the court, it must be made upon affidavits. The appellant presented no affidavits upon that subject upon his motion for a new trial, but relied wholly upon excerpts from the record of the trial to sustain his argument that the trial court was prejudiced against his cause. It is clear that the appellant's said ground of motion for a new trial was not sufficiently supported, and that his motion upon that ground was properly denied.

[6, 7] The contestant makes the further and final contention that the trial court was in error in denying his motion for a new trial made upon the ground of newly discovered evidence and supported by certain affidavits presented by him upon said motion. An examination of the affidavits discloses, however, that the evidence thus proffered was merely cumulative and of the same character as other evidence already produced by the contestant upon the trial. The record further discloses that there was no showing, or attempted showing on the part of the contestant that he could not with reasonable diligence have discovered and produced such evidence upon the trial of the cause. This latter showing is essential to the claim of the rights of the contestant to have such alleged newly dis-

covered evidence considered by the trial court upon motion for new trial. 20 Cal. Jur. pp. 84 et seq., and cases cited. It follows that the trial court was not in error in denying the contestant's motion for a new trial.

The foregoing being the only points made by the contestant upon this appeal, the judgment and order are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

201 Cal. 204

PRODUCERS' HOLDING CO. et al. v. HILL
et al. (L. A. 8552.)

Supreme Court of California. May 9, 1927.

As Modified June 2, 1927.

1. Mortgages ⇨338—Contractor should not be enjoined from selling security because work not completed, where both parties offer to do equity.

Grading contractor should not be enjoined permanently, and without alternative, from selling security under trust deed given for his release of lien, on ground that work was not completed, where both he and the other contracting party offer to do equity and he alleges his failure to complete the work was due to default in providing retaining wall.

2. Contracts ⇨294—Substantial performance entitles contractor to compensation.

Performance need not, in all cases, be literal and exact to entitle grading contractor to compensation; substantial performance being all that is required.

3. Damages ⇨121—Grading contractor not completing work held entitled to contract price, less cost of completion and amount paid.

Grading contractor, who had not removed all earth required to be removed under contract, held entitled to difference between contract price and amount required to complete the work plus part payment received.

4. Appeal and error ⇨173(9)—Grading contractor could not, on appeal, rely on estoppel not specially pleaded.

Where defense of estoppel was not pleaded in action to enjoin grading contractor from selling security because of incomplete performance, the defense could not be availed of on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Suit by the Producers' Holding Company and another against James A. Hill and others. From a decree for plaintiffs, perpetually enjoining the sale of certain real property, defendants appeal. Reversed and remanded, with directions.

Geo. F. McCulloch and E. T. Lucey, both of Los Angeles, for appellants.

W. I. Gilbert and M. M. Gordon, both of Los Angeles, for respondents.

WASTE, C. J. The defendants appeal from a decree of perpetual injunction, granted on final hearing in the court below to the plaintiffs, enjoining the defendants from excavating certain real property in the city of Los Angeles hypothecated under a deed of trust given as security for the payment of a promissory note for the balance due for work and labor performed in excavating the lands described in the trust deed and adjoining property. The work and labor was performed by the appellant James A. Hill, pursuant to an agreement, in writing, with the respondent Catherine I. Powell, under the terms of which Hill agreed to remove 21,000 cubic yards of dirt from the property of the respondent, for the sum of \$11,500. It was provided in the agreement that the compensation for the grading should be due and payable 35 days after the completion of the work, and, if not so paid, the appellant was to receive security for the payment.

Appellant James A. Hill entered into the performance of the contract, and, having, as he contended, completed the work of excavation, made several unsuccessful attempts to collect the money claimed to be due. He finally filed a mechanic's lien against the property. While the work was in progress, the respondent Powell sold the property to the respondent Producers' Holding Company. Some time after the excavation was finished, the Producers' Holding Company leased a portion (one-third) of the premises to Arthur E. Mortimer, who desired to erect a hotel thereon. On having the title examined, Mortimer discovered that the appellant Hill held a mechanic's lien on the property. Through negotiations brought about by Mortimer, a settlement was reached by which Hill released his lien on the premises, accepted \$3,800—approximately one-third of the amount of his claim—in cash, which was advanced by Mortimer, and took a 6 months' note of the Producers' Holding Company for the balance of the payment for the work. The note, executed to Robert J. Hill for the appellant James A. Hill, was secured by a deed of trust on the remaining two-thirds of the property not leased to Mortimer. The note not being paid when due, the trustee, the respondent Title Guarantee & Trust Company, declared its intention to sell the property according to the terms of the deed of trust, and advertised it for sale. Thereupon, the Producers' Holding Company and Mrs. Powell, alleging that Hill had failed and refused to complete his contract and that the defendants were insolvent and incapable of responding in damages, instituted this action, which resulted in a decree permanently

restraining the defendants from selling or attempting to sell the property, with no alternative. After motion for new trial made and denied, the defendants appealed.

Respondents object to the consideration of the appeal on the ground that there is no record or transcript before the court. The contentions urged in support of the objection appear to be the same as those advanced on motion to dismiss the appeal, which was denied April 6, 1925, and will not be reconsidered.

[1] The appellants urge upon our consideration a number of reasons why the decree should be reversed. We deem it unnecessary to consider any but the major contention that the decree must be set aside, and a new trial ordered, because the court below failed to require the respondents to do equity. The sole contention of the respondents, in support of the action of the trial court in granting the permanent injunction, with no alternative to the appellants, is that the appellant James A. Hill guaranteed full and complete performance of the grading contract, but did not fully complete the work, and therefore cannot recover any part of the agreed consideration. The appellants, in their answer, denied that Hill made any such guarantee, and alleged that at the time of making the contract it was understood and agreed that the contractor would not be required to remove all of the earth from the lots, except and until the owner had erected a retaining wall for the purpose of preventing the "cave-down" of the bank of the adjoining property, and in that connection alleged a willingness to remove all the surplus earth from the lands in accordance with the contract whenever plaintiffs furnished the necessary and proper protection against caving of the adjoining lands. They offered substantial evidence in support of these allegations, and the respondents introduced evidence to the contrary. The trial court did not find directly on the issue thus tendered, but found, generally, that although the appellant James A. Hill, prior to the execution of the trust deed, represented to the owners of the property that the work of excavation had been finished, the work had not been completed in accordance with the terms of the contract; and there remained a large amount of work yet to be done. On this finding the trial court rested its decree perpetually enjoining the defendants from selling the property under the terms of the deed of trust.

[2] The decree must be reversed. The action is one of the equitable cognizance. In their complaint, the plaintiffs alleged they "stand ready and willing * * * to pay to the defendants such sums of money as may be found to be due under said contract, if any are unpaid." In his opening statement to the trial court, counsel for the respondents, after referring to the appellants' alleged breach of contract, declared the action to be "an equity case," and stated a willingness on the

part of the respondents "to do equity." Appellants, as before indicated, stood in the same position. The facts presented called for an adjustment of the equities between the parties. It appears from the record that the grading, if completed in accordance with the terms of the contract, would necessitate the removal of approximately 21,000 yards of material, for which the appellant James A. Hill was to receive \$11,500. Witnesses on behalf of the respondents testified that the property had not been graded as agreed upon, and that approximately 2,000 yards of material would have to be removed in order that the lot be excavated as agreed upon, and fixed the cost of removal of the remaining earth at \$1 a yard, or \$2,000 for the whole amount. Appellants, in their testimony, admitted that there remained from 400 to 700 yards of earth to be removed. Accepting the figures of the respondents as correct, it thus appears that the appellants had substantially complied with their contract. There is nothing in the agreement, nor in the findings, from which it may be argued that the contractor was to receive no part of the consideration until he had fully completed the work according to the terms of contract. The rule is well established that, in cases of this character, performance of a contract need not, in all cases, be literal and exact in order to entitle a contractor to compensation therefor; and substantial performance is all that is required. *Hill v. Clark*, 7 Cal. App. 609, 611, 95 P. 382 (a grading contract); *Harlan v. Stufflebeem*, 87 Cal. 508, 511, 25 P. 686; 6 Cal. Jur. 420.

[3] The correct rule to apply to the situation, therefore, is that the contractor may not be denied all relief, but is entitled to receive from the respondents the difference between the contract price and the amount required to complete the work plus the part payment already received. Although the court did not find on the issue raised by the answer and the conflicting testimony on the point, appellants' failure to fully complete the work of excavation does not appear to have been willful, but grew out of a belief that further excavation would result in injury to the adjoining property and the improvements thereon.

In view of the fact that there existed a controversy as to the amount of the balance due the contractor, the trial court, at the most, should have granted a temporary injunction restraining the contemplated sale under the deed of trust, which was given to secure such balance, pending a determination of the amount actually required to complete the work of excavation according to the terms of the agreement. The sale should have been enjoined only until the equities between the parties which affected the amount due under the deed of trust were settled, and provision made for their complete and satisfactory adjustment. *More v. Calkins*, 85 Cal. 177, 188, 24 P. 729; *Meetz v. Mohr*, 141 Cal. 667, 673,

75 P. 298. All the parties were in the court below seeking equity and professing a willingness to do equity. The trial court did not accord them an opportunity to do so, and its action must be reversed.

[4] The appellants alleged in their answer, and supported the allegation by evidence, that when the respondents were notified by appellant James A. Hill that the work of excavation was completed, and demand was made by him for payment for the grading, they pleaded that they did not have money with which to pay for the work, and continued to make dilatory promises from time to time until the contractor filed his claim of lien upon the property, and that neither during said period nor during the negotiations which led to the release by Hill of his lien on the property, and the giving and acceptance of the note and trust deed, did the respondents offer any objection, or claim that any work remained to be done under the terms of the contract. While no estoppel is pleaded in direct terms, the appellants contend that the respondents accepted the work as completed, and actually paid for the same with the \$3,800 in cash, advanced to their use for that purpose by Mortimer, and by giving the note and trust deed, and cannot now dispute the amount claimed to be due.

Appellants did not plead an estoppel, and that defense may not be availed of on appeal. 3 Story's Equity Jurisprudence, page 582, § 2022; Blood v. La Serena L. & W. Co., 113 Cal. 221, 229, 41 P. 1017, 45 P. 252. We are of the view that the equities of the parties to this litigation can best be adjusted by the application of the doctrine of substantial performance, under which the appellant James A. Hill may be compensated for the work actually completed by him, and the respondents will not be compelled to pay for work which was not performed.

The judgment is reversed and the cause is remanded, with directions to the court below to proceed in accordance with the views herein expressed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

201 Cal. 198

ANSTEAD v. PACIFIC GAS & ELECTRIC CO. (Sac. 3894.)★

Supreme Court of California. May 4, 1927.

Rehearing Granted and Opinion Modified
May 25, 1927.

1. New trial ⇨155—Motion for new trial is denied by operation of law, where it was not made within statutory period after notice of intention (Code Civ. Proc. § 660).

Where defendant, after adverse judgment, served and filed notice of intention to move for

new trial, but such motion was never made, it was denied by operation of law at expiration of 60-day period in which it must be heard and determined, under Code Civ. Proc. § 660.

2. Appeal and error ⇨607(1)—Appellant held not in default as to time for giving notice and request for transcript, where respondent gave no notice of termination of proceedings for new trial (Code Civ. Proc. §§ 660, 953a).

One taking appeal, under Code Civ. Proc. § 953a, was not in default as to time within which notice and request for transcript should be given, where respondent gave no notice of termination of proceedings for new trial by operation of law through expiration of period prescribed by section 660 after notice of intention to move for new trial.

3. Appeal and error ⇨607(1)—Trial court may relieve appellant from default as to time for giving notice and request for transcript (Code Civ. Proc. §§ 473, 953a).

Trial court has jurisdiction to entertain appellant's motion to be relieved from default as to time within which notice and request for transcript should be given in appeal, under Code Civ. Proc. § 953a, and to grant relief thereunder, in view of section 473.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by William Anstead, by and through R. J. Anstead, as guardian of his person and estate, against the Pacific Gas & Electric Company. Judgment for plaintiff, and defendant appealed, under Code Civ. Proc. § 953a. From an order of the superior court, relieving defendant of default arising from failure to give notice and request for transcript, plaintiff appeals. Affirmed.

T. W. H. Shanahan, of San Francisco, and Carter & Smith, of Redding, for appellant.

Thos. J. Straub, of San Francisco, and Carr & Kennedy, Chenoweth & Leininger, all of Redding, for respondent.

PER CURIAM. [1] This appeal is one taken by the plaintiff from an order of the superior court of Shasta county, made on October 30, 1925, relieving the respondent upon this appeal from its alleged default arising out of its failure to give the notice and request for a transcript upon an appeal taken by it in the same action and pursuant to the provisions of section 953a of the Code of Civil Procedure. The facts with reference to these two appeals are as follows: On April 30, 1925, the jury in the above-entitled cause returned its verdict in favor of the plaintiff and against the defendant therein for the sum of \$15,000. Judgment was entered on said verdict on May 1, 1925. On May 8, 1925, the defendant duly served and filed its notice of intention to move for a new trial. Said motion was, however, not made, and the 60-day period in which the

same must be heard and determined by the trial court pursuant to section 660 of the Code of Civil Procedure expired on June 30, 1925, and said motion was therefore upon that date denied by operation of law. On July 28, 1925, the defendant duly served and filed its notice of appeal from the judgment and upon the same date gave and filed its notice and request to the clerk to prepare a transcript pursuant to the provisions of section 953a of the Code of Civil Procedure. On August 19, 1925, owing to the fact that the plaintiff and respondent upon said first appeal was threatening or preparing to move to dismiss the same upon the ground that the said notice and request to the clerk to prepare the transcript therein had been served and filed too late, the defendant gave notice of an application to be relieved from whatever default there might be in the service and filing of said notice and request, and on October 13, 1925, made its motion for such relief before the trial court. In the meantime, and on October 3, 1925, the plaintiff and respondent upon that appeal had served and filed in the Supreme Court his notice of motion to dismiss such appeal upon the ground above stated. On October 30, 1925, the trial court made and entered its order relieving the defendant and appellant on said first appeal from "any default arising out of the failure of defendant to file its notice and request for transcript" in time, and thereupon the transcript, having in the meantime been completed and presented, was settled by the trial court after notice to counsel for both parties and without further objection or exception on the part of counsel for the respondent on that appeal. From the order of the trial court granting such relief this appeal has been taken, and has been submitted for decision upon the briefs on file.

[2, 3] There is no merit in this appeal for two sufficient reasons: (1) That under the provisions of section 953a of the Code of Civil Procedure, when a proceeding upon motion for a new trial is pending, the time of the appellant to give and file his notice and request for a transcript does not expire until "ten days after notice of decision denying said motion or of other termination thereof." In the case of *Brown v. Superior Court*, 175 Cal. 141, 165 P. 429, this court held that in the absence of a showing of actual notice of the determination of a motion for a new trial the time within which an appellant might give the notice and request for a transcript did not begin to run until the service upon said appellant of a written notice of the termination of the motion for a new trial. In *Stoner v. Security Trust Co.*, 47 Cal. App. 216, 221, 190 P. 500, it was held that the time for giving such notice and request did not begin to run until a notice

had been given of the termination of the proceedings for a new trial. The case of *Bernschein v. Whitaker*, 175 Cal. 130, 165 P. 523, in so far as it is in conflict with the foregoing views, is overruled. No such notice having been given by the respondent upon said former appeal, the appellant therein was not in default as to its time within which the notice and request for a transcript should have been given. (2) Said appellant, however, apparently out of an abundance of caution, made timely application to the trial court to be relieved from whatever default might have arisen in that regard, basing its application upon the provisions of section 473 of the Code of Civil Procedure. Upon the hearing of said motion the trial court, upon what appears to be a sufficient showing, granted such relief, and thereupon, and without further objection or exception on the part of the respondent upon said former appeal, approved and settled the transcript on appeal therein. That the court had jurisdiction to entertain such motion and grant such relief has recently been decided by this court in the case of *Stenzel v. Kronick* (Cal. Sup.) 255 P. 199, and said decision is determinative of the question presented upon this appeal.

It follows that this appeal is without merit, and the order therein appealed from is affirmed.

201 Cal. 210

**DIFANI v. RIVERSIDE COUNTY OIL CO.
et al. (L. A. 8688.)**

Supreme Court of California. May 10, 1927.

1. Motions ⇨21—"Order to show cause" is notice of motion and citation to show why motion should not be granted.

"Order to show cause" is notice of motion and citation to the party to appear at a stated time and show cause why a motion should not be granted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Order to Show Cause.]

2. Motions ⇨11—Stranger may not make motion in action.

One who is not a party to a proceeding may not make a motion therein.

3. Corporations ⇨509(4)—Judgment ⇨148—Creditor of corporation which permits default judgment against it cannot move to vacate judgment and attachment against it.

Where a corporation permits judgment against it by default, a creditor cannot inject itself into the action to move to set aside the judgment and an attachment against the corporation.

4. Judgment ⇨452—Strangers necessarily affected by fraudulent judgment may attack it in appropriate proceedings.

Persons who are necessarily affected by entry of fraudulent judgment may, even though

strangers to the record, attack the judgment in an appropriate proceeding instituted for that purpose.

5. Corporations ⇨370(1)—Corporation acting in good faith represents and binds stockholders within corporate powers.

Corporation represents and binds its stockholders in all matters within its corporate powers when acting in good faith and without fraud on their rights.

6. Corporations ⇨202—Stockholders cannot interfere with corporation's litigation over corporate rights, unless directors fraudulently refuse to assert them.

Stockholders cannot interfere with right of corporation to sue and be sued concerning corporate rights and liabilities, except when directors or trustees refuse to act or are guilty of fraud in the maintenance or defense of the action.

7. Corporations ⇨206(2)—Stockholder cannot have redress for injury to corporation before exhausting means to induce directors to act.

Stockholder cannot have redress for wrong or injury to the corporation until he has exhausted all available means to obtain redress from the managing body of the corporation and the corporation has failed to take necessary steps in the premises.

8. Corporations ⇨206(1)—Where corporation refuses to defend suit against it, stockholder may on proper showing do so on its behalf.

Where a corporation defendant refuses to institute or press in good faith a defense to a suit against it, a stockholder may upon proper application and showing be allowed to become a party and defend on the corporation's behalf.

9. Corporations ⇨202—Stockholder seeking on corporation's behalf to vacate default judgment must show directors fraudulently permitted judgment.

Where stockholder seeks on the corporation's behalf to vacate a default judgment and an attachment against it in the action in which rendered and issued, he must show that the directors or trustees fraudulently permitted recovery of the judgment.

10. Corporations ⇨206(1)—Charge against president for fraud but not refusal of directors to act is insufficient to permit stockholder to move to vacate default judgment against corporation.

Mere charge of president's fraud in permitting default judgment against corporation in a suit by the assignee of the president's personal claim, without charging fraudulent refusal of the board of directors to act or the futility of requesting them to do so, is insufficient to permit stockholder to move to vacate the judgment.

11. Corporations ⇨202—Stockholder moving to vacate default judgment on corporation's behalf has no greater rights than corporation (Code Civ. Proc. § 473, and § 585, subd. 1).

Stockholder properly appearing in the corporation's behalf in a suit against it by reason of the failure of the corporation to act has no

other or greater rights than the corporation to vacate default judgment, entered by clerk under Code Civ. Proc. § 585, subd. 1, and attachment theretofore rendered and issued against the corporation, but is limited to the remedies available to it under section 473.

12. Appeal and error ⇨854(2)—Trial court's justification of order on grounds other than those found adequate by Supreme Court is immaterial.

It is immaterial that the trial court, on striking from the files a former order entered upon application of a stranger, vacating a default judgment, attempted to justify its action on grounds other than those which on appeal the Supreme Court finds adequate.

In Bank.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by Leonard J. Difani against the Riverside County Oil Company, in which plaintiff obtained judgment by default. The Twin Cities Gas Company, creditor, and Carrie Cahill, a stockholder, filed affidavits and procured an order directing the plaintiff and C. A. Sweeters, sheriff of Riverside county, to show cause why the judgment and attachment issued and levied thereon should not be vacated, and proceedings to enforce the judgment and attachment were enjoined. Upon motion the order to show cause was stricken from the files and the injunction dissolved. From the order striking the order to show cause, the complaining creditor and stockholder appeal. Affirmed.

Thomas C. Whitlock, of Banning, for appellants Twin Cities Gas Co. and Carrie Cahill.

O. K. Morton, Dist. Atty., Albert H. Ford, Deputy Dist. Atty., both of Riverside, for Sweeters.

Loyal C. Kelley, of Riverside, for respondent.

PER CURIAM. This is an appeal from an order, as amended, striking from the files of the superior court of the county of Riverside an order to show cause theretofore issued in the above entitled action.

The action was instituted by the plaintiff, as assignee of the president of the defendant oil company, to recover on a claim against said company for salary and commission alleged to be due and owing to the plaintiff's assignor. Service was had upon the defendant company by leaving a copy of the complaint and summons with its vice president. An attachment, duly and regularly issued out of the lower court upon the institution of the action, was on February 6, 1925, levied upon some 1320 feet of well casing in the possession of the defendant company. Upon the expiration of the statutory period and pursuant to the authority conferred by sub-

division 1 of section 585 of the Code of Civil Procedure, the clerk, on March 2, 1925, entered a default judgment against the defendant company in the sum of \$6,884.05, the amount prayed for in the complaint, with interest, together with plaintiff's costs of suit. Thereafter and upon the filing therein of affidavits on behalf of the Twin Cities Gas Company, a creditor, and Carrie Cahill, a stockholder of the defendant corporation, an order was made by the trial court directing the plaintiff and the respondent sheriff to show cause before it on March 7, 1925, why the judgment entered and attachment issued and levied should not be vacated, set aside, and canceled. Further proceedings to enforce said judgment and attachment were enjoined pending determination of the motion to vacate. The affidavits upon which said order to show cause was issued charged, among other things, that the action was "baseless and fraudulent" and one intended "to cheat, defraud, and deprive the stockholders of the defendant company and the creditors thereof of the only valuable asset of the defendant company and their rights thereto." Upon motion the order to show cause was thereafter stricken from the files of the court below on the ground that "no person but a stranger is before the court, * * * and this proceeding is a collateral attack upon the judgment." The temporary injunction theretofore granted was, at the same time, dissolved. It is from this order striking the order to show cause from the files that the complaining creditor and stockholder have prosecuted this appeal.

The appeal was placed upon a special calendar of this court upon an order to the respondents to show cause why said order should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of the cause upon said calendar, and the entry of the order to show cause herein, it appeared that the appellants' brief had been filed herein, but that no brief had been filed on behalf of the respondents although the time for the filing of such brief under the rules of this court had long since expired.

[1, 2] We are of the opinion, for the reasons hereinafter mentioned, that the order to the respondents to show cause in the court below why the judgment and attachment complained of should not be vacated and set aside was properly stricken from the files thereof. An order to show cause is a notice of motion and a citation to the party to appear at a stated time and place to show cause why a motion should not be granted. *McAuliffe v. Coughlin*, 105 Cal. 268, 38 P. 730. It is settled that one who is not a party to a proceeding may not make a motion therein. *Estate of Aveline*, 53 Cal. 259; *Bennett v. Wilson*, 122 Cal. 509, 514, 55 P. 390, 68 Am. St.

Rep. 61; *U. S. Bank v. Kendall* (C. C.) 179 F. 914. As stated in the opinion in the latter case:

"It is a recognized rule of legal procedure that no one not a party to the action, without any disclosed interest in the result thereof, can be permitted to thrust himself into the controversy by filing any character of pleading therein. Indeed, it would seem to confound the reason of the law, in a mere action at law, requiring pleadings to make up issues to be tried between the parties named in the action, that one not interpleaded as a party, neither for nor against whom the court could render any relief or judgment, could, *sua sponte*, come into the litigation for any purpose."

[3, 4] The appealing creditor of the defendant corporation is a stranger to the record and not a party to the action. In view of the authorities it could not therefore make any motion in the court below or come into the litigation for any purpose. It follows that said creditor could not properly inject itself into this action for the purpose of moving to set aside the judgment and attachment against the defendant corporation. The order of the court below striking from its files the order to show cause why said judgment and attachment should not be vacated did not, therefore, prejudicially injure the Twin Cities Gas Company, the appealing creditor. Nothing said herein, however, is to be considered as an expression of opinion precluding said creditor from directly attacking the asserted fraudulent judgment and attachment in an appropriate proceeding, for it has been held that persons who are necessarily affected by the entry of a fraudulent judgment may, even though strangers to the record of the action wherein the judgment was rendered, attack the same in an appropriate proceeding instituted for that purpose. *Bennett v. Wilson*, supra; 1 *Freeman on Judgments*, §§ 317-319; 1 *Black on Judgments*, §§ 291, 293, 295. As to the merits or availability of such a proceeding to the appealing creditor herein we undertake to express no opinion.

[5, 6] There remains to be considered what injury, if any, the appealing stockholder has suffered by virtue of the order of the lower court striking from its files the order to show cause why the asserted fraudulent judgment and attachment should not be vacated and set aside. A corporation represents and binds its stockholders in all matters within the limits of its corporate powers when acting in good faith and without fraud upon their rights. So long as the corporation is willing to perform its duty toward stockholders by instituting and conducting in good faith the necessary legal proceedings the stockholders have no cause for complaint; with the right of the corporation to sue and be sued concerning corporate rights or liabilities the stockholders cannot interfere.

except when the governing directors or trustees refuse to act or are guilty of fraud in the maintenance or defense of an action. *Waymire v. S. F. Ry. Co.*, 112 Cal. 646, 44 P. 1086; *Baines v. Babcock*, 95 Cal. 581, 27 P. 674, 30 P. 776, 29 Am. St. Rep. 158; *Cogswell v. Bull*, 39 Cal. 320.

[7-9] Moreover, a member or stockholder cannot have redress for any wrong or injury to the corporation until he has exhausted all the means within his reach to obtain redress from the managing body of the corporation and the corporation itself has failed, after proper application to it, to take the necessary and proper steps in the premises. *Whitehead v. Sweet*, 126 Cal. 67, 58 P. 376; *Ashton v. Dashaway Association*, 84 Cal. 61, 22 P. 660, 23 P. 1091, 7 L. R. A. 809; *James v. Steifer Min. Co.*, 35 Cal. App. 778, 171 P. 117. It is the general rule that where a corporation defendant refuses to defend an action, or, having begun a defense, it is made to appear that the corporation will not press it in good faith, a stockholder may, upon a proper application showing the facts, be allowed to become a party and defend on behalf of the corporation, but he must show that he cannot induce those in control to do that which is fair and right. *Favorite v. Superior Court*, 181 Cal. 261, 184 P. 15, 8 A. L. R. 290; *Waymire v. S. F. Ry. Co.*, supra.

[10] In the instant case the appealing stockholder made no charge in her affidavit filed in the court below, and no showing has been attempted on this appeal, that the governing board of directors or trustees of the defendant corporation had fraudulently permitted the recovery of the judgment complained of. Such a showing is, under the foregoing authorities, essential to any application by a stockholder on behalf of the corporate entity. The only charge of fraud in the procurement of the judgment herein is directed at the president of the defendant corporation, which charge would, in view of the authorities, appear to be insufficient. Nor is there any statement in the affidavits filed herein tending to show that said stockholder had, as required, made application to and demand upon the directors or trustees of the defendant corporation looking to their taking the necessary steps to have the asserted fraudulent judgment and attachment vacated and set aside. No attempt is made in the affidavits to point out the futility of such a demand.

[11] In our opinion either of the foregoing reasons would seem sufficient to warrant a holding that the appealing stockholder has not been prejudicially injured by the striking from the files of the lower court of the order to show cause. There is, however, in our opinion still another ground equally capable of sustaining the action of the court

below, for even if it be assumed that the appealing stockholder had made the necessary showing and was properly before that court, she would be clothed with no other or greater rights than those of the corporation defendant. In other words, she would merely stand in the shoes of the corporation, the latter remaining the real party in interest. *Turner v. Markham*, 155 Cal. 562, 102 P. 272; *Wills v. Porter*, 132 Cal. 516, 64 P. 896; *Wickersham v. Crittenden*, 110 Cal. 332, 42 P. 893. This being so, she could avail herself only of those remedies open to the corporate entity. *Turner v. Markham*, supra; *Wills v. Porter*, supra. The only remedies that were available herein to the defendant corporation to avoid the asserted fraudulent judgment were an appeal therefrom, a motion for new trial, and a motion to vacate and set aside said judgment under section 473 of the Code of Civil Procedure. Fraud is recognized as a ground for relief under said Code section. In *re Yoder*, 199 Cal. 699, 251 P. 205. An inspection of the record in the instant case fails to disclose that the appealing stockholder seasonably pursued, on behalf of the defendant corporation, any one of the enumerated remedies. We refrain from expressing any opinion, however, as to the right of said stockholder on behalf of the corporation to directly attack the judgment in an action on the equity side of the superior court in the event the directors or trustees of the corporation defendant, after demand made, refuse in bad faith to invoke the necessary proceedings.

[12] There is nothing in the authorities cited by the appellants inconsistent with the views herein expressed. Nor do we deem of importance the fact that the court below attempted to justify its order on grounds other than those considered in this opinion. *Troy v. Troy*, 72 Cal. App. 757, 238 P. 143; 2 Cal. Jur. 809.

The order appealed from is therefore affirmed.

82 Cal. App. 749

COVINGTON et al. v. GRANT. (Civ. 4274.)

District Court of Appeal, Second District, Division 2, California. May 5, 1927.

1. Trover and conversion ⚖️16—Plaintiff must have had actual possession, or right to possession, prior to conversion to recover.

In action for conversion, plaintiff must at least have had actual possession, or right to possession, prior to conversion in order to recover.

2. Bailment ⚖️16—Automobile seller retaining title under lease contract may maintain conversion action against one repairing carburetor refusing to allow seller to redeem from his lien (Civ. Code, § 2903).

Seller of automobile, retaining title under lease contract, had interest in car which gave

him right to redeem it from lien of one repairing carburetor, and therefore had right to immediate possession authorizing action for conversion on latter's refusal to accept tender and deliver property, in view of Civ. Code, § 2903.

3. Bailment $\Rightarrow$ 18(4)—One repairing automobile relinquished right to lien by surrendering possession (Civ. Code, § 3051).

One who repaired carburetor on automobile held to have relinquished all right to lien under Civ. Code, § 3051, for work done and materials furnished by reason of having surrendered possession of car.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by H. L. Covington and another, copartners doing business under the firm name and style of the Triangle Motor Company, against J. O. Grant. Judgment for defendant, and plaintiffs appeal. Reversed.

Earl D. Finch, of Redlands, for appellants.
George L. Wing and Thomas C. Whitlock, both of Banning, for respondent.

CRAIG, J. This is an appeal upon the judgment roll, the sole ground being that the judgment is not supported by the findings. The action is for conversion.

It appears that the plaintiffs sold an automobile to one C. L. Jones on a "lease contract," by the terms of which title was retained in the vendor. The court found that on the 23d day of July, 1922, Jones, while in legal possession of the car, brought it into the garage of the defendant, who, at Jones' request, performed services and supplied materials in repairing the carburetor of the fair and reasonable value of \$16.65; that thereafter the defendant Grant parted with possession of the car; that later, and on September 14, 1922, Jones, while in legal possession of the automobile, brought it in to the defendant's garage, whereupon the latter furnished further services and materials in again repairing the carburetor of the fair and reasonable value of \$1.25; that on the 14th day of September, 1922, the plaintiffs duly tendered to the defendant the sum of \$1.25, the value of the services and materials furnished on the last-named date, and demanded possession of the automobile, which tender the defendant refused to accept, and retained possession of the machine; that the plaintiffs did not tender to the defendant the sum of \$16.65 for the services rendered and materials furnished on the 23d of July.

[1, 2] The respondent claims that in an action for conversion the plaintiff must at least have had actual possession, or a right of possession, prior to the conversion, in order to recover. This is the general rule. *Middleworth v. Sedgwick*, 10 Cal. 392; *National Lumber Co. v. Tejunga Valley Rock Co.*, 22 Cal. App. 726, 136 P. 508; *Carvell v. Weaver*,

54 Cal. App. 734, 202 P. 897. However, in this instance the plaintiff had an interest in the property which gave him the right to redeem from the lien of the defendant, and therefore the right to immediate possession of the car. Civ. Code, § 2903; *Loughborough v. McNevin*, 74 Cal. 250, 14 P. 369, 15 P. 773, 5 Am. St. Rep. 435.

[3] Appellants insist that the respondent relinquished all right to his lien under section 3051 of the Civil Code for work done and materials furnished on July 23d by reason of having surrendered possession of the car. This is held to be the case in *Davis v. Young* (Cal. App.) 242 P. 743, and *Goodman v. Anglo-California Trust Co.*, 62 Cal. App. 702, 217 P. 1078.

It follows that, appellants having tendered to respondent the entire amount of the only lien which the latter then had upon the car, and the respondent having refused to accept the tender or to deliver the property, he was guilty of conversion. *Bumiller v. Bumiller*, 179 Cal. 119, 175 P. 897.

The judgment is reversed.

We concur: **WORKS, P. J.**; **JOHNSON**, Justice pro tem.

FRANKLIN v. SOUTHERN PAC. CO.★
(Civ. 3106.)

District Court of Appeal, Third District, California. April 27, 1927.

Rehearing Denied May 27, 1927. Hearing Granted by Supreme Court June 23, 1927.

1. Courts $\Rightarrow$ 97(5)—Passenger's suit against railroad, for baggage lost in state, on interstate trip begun in state, presents federal question.

Suit against railroad by passenger beginning interstate trip in California, on ticket to destination, for loss of hand baggage in California, presents federal question as it involves interstate commerce.

2. Courts $\Rightarrow$ 97(5)—Federal statutes and decisions control over inconsistent state decisions, in passenger's suit against railroad involving interstate commerce.

In passenger's suit against railroad involving interstate commerce, pertinent federal statutes and decisions of federal courts determining their applicability control over inconsistent decisions of state courts.

3. Carriers $\Rightarrow$ 405(2)—Railroad's limitation of liability for loss of hand baggage through porter's negligence, declared in published tariff schedules held reasonable and prevents greater recovery (Interstate Commerce Act, § 6, as amended by Act Cong. June 29, 1906, § 2 [U. S. Comp. St. § 8569]).

Railroad's declaration of limitation to \$25 of liability for loss of interstate passenger's hand baggage through negligence of red cap porters employed by railroad to assist at trains, set forth in tariff schedules published as required

by Interstate Commerce Act, § 6, as amended by Act Cong. June 29, 1906, § 2 (U. S. Comp. St. § 8569), is reasonable, lawful, and precludes passenger from greater recovery.

4. Carriers ⇨405(4)—Passenger desiring greater protection must check baggage and stipulate value, where carrier has published notice limiting liability.

Passenger desiring greater protection against loss of baggage through carrier's negligence must check it and declare and stipulate for a higher value than he would otherwise be entitled to, where carrier has published, conformably to requirements of law and the regulations of the Interstate Commerce Commission, notice limiting its liability.

5. Carriers ⇨405(2)—Court's general finding that tariff was in legal force showed that passenger, suing for baggage lost, was given notice thereof.

Court's general finding that tariff was filed and in due and legal force in accordance with laws of the United States and regulations of the Interstate Commerce Commission would be applied concretely to the case to show that passenger, suing railroad for loss of hand baggage, was given the notice, which would be presumed from duly filed and published tariff.

6. Carriers ⇨405(4)—Carrier is liable, subject to limitations, for negligence of its red cap porters handling baggage, though service is without extra charge.

Carrier is liable for passengers' loss through negligence of its red cap porters in handling baggage in course of employment, subject to existing limitations on the amount of liability, notwithstanding the porters' services are furnished without extra charge.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Nelita Franklin against the Southern Pacific Company to recover the value of personal property lost in transit. Judgment for plaintiff, and defendant appeals. Reversed.

Levinsky & Jones, of Stockton, for appellant.

Nutter, Hancock & Rutherford, of Stockton, for respondent.

HART, J. The plaintiff brought this action to recover the sum of \$800, alleged to be the value of certain personal property, which, it is further alleged, was carelessly and negligently lost by an employee or agent of the defendant while, as such, he was acting within the scope of his duties. The case was tried by the court without the aid of a jury, and judgment passed for the plaintiff for the sum demanded by the complaint. This appeal is from the judgment on the judgment roll alone.

The findings present the facts as they are stated pro and con in the pleadings, and, consequently, present the issues tendered and tried in the court below. It will therefore be sufficient to tell herein the story of the contro-

versy in the language of the findings, as follows:

"That at all times mentioned in the complaint defendant's system of trains extended from the town of Lodi, Cal., to the city of San Francisco, and from thence southward. That at the time hereinafter referred to the defendant was furnishing to all its passengers at the city and county of San Francisco the services of certain red cap porters who were in the employ of defendant, and whose duty as such employees was to take the hand baggage of passengers of defendant into the cars of defendant, in aid of such passengers who were embarking on the trains of defendant at said city and county of San Francisco. That this service was at said time and place rendered only to passengers of defendant and without extra charge to such passengers in addition to the purchase price of their tickets.

"That on January 26, 1925, plaintiff was the holder and had regularly purchased from defendant a ticket entitling plaintiff to transportation from the city of Lodi, Cal., to the city of Fairhope, Ala., over the lines of defendant extending from Lodi to San Francisco and from San Francisco southward and entitling plaintiff to carry certain hand baggage, more specifically hereinafter mentioned. That the train system of defendant made it necessary for plaintiff to change cars at San Francisco on the course of her said journey, and that on the 26th day of January, 1925, and in pursuance of said ticket owned by plaintiff, plaintiff rode on the trains of defendant as a passenger of defendant from the city of Lodi to San Francisco and carried with her certain hand baggage, consisting of a suitcase and a small hand bag with a contents of property belonging to plaintiff of the kind, quantity, and value proper for her personal use and convenience, according to the habits and wants of the particular class to which she at said time belonged, with reference to the important necessities and ultimate purposes of said journey.

"That when plaintiff was about to embark in the train of defendant in the city and county of San Francisco in the course of her said journey toward Alabama, one of said red cap porters of defendant, acting in the course of his duty as aforesaid, took from plaintiff the said suitcase and said hand bag with their contents, to return the same to plaintiff on said train after plaintiff had embarked therein as such passenger. That while said employee of defendant had said suitcase and said hand bag in his custody, he so negligently and carelessly kept, cared for, and carried said property of plaintiff that the same was lost, and neither the defendant nor any employee of defendant nor any one at all have ever returned said property to plaintiff, either on the train of defendant after plaintiff had entered same or at any other time or place, and plaintiff has never recovered possession of said property or any part thereof.

"That at the time of said loss said suitcase and hand bag with their contents were of the reasonable value of \$800. That defendant has paid plaintiff no part of said \$800.

"That on the 26th day of January 1925, there was on file, and had been on file ever since the first day of September, 1922, with the Interstate

Commerce Commission of the United States, and the Railroad Commission of the state of California, that certain tariff known and described as Western Baggage Tariff No. 7, I. C. C. No. 12, which said tariff was filed, issued, and became effective, and was in due and legal force and effect ever since said 1st day of September, 1922, in accordance with the laws of the United States, and with the rules and regulations of the Interstate Commerce Commission of the United States, in such case made and provided.

"That said tariff, among other things, therein provided in rule 10 thereof the following provision and limitation: 'Rule 10. Where red cap porter service is provided, hand baggage will be handled without charge by red cap porters to and from trains of Southern Pacific Company. Liability upon hand baggage handled by red cap porters will be limited to \$25.'"

[1, 2] The problem submitted here for solution presents a federal question, inasmuch as it involves interstate commerce and the law and the rules governing interstate common carriers of passengers and freight. In such cases, the federal statutes having pertinency to the question and the decisions of the federal courts determining the applicability or nonapplicability of such statutes to the question in hand obviously carry controlling force over any decisions of the state courts upon the same subject, should there be found inconsistent conclusions between the courts of the two jurisdictions. The rule in this respect is stated as follows in 15 C. J. 930:

"Where a question is federal in its nature, the decisions of the Supreme Court of the United States are absolutely binding upon the state courts and must be followed, regardless of the views of the latter courts, and even though such decisions are inconsistent with prior decisions of the state courts."

See, also, *Boston & Maine Railroad Co. v. Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593.

[3] The question presented by this appeal is whether or not a common carrier in interstate commerce is liable for the full actual value of hand baggage belonging to an interstate passenger riding on its trains, where such baggage, having been handled for the convenience of the passengers by a red cap porter of the carrier, has been lost through the carelessness or negligence of such porter, notwithstanding that the tariff provision or the valuation limitation as to the loss of such baggage which was in legal force and effect at the time of such loss, "limited the liability in case of such loss to the sum of \$25," in which sum, it may here be added, the defendant admitted in its answer its liability to plaintiff for the loss which she alleged that she sustained. The defendant contends, as its answer asserts in the language of a pleading, that the limitation of its liability, as published in its schedule of rates of freight and fares filed with the Interstate Commerce Commission, for the loss of her hand baggage while riding on defendant's train as an inter-

state passenger through the fault or negligence of one of the carrier's so-called red cap porters, then acting within the scope of his duties as such porter, is and was, at the time of the loss complained of here, of legal and binding force, and that the plaintiff therefore is entitled to recover for her loss no greater sum than \$25.

On the other hand, it is plaintiff's position (and such is obviously the theory of the decision below) that the rule or regulation contained in the defendant's filed schedule of rates, limiting the latter's liability for the negligent loss of baggage by red cap porters while handling the same in the discharge of their duties, involves an attempt on the part of the defendant to limit its common-law liability for the loss by its negligence of property or baggage of a shipper or passenger in interstate commerce, and that said rule or regulation is void as being in contravention of public policy; that a common carrier of freight or passengers cannot legally limit its common-law liability for full loss so sustained, save and except in those instances in which the shipper or passenger has been given by the carrier the benefit of the lower as between two alternative rates, in which case the law, invoking the doctrine of estoppel, will not permit the shipper or passenger to claim or assert and obtain a higher valuation, though representing the real value of the lost property, than that agreed upon in consideration for the reduced rate; that in this case the plaintiff was not given the benefit of a lower rate of transportation than the uniform rate or the rate common to the entire traveling public, and which prevails in all cases where there is no special agreement or consideration for a rate lower than such rate.

Section 7890 of the Interstate Commerce Act (Barnes' Federal Code, section 6), known as the "Hepburn Act," as amended by what is called and known as the "Carmack Amendment to the Hepburn Act" (U. S. Cumulative Supplement, 1919-1924, Barnes' Federal Code, pp. 777, 778 [U. S. Comp. St. § 8569]), provides:

"Every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force and shall also state separately all terminal charges, storage charges,

icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act."

The plaintiff cites the following federal cases as illustrative of the principle or rule, which, she contends, must control in the determination of this appeal favorably to the judgment appealed from: *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717; *Boston & Maine Railroad Co. v. Piper*, 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469; *Union Pac. R. Co. v. Burke*, 255 U. S. 317, 411 S. Ct. 283, 65 L. Ed. 656.

In the case first named (*Hart v. Pennsylvania Railroad*) the court states the general rule regarding stipulations in agreements between shippers and carriers for the carriage of freight, limiting the liability of the latter for the loss of such freight to an agreed valuation thereof as follows:

"It is the law of this court, that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants."

The agreement between the shipper and the railroad in the *Hart Case* was for the shipment of horses and other property, and contained a stipulation specifically fixing a valuation on each horse at a sum far below that which the owner claimed the property was really worth upon the consideration that he (the owner) should receive the benefit of the lower of two rates of such shipments specified in the schedule of freight rates filed with the Interstate Commerce Commission. The court held that the agreement was perfectly valid, or not, as was the claim of the plaintiff, in contravention of the common-law rule governing the liability of common carriers for loss of goods or commodities or other property while in transit and resulting from the negligence of such carriers or that of their agents or servants.

The other cases cited by respondent, and above named, expound and apply the same rule, the agreements, however, being held void, inasmuch as the conditions upon which the limitation of liability may be sustained did not exist therein. In other words, the agreements in those cases provided for rates less

than the regular rates specified in the company's published or filed schedule of rates, in which there was no choice of rates scheduled and legally available to the shipper. The court held that the agreements were void because they involved an illegal attempt of the carrier to limit its common-law liability for the loss of the shipper's goods while in its possession, under its contract as a common carrier, by reason of its negligence. In the *Burke Case* the court stated the rule as follows:

"A carrier may not, by a valuation agreement with a shipper, limit its liability in case of the loss by negligence of an interstate shipment to less than the real value thereof, unless the shipper is given a choice of rates, based on valuation."

The decision in the *Piper Case*, and also that in the case of *Texas & Pac. Ry. Co. v. Mugg & Dryden*, 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011, are grounded upon the same considerations as those controlling the conclusion arrived at in the other cases above named.

Thus briefly have we examined the cases relied upon by the plaintiff herein to exhibit the general principles underlying or animating the federal law regarding the respective and reciprocal duties and obligations of common carriers and shippers in interstate commerce. It is obvious, however, that the circumstances characterizing the transactions in those cases are entirely different from those of the instant case. An essentially different rule of decision in the matter of agreements for the shipment of freight and that of the transportation of the baggage of a passenger by common carriers prevails, the distinction arising from the fact that, while in bills of lading or other agreements for the shipment of freight the articles, goods, commodities, or other property to be shipped are either by bulk or specifically enumerated or described and their value stated, thus acquainting the carrier with the precise liability he is to assume in carrying them, the mere checking of the baggage of a passenger on the ticket entitling him to ride on and over the railway lines of the carrier can, generally speaking, afford the latter no information as to the character and the value of the baggage or the contents thereof. It is for this reason that common carriers in interstate traffic, to protect themselves from the enforcement of unwarrantably excessive claims of passengers for the loss of their baggage through the negligence of the carriers, insert in their schedules of rates of freight and fares as filed with the Interstate Commerce Commission a rule expressly limiting their liability for the negligent loss of baggage checked for transportation over their roads to a stated amount, unless such passengers, when checking their baggage, declare to the carriers or their agents that such baggage is of value in excess of that to which the rule men-

tioned limits their liability, thereby enabling the carrier to make such excess charges for the transportation of the baggage as will be in just correspondence with the enhanced liability. Such a regulation is held by the cases cited here by defendant as being reasonable, and, as those cases suggest, is necessary because the knowledge of the passenger checking the baggage of the character and value thereof "is peculiarly his own." *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; *Galveston, Harrisburg & San Antonio R. Co. v. Woodbury*, 254 U. S. 357, 41 S. Ct. 114, 65 L. Ed. 301. The schedules of rates filed by the defendants (railroad companies) in those cases with the Interstate Commerce Commission contained a regulation providing, among other things, that:

"Baggage liability is limited to personal baggage not to exceed \$100 in value for a passenger presenting a full ticket * * * unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of checking the baggage."

In the *Hooker* Case, it was found by the trial court that plaintiff's baggage consisted of three pieces, of the value of \$1,904.50. The charge on this valuation for transportation from Boston to Sunapee Lake (New Hampshire), according to the schedules, would have been 25 cents for each excess \$100 or fraction thereof, or \$4.75 in all. Plaintiff did not declare and stipulate at the time the baggage was checked that it exceeded \$100 in value, and did not pay any charge for valuation in excess of that amount. The plaintiff, at the time the baggage was checked, "had no notice of the regulations * * * limiting the liability of the defendant (further than such notice is to be presumed from the schedules filed and posted" as required by the Commerce Act). The defendant or its agents did not request a declaration by the plaintiff as to the value of the baggage, and made no inquiry respecting its value on receiving it from plaintiff. The court, in that case, said, among other things:

"The precise position of the defendant is that, as the limitation of liability for baggage was filed and posted as a part of its schedules for passenger tariff, the limitation thereby became and was an essential part of its rate, from which, under the Interstate Commerce Law, it could not deviate, and by which the plaintiff was bound, regardless of her knowledge of or assent to it. If the premise is sound, then the conclusion follows, for the public are held inexorably to the rate published, regardless of knowledge, assent, or even misrepresentation. *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011; *Melody v. Great Northern R. Co.*, 25 S. D. 606, 127 N. W. 543. 30 L. R. A. (N. S.) 568, Ann. Cas. 1912C, 727.

"It follows, therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate, and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at \$100, and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached."

The *Woodbury* Case is, in the facts, substantially the same as those of the *Hooker* Case. The clause in the schedule of rates and fares filed with the Interstate Commerce Commission by the railroad company (defendant in that case) limiting the liability of the latter for the negligent loss by it of the baggage of a passenger was substantially in the same language as that of the like clause in the schedule of rates and fares filed with the commission by the carrier in the *Hooker* Case. The trial court in the *Woodbury* Case held and found that the plaintiff was entitled to recover the sum of \$100 only, said amount being the sum to which the railway company had in its schedule of rates and fares limited its liability, "unless the passenger declared a higher value and paid excess charges," which the trial court found the plaintiff had not done. The Court of Civil Appeals of Texas reversed the judgment and ordered judgment to be entered for the plaintiff in the sum of \$500, the sum she sued for. The Supreme Court of the United States reversed the judgment of the Civil Court of Appeals of the state, holding, as was held in the *Hooker* Case, that, since plaintiff, when checking her baggage, did not declare to the carrier that it was of value in excess of \$100 and pay the excess charges for such higher value, she was bound by the limited liability for the loss of the baggage as set forth in the latter's duly filed and published schedules of rates and fares. But it is manifest that even the *Hooker* and *Woodbury* Cases are not strictly applicable to the present case. The case at bar, unlike the cases just named, is not one in which the plaintiff's baggage was checked. Indeed, the situation presented here is more favorable to the defendant's defense in this case than would be that presented in the *Hooker* and *Woodbury* Cases, since it may well be assumed to be generally, if, indeed, not uniformly, the fact that the carrier or its agents have no information of the carrying of unchecked baggage by and in the personal possession of the passenger himself while on his journey. The carrier can have no knowledge

of or concern with baggage thus carried, unless it be true that the doctrine of the Hooker and Woodbury Cases, supra, apply to a case where baggage is carried in person by the passenger himself. And applying the principles announced in those cases to this case, the plaintiff cannot recover beyond the amount limited by the defendant for the loss of baggage by its negligence. But the company could not and would not reasonably be expected or compelled to make an agreement to stand good for any value of baggage thus carried at which the passenger might appraise it, for the obvious reason that in such case it would not have that greater security in protecting itself against the loss thereof, which is necessarily incident to its own possession of the baggage until the destination of the passenger and the baggage is reached, and which it has the right to claim and have.

Where a transportation company has employed porters at its stations to assist passengers taking its trains, or who are required by their itinerary to transfer from one train to another, in carrying or removing their baggage, carried in hand by such passengers, to the car or from one train to another, it becomes responsible for the acts of such porters while thus they are pursuing their duties, and to provide for such a situation so that it may properly protect its own interests or fortify itself against the enforcement against it of unwarrantably extravagant appraisements by passengers of the value of baggage so carried, in case of its loss by the negligence of a red cap porter, the carrier could hardly do more than to insert a rule or regulation in its schedule of rates of freight and fares filed by it with the Interstate Commerce Commission limiting its liability for unchecked baggage or baggage carried and kept by the passenger in his own manual possession, while traveling, to an amount based upon the probable average or usual value of baggage which experience shows is commonly carried.

[4] Such a rule conforms to the requirements in that regard of the Interstate Commerce Law and the regulations and orders of the Interstate Commerce Commission, and involves a reasonable regulation, and published and posted as the Commerce Act provides, stands as a notice to the public that, if persons traveling on the trains of the carrier would be protected against the loss of their baggage through any negligence of the carrier to the extent of the real value thereof, they must commit it to the possession of the latter by checking it and at the same time declare and stipulate for a higher value thereof than the regulation respecting the checking of baggage would entitle them legitimately to claim in the absence of such declaration and stipulation. If, on the other hand, such passengers desire to and do carry

their baggage with their persons, then, as intimated, they take their own chances and become their own insurers as to the loss of the baggage through the negligence of the carrier or that of its agents beyond the amount for which the carrier has duly scheduled and published its liability in such case. As before suggested, the character and the value of the baggage are matters which are peculiarly, and, so far as the carrier is concerned, exclusively within the knowledge of the passenger or the owner thereof. As between him and the carrier or its agents, the passenger alone knows of what the baggage consists or what it contains and of its value. This is peculiarly true as to baggage that is not checked, but is carried by hand by the passenger himself. The passenger may greatly exaggerate the value of the baggage and the carrier could not, save only in exceptional cases, if, indeed, in any, deny that it was of the value so appraised and claimed. Again, the carrier, in such case, if the owner of the baggage thus carried is not to be held bound by the rule or regulation limiting the former's liability as to such baggage in case of its loss by the negligence of the carrier or that of its agents, would be required to assume a risk for which it has not received the excess charges to which, by analogy to the rule laid down in the Hooker and Woodbury Cases, it would be entitled. The unfairness or unreasonableness of the regulation so enforced is plainly manifest. The court, however, will not lend its sanction to a construction of the rule or regulation in question that will impart to it any such effect. The just and reasonable view of the regulation is, as before suggested herein, that where a passenger, having notice of the rule which the law requires, elects to carry his baggage with him rather than to adopt the safer course by checking it, he himself assumes the risk contingent upon the loss thereof by the carrier's negligence as to any amount in excess of that for which the carrier has expressly limited its liability for such loss in its schedule of rates filed with the Interstate Commerce Commission and posted as required by the Commerce Act.

[5] The findings, while not specific upon the subject, nevertheless declare that the notice of the existence of rule 10 of the defendant's tariff schedule, filed with the Interstate Commerce Commission, was published and posted as required by the Interstate Commerce Act. Finding 5, it will be perceived, finds that:

"That certain tariff known and described as Western Baggage Tariff No. 7, I. C. C. No. 12, * * * was filed, issued, and became effective, and was in due and legal force and effect ever since said first day of September, 1922, in accordance with the laws of the United States, and with the rules and regulations of the Interstate Commerce Commission of the United States, in such case made and provided."

That finding, although in general language, is, of course, to be applied concretely—that is, as to the present case—for it is with the instant case that it is directly concerned. Thus it is shown that the plaintiff was given the notice presumed from the filed, published, and duly posted baggage tariff of the defendant, and therefore she was and is bound thereby. *Boston & M. R. Co. v. Hooker* [supra] 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, 874, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593.

[6] The point is made by the defendant that the latter could not, in any event, be held liable for the loss of the plaintiff's baggage through the negligence of one of its red cap porters for the reason, as counsel declare, the furnishing to its patrons of the services of such porters is entirely "gratuitous," and for which a passenger is not made to pay an extra charge, meaning that the company is not required to furnish such service, and that, in doing so, it does not assume nor is there imposed upon it liability for any loss of property passengers may sustain by the negligence of such porters while engaged in performing their duties as such. We have already stated that a carrier employing such porters is responsible for any loss passengers may suffer through the negligence of such porters while the latter are handling the former's baggage in the course of their employment. We think that our conclusion as to that matter is unimpeachable as a legal proposition. But we need not here give the reasons therefor, since our conclusion on the other branch of the discussion is itself decisive of this appeal.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

82 Cal. App. 624

STARTZMAN v. LOS BANOS COTTON GINS, Inc. (Civ. 3220.)

District Court of Appeal, Third District, California. April 30, 1927.

1. Appeal and error $\S$ 110, 782—Order denying motion for new trial is not appealable and appeal must be dismissed (Code Civ. Proc. $\S$ 963).

Under Code Civ. Proc. $\S$ 963, order denying motion for new trial is not appealable, and appeal from such order must be dismissed.

2. Judgment $\S$ 363—Whether motion to vacate judgment for surprise, inadvertence, or neglect shall be granted rests in discretion of trial court (Code Civ. Proc. $\S$ 473).

Whether motion to vacate judgment on ground of surprise, inadvertence, or excusable neglect shall or shall not be granted, under Code Civ. Proc. $\S$ 473, is matter which rests in sound discretion of trial court.

3. Appeal and error $\S$ 982(1)—Order granting or denying motion to vacate judgment for surprise, inadvertence, or neglect will not be disturbed on appeal, in absence of abuse of discretion (Code Civ. Proc. $\S$ 473).

Order granting or denying motion to vacate judgment on ground of surprise, inadvertence, or excusable neglect, under Code Civ. Proc. $\S$ 473, will not be disturbed on appeal, unless it appears from record that in making its order on such motion trial court has been guilty of abuse of discretion.

4. Judgment $\S$ 366—Refusing to vacate judgment for surprise, inadvertence, or excusable neglect, where attorney was unable to be present at trial, held not abuse of discretion (Code Civ. Proc. $\S$ 473).

Refusal to set aside judgment under Code Civ. Proc. $\S$ 473, on ground of surprise, inadvertence, and excusable neglect on showing made, where defendant's attorney was prevented by other cases from being present at trial, and local attorney did not receive substitution of attorneys in time to defend case, held not abuse of discretion.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by C. F. Startzman against the Los Banos Cotton Gins, Incorporated. Judgment for plaintiff, and from orders denying motion for new trial, and denying motion to vacate and set aside judgment, defendant appeals. Appeal from order denying new trial dismissed. Appeal from order denying motion to vacate judgment affirmed.

R. R. Sischo, of Merced, for appellant.

Andrew R. Schottky, of Merced, for respondent.

HART, J. Defendant appeals from an order denying it a new trial and also from an order denying its motion to set aside and vacate the judgment rendered and entered against it herein.

On the 16th day of January, 1926, the plaintiff brought this action to recover from the defendant the sum of \$625, alleged to be the balance due him from the defendant "for work, labor, and services performed and rendered for defendant by plaintiff from October 1, 1925, to January 15, 1926, * * * for which work * * * defendant agreed to pay plaintiff the sum of \$300 per month." On the 4th day of March, 1926, the defendant filed a demurrer to the complaint upon both general and special grounds, and, on March 15, 1926, the demurrer was overruled and defendant allowed ten days within which to file an answer. On the 28th day of April, 1926, Messrs. Abbott & Cannon, attorneys for the defendant, filed an answer, specifically denying the allegations of the complaint, except that it admitted that of the sum of \$1,050 which the complaint alleged was the original sum earned by plaintiff un-

der the contract of employment, during the period of time stated in the complaint, the defendant paid the plaintiff the sum of \$425. On the 10th day of May, 1926, the court set the case for trial for the 15th day of June, 1926, at 10 o'clock a. m., and on May 11, 1926, counsel for the defendant were served with a notice notifying them that the trial would be proceeded with at that time. The action was tried on said 15th day of June, the defendant not being represented by its attorneys of record, or any attorney, at the trial and, as above indicated, plaintiff was awarded judgment for the sum sued for.

Upon affidavits filed by the defendant and the "files, papers, proceedings and record in the action" and a counter affidavit filed by the plaintiff, the motion for a new trial and the motion to set aside the judgment were heard, with the result as above stated.

The affidavit of K. W. Cannon, of the law firm of Abbott & Cannon, practicing the profession of law in the city of San Francisco, after reciting in chronological order the various steps taken in the action down to the date of the trial thereof, avers as follows:

"That until Friday, the 11th day of June, 1926, affiant believed he would be able to leave his office in the city and county of San Francisco on the 14th day of June, 1926, proceed to Merced and there try said cause; that on said 10th day of June, 1926, an order to show cause, returnable Friday, June 18, 1926, in department No. 2 of the superior court of the state of California, was served on affiant in an action in which affiant was named as a party defendant; that the nature of said action was such as required the actual presence of affiant in the city and county of San Francisco during the entire week commencing June 14, 1926, and ending June 18, 1926; that affiant on Friday, June 11, 1926, advised Maurice Selig, the president of said defendant corporation, to engage other counsel to try said cause inasmuch as neither he nor Wm. M. Abbott could leave the city and county of San Francisco during said week; that said Maurice Selig, said affiant, said Los Banos Cotton Gins, Inc., and said Maurice Selig, as president of said corporation and each of them, were taken by surprise by this unexpected situation and endeavored to retain other counsel to try said cause, but the time was so short, a Saturday and Sunday intervening, that it was not until Monday, June 15, 1926, that R. Sischo, an attorney in Merced, was retained; that affiant on said 15th day of June, 1926, prepared and forwarded to said R. Sischo a written substitution of attorneys in said causes; that it was impossible for affiant to have left the city and county of San Francisco, during said week, the impossibility arising after said cause had been set for trial, and arising so shortly before said trial as to take said defendant by surprise and excuse its neglect in not appearing and defending said cause on the merits, if any neglect there was; that affiant has been advised of and knows all of the facts of said cause and verily believes that said defendant has and had a good and meritorious defense to the above-entitled cause of action on the merits."

Maurice Selig, president of defendant corporation, deposed, in his affidavit, as follows:

"That K. W. Cannon and Wm. M. Abbott at all of the times herein mentioned prior to the 11th day of June, 1926, were the attorneys for said defendant in said action; that Wm. M. Abbott is the general counsel for Market Street Railway Company, and, as such, is required to remain in the city and county of San Francisco at all times, attending to the affairs of said client; that at all of the times herein mentioned prior to the 11th day of June, 1926, said K. W. Cannon has had entire charge of the legal matters of said defendant; that on the 11th day of June, 1926, K. W. Cannon informed affiant that there was pending in the city and county of San Francisco an action in which he was named as a party defendant and that he was required to be and attend on a hearing on an order to show cause in said matter in department No. 2 of the superior court of the city and county of San Francisco at the hour of 10 o'clock a. m. of Friday the 18th day of June, 1926, and that the nature of the proceeding was such as to require his presence in the city and county of San Francisco during all of the week commencing with the 14th day of June 1926; that the action of Startzman v. Los Banos Cotton Gins, Inc., was set for trial on the 15th day of June, 1926, and the case Erreca v. Los Banos Cotton Gins, Inc., was set for trial on the 17th day of June, 1926, both causes being set for trial during the said week said attorney was so required to remain in the city and county of San Francisco; that on said affiant being so advised that said attorney would not be able to try said causes, or either of them, and being advised by said attorney to employ other counsel, affiant endeavored to obtain other counsel to try said causes and each of them, or to get continuances in said actions, but was not able to employ other counsel until the 14th day of June, 1926, when affiant succeeded in retaining R. Sischo, of Merced, to defend said causes; that on said 14th day of June, 1926, affiant caused said R. Sischo to be substituted as attorney in the above-entitled action and mailed said substitutions to said R. Sischo on said 14th day of June, 1926, but affiant is informed and believes and therefore alleges that said attorney did not receive said substitutions in time to appear on behalf of said defendant and defend said actions. Affiant deposes and says that because of said situation said corporation was deprived of an opportunity to subpoena witnesses and try the above-entitled cause on its merits; that affiant has heretofore stated all of the facts of said cause to said attorney K. W. Cannon, and was informed by said attorney and verily believes that said corporation had and has a good meritorious defense to the above-entitled action on the merits; that by and because of the situation above described said defendant and said affiant were taken by surprise, and their neglect to defend the above-entitled action was and is excusable."

The affidavit of R. R. Sischo, an attorney of the city of Merced, is as follows:

"That on the 14th day of June, 1926, at about the hour of 5 o'clock p. m. of said day, affiant

received a telephone communication from one Maurice Selig, president of the above-named defendant corporation, and that said Selig asked affiant to represent the Los Banos Cotton Gins, Inc., at the trial of the above action set for the 15th day of June, 1926, and that said Selig informed affiant that he would have prepared substitution of attorneys, and forward the same by mail on said 14th day of June; that affiant did not receive such substitution until the afternoon of the 15th day of June, or until after the trial of said action, and affiant appeared in the above-entitled court and moved the court for a continuance, on the grounds that the defendant was not prepared for trial and that proper substitution of attorneys had not arrived in order that affiant could take part in said trial; that affiant's motion was overruled; that when said substitution of attorneys was received by affiant on said 15th day of June, the same was signed by Maurice Selig, the president of the above-named defendant corporation, but the consent of the attorneys Abbott & Cannon was not signed thereto; that affiant returned said substitution to K. W. Cannon, one of the attorneys for the defendant corporation above named requesting him to sign the same and return at once; that affiant did not receive the same back until the 27th day of June, 1926; that as a result of such failure to receive said substitution, there was no attorney in court to represent the above-named defendant corporation on said 15th day of June, 1926."

The affidavit of attorney for the plaintiff, Andrew R. Schottky, countered as follows:

"That he is, and at all times herein mentioned, was the attorney for plaintiff in the above-entitled action; that said action was filed on January 16, 1926, and summons was served upon defendant on January 22, 1926; that on the ——— day of March, 1926, defendant filed a demurrer to said complaint, which said demurrer was overruled by the court on March 15, 1926; that thereafter the attorneys for defendant requested, and were granted by affiant, additional time in which to file defendant's answer, and the answer of defendant was filed herein on April 28, 1926; that thereafter, on May 10, 1926, upon due notice to the attorneys for defendant, the said cause was set for trial on June 15, 1926, at 10 o'clock a. m., and notice of trial was served upon the attorneys for defendant on the 11th day of May, 1926; that after said case was set for trial K. W. Cannon, Esq., as attorney for defendant, made overtures of settlement of said case of plaintiff, but at no time made any request for a continuance of the trial of said cause; that affiant was in the office of K. W. Cannon at San Francisco on the 7th day of June, 1926, and discussed said case with said Cannon, and affiant then stated to said Cannon that the above-entitled case would go to trial on June 15, 1926, unless it was settled before that time; that said K. W. Cannon did not make any request of affiant for a continuance of the date of trial, but said Cannon did state to affiant that he had urged Maurice Selig, president of the said defendant corporation, to settle said claim of plaintiff and not litigate the matter further; that affiant proceeded to the preparation of said case for trial, and plaintiff came from

Oakland to Merced to testify at said trial, and other witnesses came from Los Banos and Fresno to testify in support of plaintiff's cause of action; that on the morning of June 15, 1926, at the hour of 10 o'clock a. m., affiant, together with plaintiff and witnesses, went to the courtroom of the superior court for the trial of said case; that upon said case being called by Hon. E. N. Rector, judge of said superior court, affiant answered 'ready' on behalf of plaintiff, and R. R. Sischo, Esq., then made a motion for a continuance of said trial; that said R. R. Sischo stated to the court that Mr. Selig, president of said defendant corporation, had called him on the telephone the previous day and had asked him to appear for defendant; that said Sischo further stated that Selig had informed him that he had been substituted as attorney for defendant, and that said substitution would be mailed to him, but that he (Sischo) had not yet received it; that said motion for continuance of said trial was argued and submitted and was denied by the court; that thereupon plaintiff introduced evidence in support of his said complaint, and no evidence was introduced by defendant; that said court thereupon rendered judgment in favor of plaintiff; that said R. R. Sischo was present during all of said trial, but did not offer any evidence, or request time to present evidence after plaintiff's testimony had been concluded; that said R. R. Sischo stated to affiant that he could see no reason for offering any evidence, as he was satisfied that defendant had no defense to said action; that because of the fact that said K. W. Cannon, as attorney for defendant, had on numerous occasions requested extensions of time to file defendant's answer, but had never made any request for a continuance of said trial, affiant believes that said attorney for defendant had no intention of contesting said action at the trial, and that the motions herein are not made in good faith, but are merely for the purpose of delaying execution of said judgment; that the action herein is a simple action to recover salary due to plaintiff for services rendered to defendant, and if said defendant had any defense to said action said Selig could easily have retained an attorney either in San Francisco or in Merced in ample time to prepare defendant's defense between June 11, 1926, and June 15, 1926; that W. M. Abbott and K. W. Cannon, who are now and at all times since the commencement of said action have been the attorneys of record for said defendant, and general counsel for the United Railroads of San Francisco, have in their office and under their direction six or more attorneys at law, any one of which could have properly prepared any defense that said defendant might have in said action between June 11, 1926, and June 15, 1926."

[1] The order denying the defendant's motion for a new trial is not appealable (Code Civ. Proc. § 963); hence the appeal from said order must be dismissed.

In presenting the motion to set aside the judgment, as the affidavits filed by the defendant clearly show, the latter proceeded under section 473 of the Code of Civil Procedure. Said section, among other things, provides that the court "may * * * relieve a party or his legal representative from

a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," etc. The affidavits of Cannon and Selig state that their failure to appear at the trial and defend against the claims of the complaint was due to surprise and excusable neglect, and the statements in their respective affidavits were directly addressed to the support of that conclusion.

[2, 3] It is the settled rule that whether a motion to vacate a judgment on the ground of surprise, inadvertence, or excusable neglect shall or shall not be granted is a matter which rests in the sound discretion of the trial court, and that the order either granting or denying the motion will not be disturbed upon appeal unless it clearly appears from the record that, in making its order on such motion, the trial court has been guilty of an abuse of discretion. *Moore v. Thompson*, 138 Cal. 23, 26, 70 P. 930; see, also, *Seymour v. Wood*, 63 Cal. 81; *Buell v. Emerich*, 85 Cal. 116, 24 P. 644; *Nicoll v. Weldon*, 130 Cal. 666, 63 P. 63; *Winchester v. Black*, 134 Cal. 125, 66 P. 197. It is true that some of the cases say that reviewing courts will "listen more readily to an appeal from an order refusing to set aside a default than where the motion has been granted. *Moore v. Thompson*, supra. All presumptions," however, proceeded the court in the case just named, "will be indulged in favor of the correctness of the court's action, and the burden in all cases is upon the appellant to make it appear that its discretion was abused in making the order."

[4] We cannot say, upon the record as made upon the motion, that the court below in this action abused its discretion in refusing to grant the continuance. The affidavits filed by the defendant and upon which it rested its motion to vacate the judgment do not, in our opinion, make such a showing as would appeal with such force as to call for favorable response by a trial court in a proceeding such as is presented here. The affidavits are set forth in full hereinabove, and it seems to us that they plainly speak for themselves and thus betray their own weakness as in support of the motion to vacate the judgment. But, if it were necessary to concede that, taken alone, or in the absence of a countershowing, it might, with some degree of reasonableness, be held that said affidavits, when considered in the light of the well-known policy of the courts of appeal to discourage a denial of a trial of an action on its merits, or a trial in which a party to the action, through no fault of his, is without the aid of an attorney in the presentation of his case or defense, presented a situation appealing for favorable action by the trial court in the exercise of its discretion in

such instances, still the strong countershowing by the plaintiff compels the conclusion that the decision of the issue presented was one peculiarly within and subject to such discretion. Indeed, accepting as verity certain statements contained in the affidavit of the attorney for the plaintiff, as we are to assume that the trial court did so accept them, it would seem that it would have been an abuse of discretion had the trial court granted the motion presented by the defendant. It is not necessary to recapitulate by way of analysis the allegations of said affidavit. The salient facts therein set forth, which are not here controverted by the defendant or its counsel, tend strongly to support the contention of the plaintiff that the continuance was asked, not because defendant or its counsel believed that the claim sued upon could or should be defeated, but because a postponement of the trial beyond the date on which it had been set was solely desired either for the purpose of affording the defendant further time within which it might the more conveniently pay the debt or like opportunity for securing a composition for the payment of a lower sum as in full satisfaction thereof than that sued for. But an inquiry to ascertain the specific considerations which, upon the record, influenced the court's action in denying the motion is of no material importance in the decision here. It is sufficient to say that the whole showing made on the motions is, at least, such as to force upon us the conclusion that the decision by the trial court on the motions involved the exercise of a judicial discretion with which a Court of Appeal is not legally at liberty to interfere.

The cases cited and relied upon by the defendant are: *Grady v. Donahoo*, 108 Cal. 212, 41 P. 41; *Dusy v. Prudom*, 95 Cal. 646, 30 P. 798; *Watson v. San Francisco & H. B. R. R. Co.*, 41 Cal. 17; *Bond v. Karma-Ajax Con. Min. Co.*, 15 Cal. App. 469, 115 P. 254. We will not review those cases herein. A reading of the opinions therein will readily disclose that the conclusions therein reached in no way militate against the conclusion arrived at herein. The general principles which control in the decision of an appeal of the character of the one now before us are in those cases soundly applied upon the facts as they appear in each case. Where relief is sought under section 473 of the Code of Civil Procedure, each case must be judged by and be required to rest upon its own peculiar facts.

The order denying the motion to set aside the judgment entered in the action is affirmed. The appeal from the order denying the motion for a new trial is dismissed.

We concur: FINCH, P. J.; PLUMMER, J.

82 Cal. App. 751

WILLIS et al. v. SAN BERNARDINO LUMBER & BOX CO. et al. (Civ. 4528.)

District Court of Appeal, Second District, Division 2, California. May 5, 1927.

1. Appeal and error ⇨1002—Verdict under conflicting evidence must stand, if jury might have reached different conclusions therefrom.

Where there is conflict of evidence, court, on appeal, will not disturb verdict where substantial showing has been made, upon which jury might have reached a conclusion different from that for which appellants contend.

2. Master and servant ⇨330(3)—Evidence held to sustain recovery against partners as having control of unlighted motor truck.

In action for damages sustained by collision with unlighted motor truck on highway at night, evidence held to sustain verdict against partners as having control of truck.

3. Master and servant ⇨318(1)—Partnership members were liable for damages from leaving unlighted truck where manager exercised control over truck, though driver was independent contractor (Deering Gen. Laws 1923, Act 5128, § 16).

Where truck was used in transporting products of copartnership and was registered in name of manager who exercised control thereof, partners were liable, under St. 1919, p. 194, Deering Gen. Laws 1923, Act 5128, § 16, for damages resulting from leaving truck unlighted on highway, though person using truck may have been independent contractor.

4. Master and servant ⇨302(2)—Members of partnership whose manager controlled operation of truck could not avoid liability for injuries because manager was agent for third party.

Members of partnership whose manager controlled truck in partnership business could not avoid liability for damages resulting from leaving it unlighted in highway on ground that manager exercised control as agent for third party.

5. Highways ⇨179—Leaving unlighted truck on highway held not excused by mishap.

In action for damages resulting from collision with unlighted truck, stopped for repairs on highway after nightfall, it was no defense, where vehicle had been permitted to operate without effective lights, that vehicle would have been back to owner's place of business before dark but for mishap on road.

6. Appeal and error ⇨1064(1)—Instruction permitting jury to find partners liable if truck driver negligently failed to carry lights held harmless, where manager of partnership instructed driver to proceed without lights.

In action against partnership for damages caused by leaving unlighted truck in highway, instruction that negligent failure of driver to carry lights rendered partnership liable, if proximate cause of damage, held harmless, where managing partner had expressly ordered driver to proceed without them.

7. Appeal and error ⇨1078(1)—Unargued points will not be considered.

Points presented on appeal, without argument, are not entitled to consideration.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by C. J. Willis and another against M. Y. Kellam, Jr., and Mollie M. Shropshire, copartners doing business under the name of the San Bernardino Lumber & Box Company, E. R. Kellam, and others. Judgment for plaintiffs against the defendants named, and they appeal. Affirmed.

William Guthrie and McNabb & Hodge, all of San Bernardino, for appellants.

Swing & Wilson, of San Bernardino, for respondents.

WORKS, P. J. This is an action for damages occasioned by the collision of an automobile with a motor truck. The automobile was proceeding along the right side of a highway and was occupied by plaintiffs. The truck was standing at the same side of the thoroughfare, partially on and partially off the traveled portion of the road, and was faced in the direction in which the automobile was proceeding. The events out of which the litigation grows occurred in the evening, when the darkness of night was fully on. The truck was wholly without lights. As plaintiffs went toward the vehicle they did not see it, the circumstance being partially owing to the fact that the headlights of a car approaching from the opposite direction blinded them to every other object. Then occurred the collision out of which the action arises.

At the trial the action was dismissed as to the defendants Parsons J. Shropshire and Doig. The jury rendered a verdict against the defendants M. Y. Kellam, Jr., Mollie M. Shropshire, and E. R. Kellam. The two of these defendants who are first named were copartners doing business under the name of San Bernardino Lumber & Box Company. E. R. Kellam was the manager of the copartnership. An appeal is prosecuted by each of the defendants against whom the verdict was pronounced.

[1, 2] The first point made by appellants is that the evidence was insufficient to support the verdict. They contend that the defendant Doig was the owner of the truck, and that he was an independent contractor in the performance of certain services for the copartners, in a part of which service the vehicle was engaged at the time when the collision occurred. There was evidence, undoubtedly, which supported this theory, but under the rules of law applying in a court of review when there is a conflict of evidence, we are to determine only whether there is a substantial showing made by the record upon

which the jury justly might have reached a conclusion different from that for which appellants contend.

The record discloses testimony from which the jury properly might have found that the following were the facts: The copartnership was in constant need of trucks for the transport of the products of its operations, the general nature of which products sufficiently appears from the name under which the copartnership did business. Without dispute, it also appears that the truck with which the car of plaintiffs collided was purchased by E. R. Kellam, the manager of the copartnership, that, as owner, he caused it to be registered in his name with the state authorities, and that it remained so registered at the time of the collision. The truck was bought on the installment plan and all payments upon it, including an initial payment of several hundred dollars, were made from the funds of the copartnership. There was undisputed testimony, however, that all these payments were charged to Doig on the books of the copartnership as an offset against amounts due to him from time to time for hauling. When the truck was first purchased it was operated by a son of defendant Doig, and pending this state of affairs that defendant left San Bernardino, in and about which city the copartnership conducted its operations, expecting to be absent therefrom for a period of two months. The collision between the car of respondents and the truck occurred before his return. Some time after his departure, and some time before the accident, defendant Doig's son ceased to operate the truck, whereupon E. R. Kellam wrote Doig suggesting that a new driver be obtained. He said in the letter:

"I am sure I can manage the truck without bothering you to come home."

Doig answered, in substance, that it was all right to put a man on the truck and put it to work. Soon after this the defendant Blodgett saw an advertisement in a newspaper, inserted by an employment agency, to the effect that a truck driver was wanted. He applied to the agency for the position and was sent to the office of the copartnership. He there first saw Mrs. Shropshire, one of the appellants, who was actively concerned in the business of the copartnership, and stated to her that he was an applicant for the position as truck driver. She turned him over to E. R. Kellam. The latter made inquiry as to Blodgett's qualifications and engaged him. He told Blodgett he would pay him a certain amount per day for his services. Blodgett was told that he was to drive the truck which is in question here, and the next morning after he was employed, apparently, he "fixed up" the body of the vehicle, which was in need of repairs. He was "set to work" by E. R. Kellam in the performance of this task. The truck, from the date of its purchase up

to the time of the mishap between it and the car of respondents, and during the time when both Doig's son and Blodgett were its drivers, was never used for any purpose except to do hauling for the copartnership. All the hauling done by Blodgett was at the direction of E. R. Kellam or some one else connected with the copartnership, and there was an understanding with Doig whereby the operations of the truck were to be conducted in that manner. The oil and gasoline Blodgett used on the truck he was told by E. R. Kellam to get. These items were charged to Doig on the books of the copartnership. An arrangement existed between Doig and E. R. Kellam, whereby the latter was to keep the truck in repair and to make charges for repairs against Doig on the copartnership books. At the time of Blodgett's employment the vehicle had neither headlights nor a tail light. At the direction of E. R. Kellam he got the headlights "fixed" so they would burn, but immediately one of them broke and would not light again. This made the remaining one useless as one would not burn unless both were connected up. Just before he took the truck out on the trip during which, on the return, the vehicle was run into by the car of respondents, Blodgett told E. R. Kellam about the condition of the headlights and called his attention to the absence of a tail light, and Kellam said to take the load which was to be hauled on the trip, "and we would get along that day all right without fixing it up." The trip was therefore undertaken with a useless single headlight and without a tail light. Something went wrong with the truck on the return from the trip, and Blodgett stopped by the roadside to make repairs. It was then that the car of respondents collided with the truck. E. R. Kellam was practically in entire control of the business of the copartnership. M. Y. Kellam, Jr., one of the partners, a brother of E. R. Kellam, did not reside in San Bernardino and was at the copartnership place of business at rare intervals. Mrs. Shropshire, the other partner, testified:

"I attend to the office in Mr. [E. R.] Kellam's absence and work directly under him. * * * I do exactly as he says."

[3] With this record we think it unnecessary to decide whether Doig was an independent contractor. Granting that he was, appellants had such control over the truck and over its driver as to render them legally responsible for the damages flowing from the accident from which the litigation arises. The fact that the vehicle was registered with the authorities in the name of E. R. Kellam is a material circumstance. Under the law, the right so to register a motor vehicle is, and was at the time of the events here set down, conferred upon "any person * * * having the lawful use or control, or the right to the use or control, of a vehicle, under a

lease or otherwise, for a period of ten or more successive days." Stats. 1919, p. 194; Deering. Gen. Laws, 1923, Act 5128, § 16. Whatever the understanding between Doig and Kellam as to the effect of the registration of the truck in the name of the latter, he certainly held himself out to the world as the one who used or controlled the use of the vehicle. There are also authorities which bear upon the general situation disclosed by the record. Where one exercises such a control over the men employed or the mechanism used by an independent contractor with him as did the appealing defendants here, he is liable for damages arising from such exercise of control, the doctrine of proximate cause, of course, being satisfied. *Cotter v. Lindgren*, 106 Cal. 602, 39 P. 950, 46 Am. St. Rep. 255; *Majors v. Connor*, 162 Cal. 131, 121 P. 371; *Connell v. Harris*, 23 Cal. App. 537, 138 P. 949; *Burns v. Jackson*, 53 Cal. App. 345, 200 P. 80.

[4] It is contended that the copartners cannot be liable for the reason that E. R. Kellam, in controlling the operation of the truck, was acting as the agent or representative of Doig. This contention is, to our minds, untenable. The record plainly shows that whatever Kellam did he did as the manager of the copartnership and in furtherance of its interests. Particularly, it is to be noted that his acts, or some of them, disregarding for the moment the fact that he was the manager of the business of his codefendant partners, were brought home to the copartnership by the charges which were made in its books against Doig. This is true as to the charges made for payments on the purchase price of the truck, for the expense of repairs made upon it under the direction of E. R. Kellam, and for oil and gasoline supplied to it under his orders. It would appear, however, that the fact that he was manager and sole directing head of the copartnership business is enough. We think the three appealing defendants were joint tortfeasors.

[5] It is insisted on behalf of E. R. Kellam that the absence of lights on the truck could have done no harm in the daytime, and that the evidence shows that the vehicle would have been back to the place of business of the copartnership before nightfall, but for some mishap on the road. This point is untenable. To uphold it would be to afford too ready a means for the escape from liability of any owner of a motor vehicle who held the fond but delusive hope that his car would reach home before night after some journey, when its lack of lights caused damage to one who came into collision with it as a penalty for being out too late himself.

[6] Appellants take exception to an instruction to the jury. It contained language to the effect that:

"If you believe from the evidence * * * that the truck was * * * used and operated by defendants and did not carry [a] lighted red lamp or lantern, * * * and if you believe that the injuries sustained by the plaintiffs were directly and proximately caused by the failure and negligence of the defendants or any of them to so carry * * * such lighted red lamp or lantern, then I instruct you that the failure of the defendants so operating said truck to carry said lighted red lamp or lantern constituted negligence on the part of said defendants and said defendants are liable," etc.

Appellants say that this was "a flat instruction that if defendant Blodgett failed to carry lights on the truck that the appellants must be held liable for damages." If the instruction is so to be construed, it could not have been harmful to appellants, for the failure to carry lights was owing solely, under the uncontradicted evidence, to the order of E. R. Kellam, issued to Blodgett, that the truck proceed on its trip without them. Also, the jury was told in another instruction, after the meaning of the term negligence had been stated to its members, that if it was found that respondents should recover, a judgment might be rendered against "the defendants, or such of said defendants as in your opinion were guilty of negligence, as defined in these instructions."

[7] Appellants make one or two points which they do not argue. Points so presented are not entitled to consideration. Other contentions are made which are answered by what we have already said. Some points are also urged which are not of sufficient merit to require a separate consideration.

Judgment affirmed.

We concur: THOMPSON, J.; JOHNSON, Justice pro tem.

82 Cal. App. 580

Ex parte McKEAN. (Cr. 1375.)

District Court of Appeal, First District, Division 2, California. April 28, 1927.

1. Motions $\S$ 56(1)—All court orders need not be entered at length in minutes (Code Civ. Proc. § 664).

Neither Constitution nor statutes require that all orders of court be entered at length in minutes to be effective; Code Civ. Proc. § 664, referring only to judgments.

2. Divorce $\S$ 303(3)—Order modifying order fixing minors' custody held not a judgment required to be filed and entered (Civ. Code, §§ 131, 138; Code Civ. Proc. § 664).

Order as to custody of divorced parents' minor children, and modifying order authorized by Civ. Code, § 138, held not judgments, required to be filed and entered by Code Civ. Proc. § 664, though original order was incorporated in interlocutory divorce judgment, authorized by Civ. Code, § 131; remedy being to ask trial

court to set aside service of order and preserve status quo until perfection of appeal.

3. Habeas corpus ⇨30(1)—Order awarding minors' custody to strangers cannot be attacked by habeas corpus for absence of finding that parents were unfit.

Order modifying order as to custody of minor children of divorced parents by awarding temporary custody to others cannot be attacked in habeas corpus proceeding for failure to find that parents were not fit and proper persons.

4. Habeas corpus ⇨29—Persons obtaining minors' custody by execution of order before mother perfected appeal therefrom had lawful custody when habeas corpus writ was issued (Code Civ. Proc. § 946).

Persons obtaining custody of divorced parents' minor children by execution of order modifying original order as to custody before perfection of appeal from modifying order by mother, who failed to ask court to set aside and withhold execution of such order until perfection of appeal, had lawful custody when writ of habeas corpus was issued at her instance; appeal merely staying all further proceedings in court below, under Code Civ. Proc. § 946.

Application by Catherine J. McKean for a writ of habeas corpus to secure the custody of her minor children. Writ discharged.

Edwin H. Williams, of San Leandro, for petitioner.

James F. Brennan, of San Francisco (Jerome Bayer, of San Francisco, and John H. Thomsen, of Monterey, of counsel), for respondent.

STURTEVANT, J. The petitioner, as the mother of three minor children, has applied for a writ of habeas corpus. In her petition she alleges that formerly she and C. J. McKean were husband and wife; that there were born as the issue of the marriage the three minor children above mentioned; that on the 7th day of May, 1926, the petitioner commenced an action for divorce; that the husband was duly served with summons and complaint, but that he did not appear and that his default was entered; that thereafter the divorce action came on for trial and an interlocutory decree was entered on the 20th day of May, 1926; that the interlocutory decree was in the ordinary form and recited that the divorce was granted on the ground of the defendant's extreme cruelty, and it also contained an order awarding the custody of the minors to the mother and granting her \$100 per month for the care, support, maintenance, and education of the children; that thereafter, on the 27th day of July, 1926, C. J. McKean appeared in the divorce action and applied for a modification of the decree, and, among other things, asked that he be awarded the custody of the minors, and that the order contained in the interlocutory decree granting the custody of the minors to the mother and granting her main-

tenance be stricken out of the decree; that the application so made by C. J. McKean came on for hearing and a hearing was duly had and the application was submitted; that on the 27th day of November, 1926, the petitioner's attorney wrote to the trial judge a letter, stating that if the ruling made on the husband's application should be granted that the wife intended to promptly appeal, and requested a reasonable stay that the appeal might be perfected; that on the 29th day of November, 1926, the petitioner's attorney appeared in open court and repeated his request for a stay of execution for the period of 48 hours, and the trial judge stated that said stay of proceedings would be granted; that in the afternoon of November 29, 1926, the trial judge made an order modifying the order contained in the interlocutory decree, which modifying order revoked the order theretofore made awarding the custody of the minors to the mother and granting her maintenance in the sum of \$100, and in lieu of such order a new order was made by the terms of which the custody of said minor children was awarded for the period of 6 months to William E. Reddy and Mary E. Reddy, his wife, and \$75 per month was set as the cost of the care and maintenance of said minors; that said modifying order further provided that the petitioner should forthwith deliver the children to the sheriff of the city and county of San Francisco, to be by him delivered to the Reddys; that said modifying order contained no recital to the effect that the parents, or either of them, were unfit or improper persons to have the custody of said minors; that during the morning of November 30, 1926, the said sheriff executed said modifying order by taking the possession of the minor children and delivering them into the custody of the Reddys, and that said children have since said day been in the custody and control of the Reddys; that the first notice the petitioner or her attorney had of the making of the said modifying order was when the sheriff appeared for the purpose of executing said order; and that the said modifying order was neither filed nor entered by the clerk until the morning of December 1, 1926, after it had been so served as above mentioned, and at that time that the wife promptly appealed from said order. Thereupon the petitioner prays that the custody of said minors be restored to her pending her appeal. The petition was presented to one of the Justices of this court on December 7, 1926, and said Justice directed that a writ issue made returnable before the court on January 10, 1927, at 10 a. m., "and in the meantime let the three children named in the petition be returned to the custody of the petitioner." A return has been filed by the terms of which it is recited that, under the order dated No-

ember 30, 1926, the Reddys received the custody of the minors and retained such custody until the ——— day of December, 1926, when they were served with the said order so made by one of the Justices of this court, and that thereupon, to wit, the ——— day of December, 1926, they delivered the custody of said minors to the petitioner.

[1, 2] The petitioner claims that the modifying order was ineffectual for any purpose until it had been filed and entered. Code Civ. Proc. § 664. That section does not refer to orders, but refers to judgments. There is no provision either in the Constitution or the statutes which requires all orders of a court to be entered at length in its minutes in order that they may be effective. *Von Schmidt v. Widber*, 99 Cal. 511, 514, 34 P. 109; 18 Cal. Jur. 663, § 16. When the trial court was disposing of the divorce action, it had the power to enter an interlocutory judgment of divorce. Civ. Code, § 131. It also had power to make an order concerning the custody and maintenance of the minors. Civ. Code, § 138. The fact that it incorporated the order in its interlocutory judgment did not convert the thing which the statute denominates an order into a judgment. Therefore the trial court had authority, and in a proper case it was its duty to modify or vacate the same. Civ. Code, § 138. The action taken by the trial court in modifying the original order, under the same line of reasoning, was an order and not a judgment. No statute requires that such an original order, or that such a modifying order, shall be filed or entered before it becomes effective as an order regarding the custody of minors. It follows that there was no invalidity in the act of executing the modifying order before it had been filed or entered. If the trial court neglected to stay its order, or if for any reason the wife was dissatisfied with the modifying order and desired to appeal therefrom, her clear remedy was to appear in the trial court and make her representation to the trial court and ask that the service of the order should be set aside and that all matters should remain in statu quo until she could perfect her appeal.

[3] The petitioner further claims that the order was defective because it did not contain a finding that the parents were not fit and proper persons to have the custody of the minors. That attack may not properly be made in a habeas corpus proceeding. In *re Lundberg*, 143 Cal. 402, 411, 77 P. 156.

[4] For the foregoing reasons, we reach the conclusion that the Reddys had the lawful custody of the children at the time this writ was issued. This is true because the Reddys had obtained possession of the children by virtue of the execution of the said modifying order before the appeal from it was perfected. Having learned that the modifying order was thus executed before it was

filed, petitioner might have asked the trial court to set aside and withhold the execution of the modifying order until she could have had time to perfect her appeal. In that case, after the appeal had been perfected, no further action of the trial court could have been taken pending the appeal looking to the enforcement of the modifying order. Code Civ. Proc. § 946; *Ex parte Queirolo*, 119 Cal. 635, 51 P. 956. But instead of doing so, she appealed at once. The appeal did not have the effect of undoing what had already been done under the modifying order before the time the appeal was perfected. *Ewing v. Jacobs*, 49 Cal. 72; *Thalheim v. Camp Phosphate Co.*, 48 Fla. 190, 37 So. 523, 5 Ann. Cas. 784; *Grayson v. Harris*, 102 Miss. 57, 58 So. 775, 59 So. 1, Ann. Cas. 1914C, 1219, 1223. We have been referred to no provisions of law, and know of none, stating that an appeal from an order has any further or additional effect upon the force of the order appealed from than is provided in Code of Civil Procedure, section 946, where it is said, "it stays all further proceedings in the court below."

The argument suggests itself that the modifying order is a continuing one and that for this court to leave the children in the custody of the Reddys now after the appeal from the order has been perfected is substantially and in effect a continuing execution or "further proceeding," within the meaning of that term as used in Code of Civil Procedure, § 946. But upon this point we are unable to distinguish the facts in this case from the ruling referred to by respondent in *De Lemos v. Siddall*, 143 Cal. 313, 76 P. 1115. There the mother of the child delivered it into the possession of its father in open court immediately upon the pronouncement by the court of a modifying order giving its custody to the father. Shortly afterwards she perfected an appeal from the order. On appeal, it was her contention that the effect of her appeal was to set at naught the order appealed from pending the appeal, but the Supreme Court held that the order had been "executed," and that the effect of the appeal was not to undo what had already been done, but that it merely held matters in the same condition as they existed at the time the appeal was perfected.

There is authority to the effect that petitioner might apply to the court having jurisdiction of the appeal for an appropriate order fixing the custody of the children pending the appeal. 3 C. J. 1323, § 1450; *Stricker v. Wakeman*, 13 Abb. Prac. (N. Y.) 85; *Burr v. Burr*, 10 Paige (N. Y.) 166, 169; *Tilley v. Washburn*, 91 Wis. 105, 64 N. W. 312. This is a question, however, that should not be decided by this court, but by the court having jurisdiction of the appeal.

This writ was issued by one of the Justices of this court, and at the time of issuing the same he made an order directing the custody

of the children to be in the mother, petitioner, pending the judgment upon this writ. This order was made under the authority of Penal Code, § 1494. The terms of that section permit such an order to be made "until judgment is given on the return."

The judgment of this court upon the return of the writ is that the Reddys are entitled to the custody of the children not by force of the order of this court, but by force of the modifying order made by the trial court. The effect of giving this judgment upon this writ is to terminate the force and effect of the temporary order made at the time the writ was issued, and it is therefore ordered that the children be restored to the possession of the Reddys, and that the writ be discharged.

I concur: KOFORD, P. J.

32 Cal. App. 586

LAPIQUE v. KELLEY et al. (Civ. 4690.)

District Court of Appeal, Second District, Division 1, California. April 28, 1927.

1. Appeal and error ⇨933(1)—Where record did not show disposition of motion for new trial, presumption was that, if made, it was denied three months after notice of judgment March 13, 1923 (Code Civ. Proc. § 660, as amended by St. 1923, p. 233).

Where notice of entry of judgment was given March 13, 1923, and record did not show any direct order of the court either granting or denying motion for new trial, the presumption was that the motion for new trial, if made, was denied on June 13, 1923; change made by St. 1923, p. 233, in Code Civ. Proc. § 660, not becoming effective until 90 days after May 18, 1923.

2. Appeal and error ⇨925(3)—Charges of misconduct of attorneys, not explained nor argued, will be presumed without support in record.

Where appellant neither explains nor argues his charges of misconduct of the attorneys for appellees, appellate court will presume that charges are not sustained by the record.

3. Pleading ⇨194(1)—Failure to properly verify answer cannot be raised by demurrer.

Plaintiff cannot raise objection that answer is not properly verified by means of demurrer.

4. Appeal and error ⇨232(1½)—Plaintiff, who did not raise question of improper verification in motion to strike cross-complaint and answer, could not claim denial of motion was error because of improper verification.

Where plaintiff did not assert that verification of answer and cross-complaint was void because made by attorney and in part on information and belief when he made his motion to strike cross-complaint and answer, he might not assert that denial of the motion was error on the ground that the verification was void because made by attorney and in part on information and belief.

5. Quieting title ⇨30(1)—Church intervening and claiming title held properly permitted to file cross-complaint in action against trustees to quiet title.

In action to quiet title against trustees of church, court properly permitted church claiming title to property to intervene and file a cross-complaint, where it appeared that its claim of title was of such a nature that a complete determination of the controversy could not well be had without the church being a party.

6. Trial ⇨6(1)—Statute requiring five days' notice of trial is mandatory, and court may not shorten it (Code Civ. Proc. § 594).

Code Civ. Proc. § 594, providing that where issue is one of fact, proof must be had that the adverse party had five days' notice of trial, is mandatory, and the court has no authority to shorten the notice.

7. Trial ⇨6(1)—Plaintiff, not having appeared at trial, might insist on five days' notice thereof (Code Civ. Proc. § 594).

Under Code Civ. Proc. § 594, providing for five days' notice of trial, where plaintiff did not appear at the trial, he might insist that he was entitled to five days' notice thereof.

8. Time ⇨9(4)—Where notice of trial was mailed to plaintiff February 10 and case brought to trial February 16, requisite five days' notice was given (Code Civ. Proc. §§ 594, 1013).

Code Civ. Proc. § 594, providing that where the issue is one of fact adverse party must be given five days' notice of trial, was complied with where notice was mailed, under section 1012, on February 10 and the case was brought to trial on February 16; section 1013 providing that service is complete at the time of the deposit in the mails.

9. Appeal and error ⇨1071(6)—Plaintiff, seeking to quiet title, but introducing no evidence, might not complain of failure to make findings on his claim or of affirmative decree for cross-complainant.

Where plaintiff in action to quiet title offered no evidence, and there was no evidence to show that he had any title or interest, he might not complain that the court made no findings of facts concerning his claim of title nor of the decree quieting title in cross-complainant, since findings on his claim of title must necessarily have been adverse to him.

10. Appeal and error ⇨1071(6)—One having burden of proof on issue and offering no evidence is not prejudiced by failure to find on issue, since findings must be adverse.

Since a party may not complain of failure to make findings which must be adverse to him, party is not prejudiced by failure to make findings on issue as to which he has the burden of proof and on which he offers no evidence.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action to quiet title brought by Clarence E. Gorthy and wife against E. L. Kelley and others, in which the Church of Latter Day Saints of Jesus Christ, Reorganized Church

of Jesus Christ of Latter Day Saints, intervened and filed a cross-complaint. John Lapique was substituted as plaintiff. From a judgment quieting title in said church, John Lapique appeals. Affirmed.

John Lapique, of Los Angeles, in pro. per.

Clyde Bishop and M. B. Wellington, both of Santa Ana, for respondents.

CONREY, P. J. This action was commenced by complaint filed on the 9th day of October, 1922, by Clarence E. Gorthy and his wife, Blenda Gorthy, against the defendants Kelley and McGuire and others. The Gorthys alleged that they were at that time the owners in fee simple of a described tract of 15 acres of land in Orange county, and they sought to obtain a decree quieting their title against any and all adverse claims of the defendants. The complaint alleged that the defendants Kelley and McGuire were "trustees of the Church of Latter Day Saints of Jesus Christ, Reorganized Church of Jesus Christ of Latter Day Saints" (hereinafter called the church), and prayed that the court by its decree restrain Kelley and McGuire, as such trustees, from asserting or claiming any interest in the described real property. This complaint was signed by "C. E. Gorthy, in Pro. Persona," and verified by affidavit of C. E. Gorthy.

On the 2d day of January, 1923, pursuant to an order permitting the said church to intervene in the action, the church filed an answer and a cross-complaint. The answer alleged that the church is a religious corporation, organized and existing under the laws of the state of Iowa, which corporation has duly filed certified copies of its articles of incorporation in the required offices in the state of California and in the county of Orange, that defendant Kelley formerly was and defendant McGuire now is the presiding bishop of said corporation, and had heretofore held the title of record of the above-described real property as trustee for said church, and denied that the plaintiffs or either of them, have or had at any time any interest in the said land as owner in fee or otherwise. The church by its cross-complaint set forth facts showing, first, conveyance of the land on June 27, 1899, to Kelley as bishop and trustee; that by deed of date October 24, 1916, duly recorded at that time, Kelley transferred his trusteeship in said property to McGuire; that on June 8, 1920, McGuire transferred all of his interest in the property to the defendant and cross-complainant, the said church, which said deed was duly recorded in the recorder's office of Orange county on December 16, 1922; that the said church is the owner and at all times has been the person for whose benefit the property was owned and held.

On January 12, 1923, the defendants Kelley and McGuire filed their answer denying the alleged ownership of the land by plaintiffs Gorthy, and alleging their former ownership

as trustees for the church and their subsequent conveyance of the property, whereby the legal title became vested in the church by virtue of said grant deed of date June 8, 1920.

On January 16, 1923, the cross-defendants Gorthy filed a demurrer "to the cross-complaint and answer," applying partly to the cross-complaint and partly to the answer of the church.

On the 9th day of February, 1923, an answer to cross-complaint was filed by the Gorthys and Lapique, which answer begins as follows: "Come now cross-defendants Clarence E. Gorthy and Blenda Gorthy, his wife, and John Lapique, heretofore substituted as a successor in interest," etc. This answer, after denying ownership in the cross-complainants, alleged that "these cross-defendants admit that they claim an estate, title, and interest in and to said real property and all thereof, and allege that their interest is the ownership in fee of all of said described property by grant and by conveyance, and by adverse possession and prescription."

On January 16, 1923, there was filed an affidavit by Lapique "that on the ——— day of January, 1923, and while said action was still pending in this court," the Gorthys had assigned, conveyed, and transferred the subject-matter in the complaint mentioned for a valuable consideration to Lapique, "who is now the owner and holder thereof of all their right, title, and interest in and to the real property in controversy in this action." In that affidavit Lapique asked that he be substituted as plaintiff in the action instead of the original plaintiffs Gorthy. The court thereupon, and on the same date, ordered that Lapique be substituted instead of said plaintiffs Gorthy. A written consent by the Gorthys to such order was filed at the same time. On the same date, January 16th, plaintiffs Gorthy filed in said action a notice of motion to strike out certain stated parts of the cross-complaint, and also a notice of motion to quash the summons and to vacate and set aside the order of January 2, 1923, permitting the church to file its cross-complaint and answer.

On February 10, 1923, in accordance with an order setting the case for trial, the attorneys for the church prepared a notice, stating that the action had been set for trial in said superior court on Friday, February 16, 1923. At the same time an order was made by the court shortening time for service of said notice of time and place of trial to three days, and directing that a copy of this order be served on plaintiffs and cross-defendants with the notice of time and place of trial. Attached to the said notice as filed on February 16, 1923, there is an affidavit of that date by Edna Hewitt, a clerk in the office of Bishop & Wellington, attorneys for said church, from which affidavit it appears:

That "Bishop & Wellington reside and have their offices in the city of Santa Ana, county of

Orange, and that John Lapique has offices and residence in the city of Los Angeles. That on February 10, 1923, affiant personally served a copy of said notice and order on Lapique, by depositing copies of the same in the United States post office, at Santa Ana, in a sealed envelope with the postage thereon prepaid and addressed as follows: 'Mr. John Lapique, 115 South Broadway, Los Angeles, California.' That said address, above given, is the address which the said John Lapique notified Bishop & Wellington as the address at which papers should be served upon him in said action."

The action was brought to trial on February 16, 1923, the defendants and cross-complainants appearing by their attorneys, the said Gorthy and Gorthy appearing in person and said Lapique not appearing. Evidence having been introduced, the court made its findings of fact and conclusions of law, and thereupon judgment was entered decreeing that appellant Lapique and other named parties have no right, title, or interest in the described premises, and quieting title of said church, as against said cross-defendants Gorthy and as against said John Lapique and sundry other named persons. These findings were both dated and filed March 12, 1923, and judgment was entered on the same date.

On February 27, 1923, appellant Lapique served and filed notice of motion to be made by him on March 9, 1923, to vacate and set aside "the findings of fact and conclusions of law, dated the 16th day of February, 1923," on certain stated grounds. At the time when said notice was given, and on March 9, 1923, there were no findings yet in existence. However, the minutes of the court show that on March 9 the motion came on for hearing and was denied.

On March 22, 1923, Lapique gave notice of intention to move for a new trial (clerk's transcript, p. 85), fixing March 30, 1923, as the date when said motion would be made. On and after March 30th this motion was continued from time to time.

[1] On June 14, 1923, appellant Lapique filed a notice of appeal from the judgment and from the order of the said superior court "denying the plaintiffs' motion for a new trial and entered on the 8th day of June, 1923." The minutes of the court for June 8, 1923, as corrected by order shown on the minutes of August 21, 1923, show that on June 8, 1923, "motion for new trial was not taken up, court not having heard the case"; that is, the judge presiding on June 8th was not the judge before whom the case had been tried. There is nothing in the record to show any direct order of the court either granting or denying the motion for a new trial, and therefore the motion (assuming that it ever was regularly presented) should be deemed to have been denied, because it was not otherwise determined within three months from the time of service of notice upon appellant of the entry of the judgment. (The change made in section 660, Code of Civil Procedure, by Statutes

of 1923 [page 233], and reducing said time limit from 3 months to 2 months was not in force until 90 days after May 18, 1923, which was the date of adjournment of the legislative session.) The record shows by an affidavit on file that on March 13, 1923, notice to appellant, of entry of the judgment, was served by the attorneys for respondent church, by depositing of said notice in the post office at Santa Ana, and addressed to appellant Lapique at his Los Angeles address. From these facts, the inference is that the motion for a new trial (assuming again that such motion was made) stands as denied on the 13th day of June, 1923. The service of notice was complete at the time of the deposit thereof in the post office. Code Civ. Proc. § 1013.

[2] In appellant's brief he first presents a list of items of alleged misconduct of the attorneys for defendants on account of which he says that a new trial should be granted. There is an absence of explanation or argument in support of these charges. For that reason we shall assume that they are not sustained by the record.

[3,4] Appellant next contends that the court erred in overruling plaintiff's demurrer to the cross-complaint and answer. The only point argued is that the pleading was not verified as required by law. This objection could apply only to the answer. Such an objection cannot be raised by demurrer. Appellant also claims that the court erred in refusing to grant his motion to strike out the said cross-complaint and answer, which motion was made on the ground that said pleadings were sham, irrelevant, and redundant. The only reason now urged by appellant in support of his claim that the court erred in overruling said demurrer and denying said motion is that the verification of the answer and cross-complaint of the church was void because it was made by the attorney for the church and purported to be made in part upon information and belief. It does not appear that this objection to the pleading was included in the motion to strike. Therefore, even treating it as a motion made by appellant, he cannot now urge this particular objection. He did answer the cross-complaint, and by such answer raised issues upon which the case was tried.

[5] Appellant next attempts, apparently, to attack an order of January 2, 1923, which permitted the filing of the cross-complaint, and, further, to attack the allegation of the cross-complaint by which it was pleaded that the title to said land, as first acquired by Kelley and afterwards transferred by him to McGuire and held by them as trustee for the church, was conveyed by McGuire to the church by the deed to which we have referred in our statement concerning the pleadings. Upon the facts shown by the cross-complaint, it plainly appeared that the claim of title on the part of the church was of such a nature that a complete determination of the contro-

versy could not well be had without the presence of the said church as a party to the action.

[6-8] Appellant contends that the ex parte order of the court shortening to three days the notice of time of trial was a nullity, and that for that reason the court was without authority to try the case on the 16th day of February, 1923, and that a judgment rendered pursuant to such trial must be reversed. Section 594, Code of Civil Procedure, provides that where the issue to be tried is an issue of fact, "proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial." It has been held, and we assume it to be the rule, that the provision of section 594 requiring a five days' notice of the trial is mandatory, and that the court is not authorized to shorten the time of such notice. *Cahill v. Verdier*, 54 Cal. App. 465, 202 P. 154. Appellant Lapique did not appear at the trial. It therefore appears to be established that he was entitled to the five days' notice. But it further appears that the notice as actually given was a five days' notice. As we have heretofore shown, the notice was mailed on the 10th day of February. Service by mail may be made where the person making the service and the person on whom it is to be made reside or have their offices in different places between which there is a regular communication by mail. Code Civ. Proc. § 1012. The condition allowing such service by mail existed in this case. Section 1013, Code of Civil Procedure, after describing the manner in which the notice must be addressed and posted, provides that the service is complete at the time of the deposit. The additional provisions, requiring further time for the notice in certain instances are not applicable to a notice of time set for trial of an action. It follows that the service of notice of trial was complete on the 10th day of February, which was fully five days before the set date of trial of the action. It may be that, as appellant claims, he did not receive the notice until the 14th day of February, but that does not alter the fact that the statutory notice was given. If he then chose, as he did, to remain absent from the trial, he has no valid ground of complaint that the court proceeded to try the action without his presence. *Brown v. Rouse*, 115 Cal. 619, 621, 47 P. 601.

[9, 10] Appellant contends that the evidence is insufficient to support the findings, conclusions of law, and judgment, and that the court did not find upon the complaint of the plaintiff, or the answer, and therefore that the decision is against law, since the findings do not determine all of the issues. "Inasmuch as a party may not complain of a failure to make findings when, if made, they must necessarily have been adverse to him, the one who has the burden of proof upon an issue, and who offers no evidence relative thereto, is not prejudiced by failure of the court to find

upon such issue." 24 Cal. Jur. pp. 945, 946, with citations of many decisions. At the trial no evidence was offered on the part of appellant Lapique, and there is no evidence tending to prove any title or interest of appellant in the land. This being so, the finding of fact concerning his claim of title, if any such finding had been made, necessarily must have been against him. Since, therefore, he has no interest in the subject-matter of the action, it cannot be a matter of interest to him that the court also granted an affirmative decree to the church as cross-complainant, even if it be true, as he contends, that there was not sufficient evidence of cross-complainant's title to have justified such affirmative relief.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

82 Cal. App. 594

HALL et al. v. AUGUR et al. (Civ. 4837.)★

District Court of Appeal, Second District, Division 1, California. April 28, 1927.

Hearing Granted by Supreme Court June 27, 1927.

1. Mines and minerals ⚡77—Evidence that lessees admitted inability to perform covenants of oil and gas lease and assigned interest held to show abandonment.

Evidence held to show abandonment of oil and gas lease, where lessees failed to perform any covenants of lease except to erect a derrick, told original agent they were unable to proceed, and assigned their interests.

2. Mines and minerals ⚡77—Abandonment of oil and gas leases will be more readily found than in other cases.

Abandonment will be more readily found in the case of oil and gas leases than in most other cases.

3. Mines and minerals ⚡78(1)—Title under oil and gas lease is inchoate until oil or gas is found in quantities justifying operation.

The title or interest granted under oil and gas lease for exploration and development is inchoate until oil or gas is found in quantities warranting operation.

4. Mines and minerals ⚡78(1)—Oil and gas lessee cannot fail to develop and hold for speculation, except in strict compliance with contract, for consideration other than development.

Courts will not permit the lessee to fail in development and to hold oil and gas lease for speculative purposes, except in strict compliance with contract, for a valuable and sufficient consideration other than such development.

5. Mines and minerals ⚡77, 78(1)—Inchoate title under oil lease ends on abandonment, or becomes vested right if oil is found.

The inchoate title of lessee under oil lease ends if unsuccessful search is abandoned, but if oil is found such title becomes a vested right in accordance with the terms of the contract.

6. Mines and minerals ⚡78(1)—Lessee's duty to develop under oil is not mere covenant, but condition precedent to vesting of rights under lease.

The lessee's duty under an oil and gas lease to develop the property, upon discovery of oil and gas in paying quantities, is not to be regarded as a mere covenant, but where practically the whole consideration must depend upon the undertaking, it is to be treated as a condition precedent to vesting of rights under lease.

7. Mines and minerals ⚡78(2)—Rule against forfeitures does not apply to oil and gas leases.

The rule that forfeitures are not favored in law does not apply to oil and gas leases, when right to declare forfeiture protects a landowner from the laches of a lessee whose lease is of no value until developed.

8. Mines and minerals ⚡78(4)—Lessor may re-enter and declare forfeiture, where oil and gas lessee breaches implied condition to drill and develop.

Where there is a breach of the implied condition of an oil and gas lease that the lessee will drill and develop the lands if circumstances warrant, the lessor may re-enter and claim a forfeiture of the lease.

9. Mines and minerals ⚡77—Oil and gas lessees could not revive abandoned leases by assigning interests.

Lessees, who abandoned oil and gas leases by indicating inability to finance the undertaking and failing to comply with its terms by not commencing drilling operations, could not revive the leases by assigning them to third parties.

10. Mines and minerals ⚡78(2)—Lessees' assignment of abandoned oil leases could not affect lessors' forfeiture rights, though leases did not contain condition subsequent, or forfeiture, re-entry, or penalty clauses.

Lessees' attempted assignment of oil and gas leases, after lessors had become entitled to declare a forfeiture for conditions broken, could not affect the lessors' forfeitures declared by leasing to other parties or their right to declare forfeiture as against any assignee, although the leases did not contain any express condition subsequent, forfeiture, re-entry, or penalty clauses.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action to quiet title by Signourney D. Hall and others against Irving V. Augur, Interstate Oil Corporation, and others, with consolidated cases. Judgments for plaintiffs, and second named defendant appeals. Affirmed.

Black, Hammack & Black, of Los Angeles, for appellant.

Kelby & Lawson and Samuel M. Garroway, all of Los Angeles, for respondents.

McLUCAS, Justice pro tem. These are consolidated actions for the purpose of quiet-

ing title against the various defendants to the property described in certain oil leases. Defendant Interstate Oil Corporation is the holder of said leases and appeals from the judgments rendered for plaintiffs.

Upon trial, it was conceded by counsel for defendants that in each case the plaintiffs were the owners of the respective properties set forth in their respective complaints. The evidence offered and admitted showed an assignment by the defendants Augur, Trebell, and Young to the A. & T. Oil Company of the leases involved in each of the actions, bearing date of December 15, 1921; also, an assignment by the A. & T. Oil Company of the leases involved in the above actions to Interstate Oil Company under date of December 31, 1921; also, an assignment of said leases by the Interstate Oil Company to the Interstate Oil Corporation, dated January 24, 1922; all of which leases, save as to differences in names and properties, and differences not exceeding a period of 2 months in the respective dates of execution, are identical. The lease appearing in the transcript is dated May 5, 1921, and provides that in consideration of \$1 and of the other agreements contained in said lease, the lessor lets to the lessee for the term of 20 years a certain lot, together with the exclusive right to explore, drill for, etc., all kinds of crude petroleum, gas, and other hydrocarbon substances. It is covenanted, among other things, that the lessee has already obtained and will obtain other leases similar in form upon other lots situated in the same 5-acre tract; that all such leases shall be deemed to constitute one pool or community lease; that as rent and royalty the lessee shall pay to the lessor such proportion of one-sixth part of the proceeds from the sale, at the market price at the well, of all crude petroleum, oil, gas, and other hydrocarbon substances produced from any lots in said tract, as the number of lots leased by the respective lessors bears to the total number of lots in the community lease; that the lessor shall not allow any other person, firm, or corporation to drill any wells upon said ground as long as the lessee shall continue to produce oil in marketable quantities and pay royalties as agreed upon; that no lease shall be accepted as a portion of this community lease after May 30, 1921, and upon that date the community lease shall be deemed closed. The lease further provides:

"It is further understood and agreed that it shall be the duty of the lessee to commence the erection of a derrick within 30 days from the closing of this community lease and to commence drilling operations within 30 days thereafter, and that drilling operations from the time they are commenced shall be prosecuted with due diligence, until oil is found in paying quantities, or to a depth at which further drilling would, in the judgment of the lessee, be unprofitable."

There is no condition subsequent, no re-entry clause, no forfeiture clause, nor any penalty clause contained in the lease. It appears from the evidence that the defendants did not commence drilling operations within the time prescribed in said lease or at all, nor have the leases ever been canceled or abandoned in writing. Suit was filed on May 22, 1922.

[1] It is urged that appellant owns a leasehold interest which has never been canceled, terminated, or abandoned; that the deed is absolute and contains no condition subsequent, forfeiture, re-entry, or penalty clauses. Before discussing the law of the case it may be well to consider the evidence on the subject of abandonment. It appears that none of the covenants of the lease were ever performed by the lessee, except the erection of a derrick after the period within which such erection was required by the terms of the lease. No attempt was ever made to commence drilling operations. The lease was executed May 5, 1921. It was a community lease and was to be deemed closed on May 30, 1921. The lessees agreed to erect a derrick within 30 days from the closing of the community lease, and to commence drilling operations within 30 days thereafter, and to prosecute such drilling operations with due diligence. Thus it was required that drilling operations be commenced within 60 days after May 30, 1921, and prosecuted diligently thereafter. Upon failure of the lessee to comply with the terms of the lease, the lessors made new leases of the respective parcels to the Texcal Oil & Refining Company; said leases being dated between October 31, 1921, and July 1, 1922. The witness Logsdon, who was the original agent for the lessees, testified that he entered into negotiations with the Texcal Company after one of the lessees, Trebell, told him in September they would not be able to go ahead, and that they would quitclaim the leases back to the original lessors; that before negotiating with the Texcal Company the lessees Augur, Trebell, and Young told him they were unable to render financial assistance in carrying out the drilling operations. All these conversations were held prior to December 15, 1921, the date of the assignment of the original lease to the A. & T. Oil Company. The foregoing is the substance of the testimony in respect to abandonment and is not contradicted by any other witness.

[2-4] Abandonment will be more readily found in the case of oil and gas leases than in most other cases. In *Harris v. Riggs*, 63 Ind. App. 201, 112 N. E. 36, it is said:

"Such a lease may be abandoned, and when once abandoned by the lessee, he cannot thereafter claim or enforce any right thereunder without first securing the consent of the lessor or a renewal of the lease. *Gadbury v. Ohio*, etc., Co., 162 Ind. 9, 16, 67 N. E. 259, 62 L. R. A. 895; *Island Coal Co. v. Combs*, 152 Ind. 379, 387, 52 N. E. 452; *Ohio Oil Co. v. Detamore*,

165 Ind. 243, 252, 73 N. E. 906; *Bartley v. Phillips*, 165 Pa. 325, 30 A. 842; *Calhoon v. Neely*, 201 Pa. 97, 50 A. 967; *Lowther Oil Co. v. Miller*, etc., Co., 53 W. Va. 501, 44 S. E. 433, 435, 97 Am. St. Rep. 1027; *Van Meter v. Chicago*, etc., Co., 88 Iowa, 92, 55 N. W. 103; 1 *Corpus Juris*, page 5 et seq.; 1 *Cyc.* p. 4 et seq.; *Thornton*, *Law Oil and Gas*, § 137.

"It has been held and supported by sound reason that abandonment may be more readily found in cases of oil and gas leases than in most other instances. The rights granted under such leases are for exploration and development. The title or interest granted is inchoate until oil or gas is found in quantities warranting operation, and courts will not permit the lessee to fail in development and hold the lease for speculative or other purposes, except in strict compliance with his contract for a valuable and sufficient consideration other than such development. *Gadbury v. Ohio*, etc., Co., supra, page 14 of 162 Ind., 67 N. E. 259, 26 [62] L. R. A. 895; *Lowther v. Miller*, etc., Co., supra; *Huggins v. Daley*, 99 F. 606, 40 C. C. A. 12, 48 L. R. A. 320, 325; *Dittman v. Keller*, 55 Ind. App. 448, 451, 104 N. E. 40; *Risch v. Burch*, 175 Ind. 621, 627, 95 N. E. 123; *Dill v. Frazee*, 169 Ind. 53, 57, 79 N. E. 971; *Ramage v. Wilson*, 45 Ind. App. 599, 604, 88 N. E. 862."

[5] We believe the evidence was sufficient to support the finding of fact by the trial court that the defendants abandoned whatever right, title, or interest they or either of them, had in and to such lease prior to the assignment of said lease to the Interstate Oil Corporation. It then remains to determine the rights of the plaintiffs, as a matter of law, in a suit to quiet title, where the lease has been abandoned by the lessees and where there is no condition subsequent, forfeiture, re-entry, or penalty clauses contained in the lease. The rights of the parties to ordinary oil leases is well stated in *Brookshire Oil Co. v. Casmalia*, etc., Co., 156 Cal. 211, at page 215, 103 P. 927, 928, wherein it is said:

"In regard to such agreements it is said: 'The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract.' *Venture Oil Co. v. Fretts*, 152 Pa. 451, 460, 25 A. 732; *Steelsmith v. Gartlan*, 45 W. Va. 27, 34, 29 S. E. 978 [44 L. R. A. 107]; *Lowther Oil Co. v. Miller*, etc., Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; *Huggins v. Daley*, 99 F. 608, 40 C. C. A. 12; *Gadbury v. Ohio*, etc., Gas Co., 162 Ind. 14, 67 N. E. 261 [62 L. R. A. 895]; *Eaton v. Alleghany [Allegany] Gas Co.*, 122 N. Y. 417, 25 N. E. 981; *Funk v. Haldeman*, 53 Pa. 242; *Union*, etc., Co. v. *Bliven*, etc., Co., 72 Pa. 173; *Grubbs v. Grubbs*, 74 Pa. 33; *Thornton on Oil*, § 53."

However, it has been held by the California courts that an oil lease grants a vested interest where the entire consideration has been paid and there are no conditions in the

lease requiring development of the property by the lessee. *Chandler v. Hart*, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094. In *Taylor v. Hamilton*, 194 Cal. 768, 230 P. 656, it was held that an oil lease was more than a mere license and was to be considered as a lease of the premises for the purpose of drilling for oil and gas, which was subject to forfeiture under the terms of the lease on sufficient notice being given to the lessees of nonperformance by lessees of conditions contained in the lease. It is well settled that the principal purpose of an oil and gas lease is to procure the exploration of the land for oil and gas, to be followed by the development of it if circumstances warrant. *Dill v. Frazee*, 169 Ind. 53, 79 N. E. 971. The grantee cannot omit to drill and develop and hold the grant for speculative purposes purely.

[6] The duty to drill and develop the property upon the discovery of oil or gas in paying quantities is not to be regarded as a mere covenant, but in a case like this, where practically the whole consideration must depend upon the undertaking it is to be treated as a condition precedent. *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895.

[7] The rule that forfeitures are not favored in law does not apply to oil and gas leases. Forfeitures are usually against conscience and without equity, and it is for these reasons that courts of chancery ordinarily refuse relief in such cases, but an exception to the rule must exist where it is against equity to permit the defendant to longer assert his title. The lack of any other remedy and the danger that the oil and gas might be withdrawn through wells on other lands makes a case of this kind appeal to the chancellor and calls upon him to enforce the incurred forfeiture by removing the cloud from the title. In general, equity abhors a forfeiture, but not when it works equity and protects a landowner from the laches of a lessee whose lease is of no value until developed. *Gadbury v. Ohio, etc., Gas Co.*, supra; *Huggins v. Daley* (C. C. A.) 99 F. 606. In *Acme Oil & Mining Co. v. Williams*, 140 Cal. 681, 74 P. 296, where, as in the case at bar, the defendant leased a certain tract of land and the right to enter thereon and drill for oil, the sole consideration for the execution of the lease being the payment of royalty, the court held that in leases of this character "there is an implied covenant, not only that the wells will be sunk, but that if oil is produced in paying quantities they will be diligently operated for the best advantage and benefit of the lessee and lessor." The court further said, page 685 (74 P. 297):

"It is not necessary that technical words should be inserted in such a lease in order to raise the condition. If a reasonable and fair interpretation of its terms shows that it was made to depend on doing something essential

to its object and purpose, the law implies the condition to attain that end. *Petroleum Co. v. Coal & Coke Mfg. Co.*, 89 Tenn. 391 [18 S. W. 65]; *Conrad v. Morehead*, 89 N. C. 35."

[8] Where there is a substantial breach of such implied condition, the lessor may re-enter and claim a forfeiture of the lease. In *Acme Oil & Mining Co. v. Williams*, supra, it is said:

"If the right of forfeiture could not be exercised under such circumstances, a lessor would be at the mercy of his lessee; his land would be burdened by a lease which, while it could, and should, be made profitable through the diligence contemplated, would in fact be profitless through neglect; the lessor could not make other arrangements for the development of his property and his interest in the fee in the oil district might consist of a small holding, surrounding which numerous other operators would be successfully working, drawing off the oil to his irreparable injury. These are some of the peculiar circumstances surrounding leases of this character which favor the right of re-entry for condition broken. *Maxwell v. Todd*, 112 N. C. 686 [16 S. E. 926]."

To the same effect are *Sledge v. Stolz*, 41 Cal. App. 209, 182 P. 340, *McIntosh v. Robb*, 4 Cal. App. 484, 88 P. 517, and *Payne v. Neuval*, 155 Cal. 46, 99 P. 476.

[9, 10] Applying the principles discussed to the present case, the main consideration for the execution of these leases was the payment of royalties to the plaintiffs, which could only be obtained through drilling the oil wells. Royalties were never paid because no wells were drilled. The lessees before the assignment of the lease on December 15, 1921, both by word and deed indicated their inability to finance the undertaking and their intention to abandon the lease. For a period of several months the lessees failed to comply with the terms of the lease requiring drilling to commence within 60 days from May 30, 1921. Under these circumstances, the plaintiffs executed new leases to the *Texcal Oil & Refining Company* between October 31, 1921, and July 1, 1922. Defendants could not revive said leases after their abandonment by assigning them to third parties. Besides, the evidence shows that no drilling was ever commenced by the assignees of the lessees. The attempted assignment of the leases did not affect the plaintiffs' declared forfeiture of the leases by their act in leasing to other parties. The plaintiffs had a right to forfeiture for conditions broken not only as against the lessees, but as against any assignee of the lessees who might claim possession of the premises under them.

For the reasons stated, it is ordered that the judgments be affirmed.

We concur: CONREY, P. J.; YORK, J.

DIMOCK et ux. v. MILLER. (Civ. 5592.)★

District Court of Appeal, First District, Division 2, California. April 27, 1927.

Hearing Granted by Supreme Court June 23, 1927.

1. Physicians and surgeons ⇨18(8)—Liability of dentist for negligent treatment can be established only by expert testimony.

In action for negligent treatment by dentist, plaintiffs can establish liability only by testimony of experts.

2. Physicians and surgeons ⇨14(1)—Dentist need exercise only care and skill ordinarily used under similar circumstances by dentists in good standing in locality.

The degree of care and skill which a dentist must exercise is only that ordinarily possessed and used under similar circumstances by dentists in good standing practicing their profession in the same locality, and evidence of what is good surgery, good practice, or poor surgical technique will not show negligence.

3. Physicians and surgeons ⇨18(6)—Burden of showing dentist's negligence was on plaintiffs.

In action for negligent treatment by dentist, plaintiffs had burden of showing that dentist did not exercise the degree of care and skill ordinarily possessed and used under similar circumstances by dentists in good standing in locality.

4. Physicians and surgeons ⇨18(8)—Evidence held insufficient to show dentist's negligence in giving hypodermic injection after extracting teeth.

Evidence held insufficient to sustain finding of negligence of dentist in giving hypodermic injection after extracting teeth, from which infection arose.

5. Trial ⇨216—Where husband and wife alleging negligent treatment of wife by dentist plead distinct items of damage, jury should be instructed that allowance for any item cannot exceed amount demanded therefor.

In action by husband and wife for negligent treatment of wife by dentist, where plaintiffs allege distinct items of damage, court should instruct the jury that the amount allowed for any one item cannot exceed amount demanded for that item, even though, where special verdicts are not requested, the jury need not specify amount allowed under each item in general verdict.

6. Damages ⇨216(8)—Instruction affecting husband's right to recover for loss of wife's services in future held erroneous for failure to require finding that future disability was certain (Civ. Code, § 3283).

In action to recover for loss of services of wife caused by negligent treatment by dentist, instruction, if jury believe that wife, before the injuries, performed services for her husband, and shall believe that she has been unable since such injuries, and will be unable in the future, to perform the same services by reason of the injuries, to find for husband, held erroneous, un-

der Civ. Code, § 3283, authorizing recovery for detriment "certain to result in the future," for failure to require finding that a condition of permanent or future disability was certain to result.

Appeal from Superior Court, San Bernardino County; Jesse Olney, Judge.

Action for negligent treatment by a dentist, brought by George M. Dimock and wife against Goodman A. Miller. From an adverse judgment, defendant appeals. Reversed.

Swing & Wilson, of San Bernardino, for appellant.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for respondents.

NOURSE, J. Plaintiffs sued as husband and wife to recover damages alleged to have been caused by the negligent treatment of the wife by the defendant, who was a practicing dentist. The cause was tried before a jury, which rendered a general verdict in the sum of \$6,000, and from the judgment following the verdict the defendant has appealed upon a typewritten record.

The charge of negligence is based upon the claim that in giving to his patient a hypodermic injection following the extraction of two of her teeth the defendant failed to sterilize the skin at the point of injection, failed to sterilize the hypodermic needle, and used impure water in the morphine solution. The facts of the case are that Mrs. Dimock had been suffering for a number of years from imperfect teeth, and that on January 23, 1923, defendant at her request performed an operation, extracting two teeth which were imbedded and one of which was badly infected. On the evening of the same day defendant called at the home of his patient and cleansed the cavities, thereafter administering a hypodermic injection to ease the pain from which she was suffering. This was repeated on the following morning and again on the following afternoon. The manner of administering this hypodermic injection on the afternoon of January 24 is the basis of plaintiffs' charge of negligence. It is claimed that the defendant used an ordinary bulb syringe to cleanse the cavities from which the teeth had been extracted, previously having mixed in a glass a solution of warm water and salt; that after he had used the syringe in cleansing one of the cavities he immersed the syringe in the water again and cleansed the other cavity, and thereafter called for a spoon with which he dipped a small portion of the water from the glass, using this to dissolve the morphine tablet. The hypodermic needle was then filled with this solution and injected into the right forearm of the patient. A small red blot soon appeared at the point of injection, and this continued to increase in size until it was found that the patient was suffering from

infection throughout the arm and incisions were made and drains inserted for the purpose of eliminating the toxins.

Some evidence was offered that the injection may have been given in this manner. The testimony of the defendant as to what actually occurred at the time complained of is:

"I called for some sterile salt solution, and George Dimock brought this to me, and I took a satchel I had carried in which I carried all my instruments to and from the office to the place I am visiting, and out of the satchel I took a clean, sterile water syringe wrapped in a sterile towel and washed out with one filling of that syringe—the syringe holds two ounces, sufficient to wash small wounds of this character. I took this sterile syringe and inserted it in the glass and washed out the wounds in Mrs. Dimock's mouth, and she expectorated in a receptacle. In doing this she complained of extreme pain, and naturally being anxious to alleviate that pain as quickly as possible—previous to this George had brought a spoon and I went back into this satchel and undone a sterile hypodermic syringe, which had been inclosed in gauze and boiled in that gauze—and by the way, it was boiled long enough to make it sterile—and that it is never opened until I am ready to use it. The needle is attached. This is the packet the nurse prepared. This syringe has not been undone since the boiling. There is the syringe and the condition the syringe is in when used. It has a platinum wire to keep the needle from filling up. I took this needle from the sterile packet in which it had been boiled. * * * I inserted the spoon into this sterile solution, took about 15 minims of the sterile solution into the spoon, dissolved the tablet in it, put the needle into the spoon and drew the solution in the syringe, expelled the air, and took this piece of sterile gauze and wiped the arm and inserted the needle into the right forearm and gave the sterile injection."

Mrs. Dimock suffered severe pain from the infection in her arm, and was unable for a considerable time thereafter to make use of it in the ordinary way in the performance of her household duties, and there was some evidence that she was not able to use the right hand in sewing, the calling from which she had been earning about \$50 a month prior to the injury. The plaintiffs sued for \$20,000 as personal injuries sustained by the wife, \$500 as loss of her earnings as a seamstress, \$1,029.95 expenses incurred for medical treatment, and \$5,000 for loss of services by the wife in the performance of her household duties.

Aside from the criticism of certain instructions given the jury, the position of the defendant on this appeal is that the evidence wholly fails to *sustain* any charge of negligence. It is pointed out that though the respondents rely upon the charge that the appellant failed to sterilize the skin and the hypodermic needle and that he used impure water in preparing the injection, there is no proof of any character that at the time of

the injection the skin was not sterile, or that the hypodermic needle was not sterilized, or that the water used in preparing the injection was impure. This challenge is not met by the respondents, and an examination of the record fails to disclose any evidence tending to prove any one of these three elements. The respondents in their brief state that all the physicians who were called as expert witnesses without exception testified that the preparation of the hypodermic solution in the manner outlined was "improper and negligent." Citations are made to the printed transcript purporting to bear out this statement, but in each and every case the testimony is not in the record. It is also stated in respondents' brief that all these experts (with two exceptions) testified that the injuries sustained by the respondent were caused by the hypodermic injection. Here again the record does not support the statement made. The testimony of the experts in this respect was that the preparation of the hypodermic solution in the manner claimed by the respondents was not "good surgery"—a matter which does not require medical testimony to prove. When, however, they were asked to testify whether the subsequent infection of the arm came from the hypodermic injection, they all, without exception, testified that it was impossible for them to determine that upon the facts before them. Some of these witnesses testified that from the subsequent history the hypodermic may have caused the infection; other testified that from the entire history of the case it was just as probable that the infection came from germs carried from the infected teeth through the blood as it was that it came from the hypodermic injection. One witness testified that, assuming that either the hypodermic needle or the solution used was not clean, it would be far-fetched to say that the subsequent infection came from any other cause than from the hypodermic injection. All the physicians called as experts conceded that the infection might have come from either the hypodermic injection or the infected teeth, and all refused to say that in this particular case it came from either one or the other cause. One of these witnesses testified that the fact that no pus formed at the place of the hypodermic injection until the seventh day thereafter and that the patient had no fever until the fourth day thereafter was a strong indication that the infection came through the blood from the teeth and not from the local injection.

[1, 2] Cases of this character can be established only by the testimony of experts (*Hessler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654), but even such testimony is insufficient when it fails to prove the essential elements of negligence. The mere fact that a more scientific or more sanitary method may have been employed is not in itself sufficient to prove that the method used was neg-

ligent. Thus, evidence of what is not "good surgery" or of what is "bad technic" does not prove negligence on the part of a physician within the rule of the authorities in this state. In cases of this character it is required that the physician or surgeon in the practice of his profession shall possess and use "that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in the same locality." Markart v. Zeimer, 67 Cal. App. 363, 368, 227 P. 683, 684; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642.

It was said in Leighton v. Sargent, 27 N. H. 460, 474 (59 Am. Dec. 388), which is quoted with approval in Hesler v. California Hospital Co., 178 Cal. 764, 766, 174 P. 654, 655:

"It is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required; because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible."

It is true that the rule of the cases just cited is not without conflict. It is, however, the accepted rule in California, New York, and many other jurisdictions, and in Hesler v. California Hospital Co., supra, our Supreme Court said that "the law on the subject of care and skill required of physicians in the treatment of patients is well settled," and then quotes with approval the rule stated in Pike v. Honsinger, 155 N. Y. 201, 209, 49 N. E. 760, 63 Am. St. Rep. 655. We have not found any California case which expressly applied the rule to cases involving professional treatment by a practicing dentist, but in Robbins v. Nathan, 189 App. Div. 827, 179 N. Y. S. 281, and Van Epps v. McKenny (Sup.) 189 N. Y. S. 910, the New York courts have treated dentists the same as physicians and surgeons, and have held that where negligence is claimed as a result of their professional treatment they are governed by the same rule.

[3, 4] With this the rule which must be applied to the case at hand, it was incumbent upon the respondents to prove that the methods used by the appellant in giving the injection did not conform to the degree of care and skill ordinarily possessed and used, under similar circumstances, by dentists in good standing practicing their profession in the locality of the city of San Bernardino. We have searched the typewritten record, but have failed to find any testimony or evidence which even remotely bears on this essential issue. Proof of what, under other circumstances, might be condemned as not "good surgery," "good medical practice," "good practice," or "poor surgical technique," does not

tend to prove any of the elements of negligence necessary to be proved in a case of this kind.

[5] As the cause must go back for a new trial, we deem it proper to add that appellants' criticism of instructions numbered 7 and 12 is good, because in an action of this kind, where four distinct items of damage are pleaded, the jury should be told that the amount allowed for any one item could not exceed the amount demanded for that item. Such an instruction should be given even though, where special verdicts are not requested, the amount allowed under each item need not be specified in the general verdict.

[6] Criticism is also made of instruction No. 24, which reads:

"If you shall believe from the evidence that the plaintiff Zula P. Dimock before the injuries sustained * * * performed services for her husband * * * and shall believe that she has been unable, since said injuries, and will be unable in the future, to perform the same services by reason of any disability resulting therefrom, then I instruct you that * * * you should find for the plaintiff George M. Dimock such sum in damages as will reasonably and fairly compensate him for such losses."

The criticism is that because of the provisions of section 3283, Civil Code, authorizing an award of damages for detriment resulting after the commencement of the proceedings "or certain to result in the future," the jury should have been instructed that it was necessary for them to find from the evidence that a condition of permanent or future disability was certain to result and that this matter could not be left purely to conjecture. In Saylor v. Taylor, 42 Cal. App. 474, 183 P. 843, an instruction using the language, "but in case you find from the evidence that plaintiff is liable to continual suffering, and is liable to future mental anguish and bodily pain," was held error as not coming within the rule of section 3283 that damages for future suffering or detriment must be based upon detriment "certain to result." To the same effect are Melone v. Sierra Ry. Co., 151 Cal. 113, 91 P. 522; Pouchan v. Godeau, 167 Cal. 692, 696, 140 P. 952; Richman v. S. F., etc., Ry., 180 Cal. 454, 181 P. 769. In the Melone Case it was pointed out that the true rule was stated in another instruction, but the Supreme Court held that this merely created a conflict and required a reversal. In the same case the court quoted with approval the ruling in Pennsylvania Co. v. Files, 65 Ohio St. 403, 62 N. E. 1047, condemning an instruction advising the jury that they might award such prospective damages "as they believe plaintiff has sustained or will sustain."

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

82 Cal. App. 564

WILLSON v. EDWARDS et al. (Civ. 3200.)

District Court of Appeal, Third District, California. April 27, 1927.

1. Appeal and error ⇨907(3)—Defendant's appeal on judgment roll alone will be held to admit that evidence supports findings.

On defendant's appeal on the judgment roll alone, in action to abate a nuisance, it must be taken as admitted that the findings are supported by the evidence.

2. Nuisance ⇨72—Residence owner may maintain private action against person maintaining lunch stand causing offensive odors and noises at night, notwithstanding statute (Civ. Code, § 3493).

Residence owner may maintain private action for a nuisance against persons maintaining, in a residence district, a stand for sale of barbecued meats, coffee, soft drinks, and candy, and causing offensive odors and loud and disturbing noises at night; Civ. Code, § 3493, not requiring in such case that the action be on behalf of the public.

3. Nuisance ⇨72—Residence owner may maintain private action for public nuisance of business interfering by odors and noises with his use of residence.

One has a private right of action against persons causing, in the operation of private enterprises, odors and noises interfering with his private right of property in the use and enjoyment of his residence, even though the nuisance be so extensive as to affect the general public.

4. Nuisance ⇨35—Injunction restraining lunch stand proprietors from causing or permitting noises held not too broad.

In private action by residence owner against lunch stand proprietors, an injunction whose whole intentment was to restrain defendants in causing, permitting, or suffering the creation of noises between 10 p. m. and 3 a. m. constituting portion of the nuisance complained of held not too broad in its terms.

5. Nuisance ⇨35—Injunction restraining lunch stand proprietors from causing noises, should be read as whole, on contention its terms are too sweeping.

Injunction, whose whole intentment is to restrain proprietors of lunch stand in residence district from causing or permitting unusual noises at night should be read as a whole and not in separate extracts in determining contention that its prohibition is too broad.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action to abate a nuisance by J. F. Willson against Walter Edwards and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Louttit, Stewart & Louttit and Levinsky & Jones, all of Stockton, for appellants.

Daniel V. Marceau, of Stockton, for respondent.

PLUMMER, J. Action by plaintiff to abate a nuisance. Plaintiff had judgment, from which the defendants appeal.

The record shows that some time during the year 1925 the defendants opened a refreshment stand at the corner of Pacific avenue and Elm street, in the city of Stockton. At this stand the defendants served to the public sandwiches made of barbecued ham and beef, coffee, soft drinks, and candy. The complaint sets forth that in the operation of the business referred to the defendants caused odors, smells, and stenches offensive to the plaintiff to pollute the air in and about the dwelling house of plaintiff, so as to deprive the plaintiff of the comfortable use and enjoyment of his premises. The complaint also charges that the defendants' place of business is patronized by a large number of people, who, in sounding the horns on their automobiles, starting their automobiles, and talking, shouting, and singing, so disturbed the plaintiff that he was unable to enjoy the comfort, use, and occupation of the premises belonging to him. The record shows that the plaintiff's premises are located in close proximity to the premises occupied by the defendants.

[1] The appeal is taken upon the judgment roll alone, and two grounds are assigned for reversal herein: (1) That the actions complained of constitute a public and not a private nuisance; and (2) that the injunction is too broad in its scope and not warranted by the findings. The appeal being upon the judgment roll alone, it must be taken as admitted that the findings are supported by the evidence, and, as to the first point assigned for error, it is only a question of whether the plaintiff was so injured as to give a right of action in his private capacity for the abatement of the nuisance.

The findings, among other things, set forth that during certain hours of each day the odors, smells, and stenches have polluted and continue to pollute the air in and about the dwelling house of the plaintiff; that, by reason of said odors, smells, and stenches, the enjoyment by said plaintiff and his family of the said dwelling house has been and is interfered with, and said dwelling house rendered uncomfortable for habitation; that plaintiff has been frequently compelled to close all the doors and windows in his dwelling in order to prevent said odors, stenches, and smells from permeating his said dwelling; that by reason of said odors, stenches, and smells, plaintiff and his family have been and are unable to comfortably occupy said dwelling; that practically all the customers of said defendants arrive at their place of business in automobiles; that said customers drive their automobiles in front of said place of business, either on a driveway adjoining said place of business or upon the

streets upon which said place of business fronts; that a large number of said customers so arriving in automobiles between the hours of 10 o'clock p. m. and 3 o'clock a. m. have sounded and still sound the horns of their respective automobiles upon arriving at said defendants' place of business; that numerous customers of said defendants arriving between said hours have driven and still drive their automobiles with the mufflers open; that large numbers of customers of defendants arriving between said hours of 10 o'clock p. m. and 3 o'clock a. m., or on the streets in front thereof, and while awaiting service, have left the motors of their automobiles running, causing loud and unusual noises, and have made and still make loud and unusual noises by starting the motors of their automobiles, racing the engines, and shifting gears, etc.

It is further found that the place of business maintained by the defendants is situated in a locality occupied principally by dwellings; that the actions complained of constituting the nuisance and depriving the plaintiff of the comfort, use and occupancy of his residence have been and are committed between the hours of 10 o'clock p. m. and 3 o'clock a. m. of the following day; that this is the period of time when the plaintiff and his family seek rest and sleep and are so disturbed by the acts complained of as not to be able to comfortably occupy their said dwelling, or to secure the rest and sleep to which they are ordinarily entitled. We have not followed the language of the findings, but have summarized their substance, as the findings are quite lengthy. It is further found that the noises hereinbefore mentioned are necessary incidents in the conduct of defendants' business, and necessarily follow from the use or adaptation by the defendants of their said premises.

[2] Notwithstanding these findings, which we think show that the plaintiff is injured in his private capacity and deprived of the exercise of the private rights to which he is entitled, it is argued that the acts complained of and found by the court constitute a public nuisance only and that the plaintiff suffers therefrom only as the public may be said to be injured, and, therefore, that section 3493 of the Civil Code, which reads, "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise," deprives the plaintiff of a right of action in his private capacity.

This objection appears to be so clearly answered by the following California cases that their citation constitutes all that is necessary: In *Lind v. City of San Luis Obispo*, 109 Cal. 340, 42 P. 437, the court in distinguishing between a private nuisance and nuisances which permit only of a public prosecution, or of facts warranting a public or private prosecution, thus sets forth the law:

"If a substantial right has been invaded, especially if the wrong be in the nature of a continuing trespass of such a character that its continuance will create a right against the plaintiff's estate, or operate to deprive plaintiff of a substantial right incident to her property, the nuisance will be abated. * * * The substantial right mentioned in the above extract means a substantial private right, as distinguished from a public right enjoyed by plaintiff in common with the public at large. The injury which may entitle a private person to maintain an action to abate a public nuisance must be an injury to plaintiff's private property, or to a private right incidental to such private property; and where the injury is of this nature the injured person may maintain the action, although the private rights of an indefinite number of other persons may be infringed and injured in the same way by the same nuisance."

And, further:

"The real distinction would seem to be this, that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. * * * But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance."

The findings in this case show that the private property of the plaintiff is injured. The obstruction or nuisance complained of does not pertain to the exercise of any common and public right, such for instance as the right of the public to propel automobiles along a public highway, upon which the premises occupied for residence purposes may be abutting. Under such circumstances, a common public right is being exercised, and it is a matter of universal knowledge that the propelling of automobiles to and fro creates considerable noise, especially if the premises involved are so situated that the maximum speed limit provided by law is permissible. This illustration shows the difference between a public obstruction or nuisance and a private one created by a defendant upon premises in close proximity to those of another at the unusual hours set forth in the findings and the actions of the defendants and the injuries caused by the manner of conducting their business. It is purely a question of a private business being so conducted that the private rights of the plaintiff are being interfered with.

In the case of *Fisher v. Zumwalt*, 128 Cal. 493, 61 P. 82, a question involving the right of a private action to abate a nuisance, where it was contended that the section of the Code above referred to barred the right of the plaintiff, the court said (quoting from the syllabus):

"Although a nuisance may be public, that fact does not deprive an individual of an action, if, as to him, the nuisance is private, and obstructs the free use and enjoyment of his private property. A nuisance, the effect of which extends to the dwellings or places of business of other persons to such an extent as to render their occupancy materially uncomfortable, is a private nuisance as to each of them, for which each one thus injured may have a private action, though there are many persons thus affected, and the result will be to promote a multitude of suits."

Likewise, in *Johnson v. V. D. Reduction Co.*, 175 Cal. 63, 164 P. 1119, L. R. A. 1917E, 1007, it is said:

"The fact that a nuisance giving rise to offensive odors and smells is of a public nature does not deprive an individual plaintiff of the right to an action for its abatement, if it interfered with or obstructed the use and enjoyment of his private property."

This case refers to and approved the decision in the case of *Fisher v. Zumwalt*, *supra*, where it is held:

"That, conceding the nuisance to be of a public nature, such facts do not deprive the individual plaintiff of the right to an action for its abatement if it interfered with or obstructed the use and enjoyment of his private property," etc.

[3] These cases refer to and cite a number of authorities supporting the rule which we may now consider definitely settled in this state: That if a private right of property is interfered with by the acts of the defendant, if the plaintiff is deprived of the free use and enjoyment of his residence by the smells, odors, and noises caused and created by the defendant in the operation of some private enterprise, the plaintiff has a right of action, even though the nuisance may become so extensive in its proportions as to affect the general public and give rise to a prosecution for the abatement thereof as a public nuisance.

[4] We will next consider the objection that the injunction ordered by the court is too broad and sweeping in its terms. Subdivision (a) of the injunction reads:

"From expressly or impliedly causing, permitting, suffering, consenting to, or acquiescing in, the sounding of the horn of any automobile, for any purpose other than the giving of such warning signals as are, or may be required, by the laws of the state of California, at any time between the hours of 10 o'clock p. m. of any day, and 3 o'clock a. m. of the following day upon the premises hereinabove described, or upon any highway adjacent thereto, while any occupant of said automobile is awaiting service or is being served by defendants, or either of them, or by any servant or employee of said defendants."

Against this provision it is urged that the language thereof would authorize contempt proceedings against the defendants in the event that any patron sounded the horn of his automobile, the sounding of which may not in any way be heard by the plaintiff and

might not in any way prevent him from the free use and occupancy of his home. This objection is really more technical than meritorious. When the whole paragraph is read and considered it will be found that it really restrains only unusual and unnecessary noises, and noises made between the hours of 10 o'clock p. m. and 3 o'clock a. m. of the following day; that it does not restrain the giving of such warning signals as may be required by the laws of the state of California.

It is further apparent that it is the establishing and maintaining of the defendants' business in a residence section that has created the nuisance complained of and caused and induced the making of such noises at and during the hours when such noises should not be made in a residential district, or in close proximity to the plaintiff's premises, as found by the court to be caused by the defendants in the instant case. Furthermore, unless it be shown that the defendants expressly or impliedly caused or permitted, or suffered, or consented to, or acquiesced in the making of the unusual noises restrained, the defendants would not be liable for contempt. If the defendants' business is such that it cannot be conducted without creating a nuisance and depriving other people of the enjoyment of their private rights, to which they are reasonably entitled under the law, and that the defendants' business is such that it necessarily induces the creation of loud and unusual noises by patrons coming to the defendants' place of business at the unusual hours mentioned, a condition might be created which would authorize the trial court to entirely restrain the conduct of defendants' business, but, as we read the injunction, the court has not attempted to impose such a penalty upon the defendants, or resorted to such drastic restrictions.

[5] We do not need to set forth the respective paragraphs of the injunction ordered, for the reason that the first two or three lines of the several paragraphs sufficiently show the scope of the order. These lines read in such paragraphs substantially as follows: Enjoin the defendants "from expressly or impliedly causing, permitting, suffering, consenting to, or acquiescing in the operation of the automobiles in the prohibited manner; also, from making the unusual noises sought to be restrained." In other words, the whole intentment of the injunction is to restrain the defendants, in so far as their acts are concerned, in causing, permitting, or suffering the creation of the noises constituting a portion of the nuisance complained of. The fact that in some instances the noises are defined as being made by the racing of motors or the running of motors with the mufflers open does not jeopardize the defendants in any particular, for the reasons which we have herein stated. If no disturbing noise is created in the conduct of

defendants' business during the hours mentioned, nothing is restrained. If any loud or unusual noises are made by the defendants' patrons, which are attributable to the consent, acquiescence, or sufferance of the defendants, the defendants are in jeopardy. The findings of the court show that the defendants have seen fit to establish their business in a section of the city principally occupied by residences; that they have seen fit to conduct the business so that it creates unusual noises between the hours of 10 p. m. and 3 a. m. of the following day, and we find nothing in the injunction, when reasonably considered, and considered according to the reasonable intentment of the language used, which trenches upon any of the reasonable rights of the defendants, or limits them in the conduct of their business in any manner sanctioned by law. The injunction permits the defendants to continue in business and to operate the same, provided it can be done in a manner that will not deprive the plaintiff of his legal rights. The whole injunction, so far as it relates to the noises, is based upon the loud, unusual, and disturbing character of the noises, and if the noises hereafter are neither loud nor unusual nor disturbing, such noises are not included within the terms of the injunction. If we take only the separate extracts set forth by the appellant and read them separate from the context of the whole injunction, it might seem that the making of any noise whatever in the conduct of the defendants' business was restrained, and the argument of the appellant well founded, but that is not the manner in which the injunction here should be read, and, in considering the order, it must be read as a whole and as so read it restrains only what we have hereinbefore set forth and a restraining order to which the findings show the plaintiff to be entitled.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

82 Cal. App. 553

CALIFORNIA STEARNS CO. v. TREADWELL et al. (Civ. 4526.)

District Court of Appeal, Second District, Division 2, California. April 27, 1927.

1. Principal and agent ⇨171(7)—Automobile company's acceptance of partial payment on contract to buy automobile was adoption of contract made by agent.

Automobile company accepting check to its order as a partial payment on the purchase price of an automobile, with knowledge of the contract to purchase made by its agent, adopted the contract.

2. Principal and agent ⇨23(1)—Automobile salesman, dealing with automobile buyer held agent in fact to receive payment.

Automobile salesman, who alone dealt with buyer of automobile, held under evidence, automobile company's agent in fact to receive payment and not merely its ostensible agent.

3. Principal and agent ⇨105(4)—Buyers of automobile were entitled to assume that they could make valid payment to salesman.

Where employee of automobile company was salesman empowered to close sale, buyers were entitled to assume that he possessed usual powers incident to capacity in which he was permitted to act and that they could make a valid payment into his hands.

4. Principal and agent ⇨105(9)—Rule that agent authorized to collect debts can accept only money applies mainly to acceptance of notes, due bills, merchandise, etc.

An agent authorized to collect debts owing to his principal has no authority to accept anything but money, but rule applies mainly to acceptance of notes, due bills, or merchandise, offsetting of debt against obligation of agent to debtor, special adjustments between agent and debtor, and the like.

5. Principal and agent ⇨105(9)—Agent's authority to accept check instead of cash is determined by whether bank is so located that check is acceptable under usages of trade and agent has reason to believe check will be honored.

Whether an agent has power to accept a check in payment instead of cash is determined by whether the bank on which the check is drawn is so located that the check is acceptable under the usages of trade and the agent has reason to believe that the drawer is in good credit so that the check will be honored in due course.

6. Principal and agent ⇨105(9)—Check drawn by buyer of automobile to order of salesman and delivered to salesman at seller's place of business coincidentally with delivery of automobile held "payment," though salesman absconded (Civ. Code, §§ 2326, 3169).

Check drawn in good faith by buyer of an automobile to the order of salesman who had conducted negotiations and delivered to salesman at the place of business of the automobile company coincidentally with delivery of automobile and paid in due course, under Civ. Code, § 3169, held to constitute payment to the automobile company, in view of section 2326, although the salesman after cashing the check absconded with the money.

7. Evidence ⇨244(2)—Declaration of president of seller of automobile, made in course of an investigation as to salesman absconding with payment made by buyer, held admissible.

In seller's action to recover purchase price of automobile paid to absconding salesman by buyer, declaration of seller's president that he told salesman to take care of buyer when he came, which declaration was made in course of an investigation which president was making in interest of seller, held admissible.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action for money by the California Stearns Company against A. W. Treadwell and another, who filed a cross-complaint. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

I. Henry Harris, of Los Angeles, for appellant.

Wright & McKee and Treadwell, Tompkins & Clark, all of San Diego, for respondents.

JOHNSON, Justice pro tem. The legal question in this case is whether a check of \$2,000, drawn in good faith by the purchaser of an automobile to the order of the salesman with whom he dealt and delivered to the salesman at the place of business of his employer, the vendor, coincidentally with the delivery of the car to the purchaser, constitutes payment to the vendor, though the salesman, upon cashing the check, absconded with the money. The defendants were sued here for the sum of \$2,000 as the balance of the unpaid purchase price, upon the theory that the check was not payment. There is no substantial dispute as to the facts, and the trial court, holding that the vendor must be deemed to have received payment in full, gave judgment in favor of the purchasers, who are the defendants here. From that judgment this appeal is prosecuted by the plaintiff, who was the vendor.

[1] Plaintiff is a corporation, and in 1922 was engaged in business in Los Angeles as the local distributor of the Stearns motor car. On May 15, 1922, the defendant A. W. Treadwell, a practicing attorney residing in San Diego, visited plaintiff's establishment in Los Angeles with a view to purchasing a car. There he met and was waited upon by L. M. T. Romer, who had then been in plaintiff's employ for about two months and who is admitted to have been a salesman authorized to deal as such with customers. After discussing prices and spending some time examining with Romer the particular car which was later purchased, Treadwell mentioned that he had a car of the same make in San Diego which he would like to exchange in part payment; and Romer thereupon suggested that the exchange could probably be effected with the co-operation of the Campbell Machine Company, which had the Stearns agency in San Diego. Romer stated, further, that he himself was to be in San Diego in about ten days, and would then see what arrangement could be made for trading the old car and buying the new one from plaintiff. On May 25th Romer called upon Treadwell in San Diego, in company with George Campbell of the Campbell Machine Company. At this conference Treadwell was specific in declaring that the purchase was to be from the Stearns agency in Los Angeles, and an arrangement was made whereby the

price of the new car was fixed at \$2,680, with \$90 added for extras, and an allowance was to be made by plaintiff of \$770 for the old car, which was to be taken by the Campbell Machine Company. In conformity with this understanding, one of plaintiff's order forms was signed by Treadwell for the new car therein described, at a total price of \$2,770 of which \$770 was to be paid by the allowance on the old car. This form contained a clause reading: "When accepted by the company, this order constitutes the entire agreement between parties." At the foot was also the notation, "No order valid until countersigned." Treadwell signed this form as purchaser, and there appears also, above Treadwell's name, the subscription, "California Stearns Co., by Romer, Salesman." The order was never countersigned in any other way. The absence of a written acceptance by an officer of the plaintiff is, however, unimportant. At the time the order was signed Treadwell delivered to Romer a check for \$25, drawn on the United States National Bank of San Diego to the order of California Stearns Company. This was accepted as a partial payment by plaintiff on account of the purchase price; and P. M. Reidy, the president of the California Stearns Company, testified that the contract made was brought to his attention at least two weeks before the delivery of the new car to the defendants, and that he knew of the initial payment and the arrangement about the old car. The acceptance and retention of the initial payment with such knowledge was therefore an adoption of the contract as made through Romer's agency; and this is conceded in appellant's brief.

Treadwell was expecting to be in Los Angeles on June 6th, and it was arranged between him and Romer that the new car should be delivered at that time. At about half past 9 in the morning of the day so fixed Treadwell and his wife called at plaintiff's salesroom in Los Angeles, where they found Romer in attendance. The president, Mr. Reidy, was in San Francisco that day, but defendants were introduced by Romer to the shop foreman, and the car designated in the contract was brought out. After the addition of some small appliances by the foreman, Treadwell spent a couple of hours with Romer in studying the details of operation, and about noontime Romer conducted Treadwell to a small room on the office floor above and there the latter drew his check. After starting to make the check payable to plaintiff, and writing the word "California," Treadwell inquired how the check should be drawn, whereupon Romer directed that it be made payable to himself. Accordingly, the check was drawn to the order of L. M. T. Romer, in the sum of \$2,000, on the same bank as before; and immediately thereafter Romer, with the check in hand, stepped into the office of the cashier and in the presence of

Treadwell dictated a report of the sale. In response to an inquiry of the cashier as to the name of the person to be registered as owner, Mrs. Treadwell was designated. After Romer and Treadwell had rejoined Mrs. Treadwell on the lower floor and she had signed the application blank, all three went together to the office of the state motor vehicle department, where the car was registered in Mrs. Treadwell's name, the license issued, and number plates obtained. Thereupon, all returning to plaintiff's salesroom, the plates were affixed by one of the employees and Mr. and Mrs. Treadwell drove away in the car. The check to Romer's order was indorsed by him and others, and was duly paid on presentation, but Romer disappeared without accounting to plaintiff for any part of the money. Within a day or two after the completion of the sale plaintiff's president returned from San Francisco, and was informed by the cashier that Romer had concluded the transaction and had received payment from Treadwell, but that no money had come from Romer to the cashier. The president does not seem at the time to have had his confidence impaired by Romer's neglect. Mr. Reidy testified that he was busy with one thing and another, and let the matter rest for about two days before he began an investigation. After investigation and an ineffectual conference with Treadwell, this action was begun.

[2] Much of the argument in the briefs revolves about the theory of ostensible agency. There is, however, no ostensible agency shown by the evidence. It is contended by the appellant in argument that Romer was merely an "order-taker" and had no authority to receive any of the purchase money. But throughout the transaction, which began and ended at plaintiff's salesroom, the defendant dealt with no one but Romer, and the terms Romer arranged were accepted by plaintiff. Furthermore, at the trial plaintiff's attorney made this admission of agency: "We state in our contract that the man Romer was our agent; we do not deny that; he just was a salesman; that is all." Moreover, Treadwell testified that in a conversation between himself and Reidy on June 26th the latter admitted that before he himself left for San Francisco he knew that Treadwell was to call for the car on June 6th, and said to Treadwell, "I told the man to take care of you when you came." This conversation was not denied by Reidy, and, no other person being mentioned, presumably the man indicated was Romer. The contract calls for cash payment on delivery, and it must therefore have been contemplated that payment would be made to plaintiff through the person closing the sale.

[3] The case is thus not one of ostensible agency. It concerns itself with the character bestowed on the agent by the principal. In his character as a salesman, designated and

empowered to close the sale, defendants were entitled to assume that Romer possessed the usual powers incident to the capacity in which he was permitted to act. By section 2326 of the Civil Code a special agent to sell has authority to receive the price on delivery of the thing sold, and defendants had a right to assume that Romer could say and do for his principal those things fitting the character in which he was serving his employer. It would require boldness to maintain that one taking delivery of a car in the ordinary course of business at a distributor's salesroom, through an employee with whom the purchaser had openly negotiated, could not make a valid payment into the hands of the employee, but would have to go personally to the cashier's desk to pay the money directly to the cashier.

By the usages of trade, checks operate commercially as a convenient form of money payment, and are ordinarily accepted provisionally in place of money. *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 20 P. 28; *South San Francisco Pkg. Co. v. Jacobsen*, 183 Cal. 131, 134, 190 P. 628; *National Bank of New Zealand v. Finn* (Cal. App.) 253 P. 757. And when a check is cashed by a recipient, the payment relates back to the time when the check was delivered. *Hooker v. Burr*, 137 Cal. 663, 668, 70 P. 778, 99 Am. St. Rep. 17. Plaintiff does not contend that Romer would not have had the power to deliver the car, if the check handed him had been drawn to plaintiff's own order instead of Romer's. There can be no doubt of an agent's power to receive payment in the usual way; and, speaking of an agent for collection, Judge Story, in section 202 of his work on Agency, says:

"So, if payment is received in the usual manner of conducting the like business transactions, as by receiving a check on a bank from a person in good credit, who should become insolvent before the check could be duly presented; or by receiving the common currency of the country, which should afterwards become depreciated; in each of these cases the loss would be the loss of the principal, not that of the agent."

[4, 5] The question reduces itself, then, to the inquiry whether the personal check delivered to Romer under the circumstances detailed was tantamount to cash payment to plaintiff itself. Plaintiff cites cases holding that an agent authorized to collect debts owing to his principal has no authority to accept anything but money. This is a well-established rule, but the application given to it is confined mainly to the inhibition of the acceptance by the agent of notes, due bills, or merchandise, the offsetting of the debt against an obligation of the agent to the debtor, special adjustments between the agent and the debtor, or the like. No case directly in point here has been cited either by appellant or respondent, and we ourselves have been able to find but few possessing a

resemblance or analogy to the case under review. One, however, worthy of attention, is almost a brother to this action. In *Potter v. Sager*, 184 App. Div. 327, 171 N. Y. S. 438 (affirmed in 228 N. Y. 526, 126 N. E. 920), plaintiff, who was the mortgagee under certain mortgages of real property in Rochester county, N. Y., had had her business transacted for several years through a resident agent named Sherwood. He had regularly accounted for collections both of principal and of interest, but a time came when he failed to account for two payments collected from the defendants in separate checks, each made payable to Sherwood personally and cashed by him. The question there, as here, was whether the checks constituted payments to the principal, when actually paid to the holder by the bank on which they were drawn. The court held that the principal was bound by the payments so made to the agent, and its reasoning is as follows:

"Where a person is an agent with authority from his principal to collect principal and interest, the general rule is that a payment by a debtor to such agent, to constitute a good payment, must be made in cash. The reason for this rule is that a payment in any other medium is not as good as cash—is not the exact equivalent of cash. Thus it has been held that the giving of a note, mortgage, postdated check, property, etc., does not constitute a payment because the acceptance of those things by the agent exceeds his authority and constitutes the exercise of a discretion by the agent not vested in him by his principal.

"It would seem, however, that this court should take judicial notice of the fact that checks and drafts are usual and ordinary means of transacting business and transferring money in all business transactions; that, where an agent is given authority to collect money, the authority granted implies that he shall do so in the usual and ordinary way and, where a check is given by the debtor, not postdated and payable at a bank in the same city, the giving of such check payable to the agent constitutes payment from the time that such check is cashed in due course. 'Power to employ all the usual and necessary means to execute the authority with effect is an incident of every contract of agency.' *Lawson, Cont.* (2d Ed.) 227, § 184.

"Such a check, of course, would not constitute payment if not in fact honored on presentation in the ordinary course of business. The agent could not accept such a check in absolute payment and satisfaction. He can, however, receive a check which he has reason to believe will be honored upon presentation as a convenient and customary way of obtaining the money which he is authorized to collect. Such a payment offers no greater temptation to the agent than the payment of the money would offer. If the check is paid by the bank, then the agent has received what he was authorized to receive, and, if not paid when presented, the creditor has lost nothing. The reason for the rule which does not permit a payment to an agent by note, mortgage, etc., does not apply when payment is made by a check which is actually cashed by the bank upon which it was drawn. The cases where checks

were made payable to the principal and wrongfully indorsed and collected by the agent have no application, as in those cases they were not paid in due course."

Here, the check given by the defendant was paid in due course, under section 3169 of our Civil Code, having been paid on presentation to the holder in good faith and without notice of any defect in the title. In the opinion quoted the court was dealing with a check drawn on a bank in the city where the check was delivered; but the rule is not to be so closely circumscribed in its application. In *Jessup v. Carey*, 61 Ind. 584, a check held to have been equivalent to cash was drawn on a bank in Indianapolis, which is in Marion county, and was delivered at Noblesville in Hamilton county. The criterion is whether the bank is so located as to render the check acceptable under the usages of trade, and there is reason to believe that the drawer is in good credit so that the check will be honored in due course. No point is made by the appellant in this case, because the check was drawn on a San Diego bank, as was the check for the initial payment.

[6] In *Stevenson Co. v. Fox*, 19 Misc. Rep. 177, 43 N. Y. S. 253, an agent of plaintiffs, named Renner, who among other things had authority to make sales and receive payments, allowed a deduction from a bill of goods previously sold defendant, and then, at his own request, receiving a check for the reduced amount payable to himself personally, Renner misappropriated the proceeds. The court, sustaining the defense of payment, said:

"Against the appellant's first contention appears evidence of express authority in Renner to collect sums due his principal, and therefore, whether in cash or in personal check, the payment, if made to the agent in his capacity as such, was payment to the principal."

A like view was expressed in *Cohen v. O'Connor*, 5 Daly (N. Y.) 28, where the court declared:

"The objection that this was not a direct payment of money to the agent and as requested is equally untenable as if the money had actually been paid by the bank and lost by the agent."

In *Harbach v. Colvin*, 72 Iowa, 638, 35 N. W. 663, plaintiff was a junior mortgagee of property on which defendant held a first mortgage in course of foreclosure. To protect his second mortgage plaintiff, through one Creighton, who was defendant's attorney in the foreclosure suit, took an assignment of defendant's mortgage, and in payment therefor delivered to Creighton a check to Creighton's order. This check was deposited by Creighton to his own credit in bank, and the proceeds were later converted to his own use. The foreclosure suit proceeded, and, the property being sold at the sale to defendant, plaintiff instituted action to establish his su-

perior equity. The court held that Creighton, as attorney of record, had authority to receive payment for his client, and that the defendant was therefore chargeable with payment through the medium of the check as fully as if money had actually passed.

A somewhat similar situation is exhibited in *Bridges v. Garrett*, L. R. 5 C. P. 451. There Craig, an agent representing plaintiff in the sale of a copyhold interest to defendant, received from defendant a check to Craig's order in an amount including the purchase price and certain charges of Craig himself as solicitor. Craig deposited the check in his bank, but the bank applied the amount in its own favor in settlement of an overdraft in Craig's account. In relation to the effect of the payment by check drawn to Craig's order, Cockburn, C. J., delivered himself as follows:

"There is no doubt that, where an agent is authorized to receive money for his principal, he cannot allow it by way of set-off in accounts between the payer and himself; he must receive it in money. If, however, payment is made by cheque, and the cheque is duly honoured, that is a payment in cash. There is nothing in the circumstance of a cheque being given which invalidates the payment. * * * If Craig was authorized to receive the money, I think the payment to him was a payment to the plaintiff, and that there was nothing in the mode of payment to take the case out of the ordinary rule."

Concurring in this view, Justice Blackburn remarked:

"Where the person to whom the money is paid stands in the relation of a clerk or servant, the payment to him, whether in cash or by a cheque which is afterwards paid, is a good payment to the principal."

Likewise in *Bardwell v. American Express Company*, 35 Minn. 344, 28 N. W. 925, defendant received from plaintiff for collection a draft on a resident of Nebraska, which defendant forwarded to its local agent. The agent received from the drawee a check covering that draft and also certain other demands which the agent had in charge. The check was duly honored, but the agent absconded without accounting for the collection. The defendant was held liable to plaintiff for the amount so collected on plaintiff's draft. And in *Pate v. Westacott*, L. R. (1898) 1 Q. B. D. 272, 278, it is said:

"If an agent is merely to collect money, taking a check from a person having a bank account is not a departure from his authority."

In *Hooker v. Burr*, 137 Cal. 663, 70 P. 778, 99 Am. St. Rep. 17, the question arose whether the delivery of a check to a sheriff operated to effectuate a statutory redemption of realty sold under execution sale. The court, citing from other states several cases presenting a similar problem, held that the sheriff, as agent for the execution purchaser,

had authority to accept, as a provisional legal payment, a check in a form convenient for the transfer of money; that upon payment of the check the redemption became absolute as of the time of delivery of the check to the sheriff, and that a valid redemption had therefore taken place.

Following this general current of authority, we conclude that the check drawn to the order of plaintiff's salesman, and honored in due course, constituted a payment of cash to plaintiff as of the time of the delivery of the automobile to the defendants, and that the trial court was correct in the judgment which it rendered.

[7] It remains but to note plaintiff's exceptions to the admission by the court of certain evidence over plaintiff's objection. It is urged that the conversation between A. W. Treadwell and Mr. Reidy, plaintiff's president, on June 26, was not admissible, and that prejudicial error resulted from receiving evidence of a declaration made by Reidy on that occasion. At the time of the conversation Reidy was engaged on plaintiff's behalf in seeking to ferret out what had occurred between Treadwell and plaintiff's admitted salesman concerning payment and delivery. Reidy went to Treadwell on that errand in company with George Campbell, and, while drawing from Treadwell an account of the circumstances attending the closing of the sale, Reidy himself, in response to a question as to whether he knew that Treadwell was to be at plaintiff's establishment on June 6th, said, "Yes; I was in San Francisco on the 6th, however, and I told the man to take care of you when you came." Neither Reidy nor Campbell denies that Reidy so spoke. Reidy's statement concerning this fact within his personal knowledge was made in the course of an investigation which he was making in the interest of his company, and was a declaration by him as the chief executive officer while in the performance of duty. There was no error in admitting the declaration made under those circumstances.

Other testimony concerning statements of plaintiff's president was given by Edna M. Moore and John H. Moore, but their testimony related to a different cause of action from that involved in this appeal. The defendants interposed a cross-complaint for damages on the ground of fraud, alleging that the car purchased was represented to be a 1922 model when in fact it was a 1921 model, possessing a value of only \$2,150. The finding on that issue was, however, in favor of plaintiff, and no appeal appears to have been taken by defendants. The testimony of the two witnesses mentioned bore only upon the issue arising under the cross-complaint, and can have no effect upon this appeal.

The judgment from which plaintiff appeals is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

82 Cal. App. 696

(256 P.)

JONES v. BANK OF SAN JOSE et al.
(Civ. 5740.)

District Court of Appeal, First District, Division 2, California. May 4, 1927.

1. Gifts $\hookrightarrow$ 30(1)—There was no valid gift of money deposited in bank, where donor did not divest himself of control of such money (Civ. Code, § 1146).

There was no gift, within Civ. Code, § 1146, of money on deposit in bank by addition of donee's name to pass book, where donor did not divest himself of control of money, and donee never asserted any right or claim to money until after donor's death.

2. Gifts $\hookrightarrow$ 49(1)—Clear and satisfactory evidence is required to sustain claim of gift not asserted till after alleged donor dies.

Where claim of gift is not asserted until after alleged donor dies, clear and satisfactory evidence is required on every element for sustaining of such claim.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by James B. Jones, as administrator of the estate of William O. Jones, deceased, against the Bank of San Jose, in which money in dispute was deposited in court, and Maud K. Lowe was substituted as defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

Owen D. Richardson, of San Jose, for appellant.

George D. Smith and J. S. McGinnis, both of San Jose, for respondents.

BARTLETT, Justice pro tem. By this action the respondent, James B. Jones, administrator of the estate of William O. Jones, deceased, seeks a judgment against the respondent, the Bank of San Jose, a corporation, for the sum of \$1,629.66, which it is claimed the respondent bank had in its possession as a balance of a deposit made by W. O. Jones with said bank; the inception of the account being a deposit of \$2,000 on the 25th of November, 1913, by W. O. Jones and the issuance and delivery to him of a pass book by the bank, No. 10,939, in the name of said W. O. Jones. W. O. Jones died on March 28, 1926. After due proceedings had, the respondent, James B. Jones, a brother of W. O. Jones, was appointed as administrator of the estate of W. O. Jones on April 23, 1926, and thereafter qualified as such administrator on May 19, 1926. The administrator brought action against the bank for the recovery of the moneys in question, and thereafter, on motion of the respondent Bank of San Jose, the money in dispute was deposited in court, and the appellant Maud K. Lowe ordered substituted as defendant in the action in place of the Bank of San Jose.

The substituted defendant, Maud K. Lowe (appellant herein), answering the complaint in the action, averred that the money in question was, at the date of the death of William O. Jones, March 28, 1926, on deposit with the bank in the names of W. O. Jones or Maud K. Lowe, and that said W. O. Jones, at the time of making said deposit and thereafter, gave said deposit to the appellant conditioned upon her surviving said W. O. Jones, and that she is such survivor, and is the owner of the whole of the moneys remaining of the deposit.

The action was tried by the court and judgment in favor of the respondent administrator given for the sum of \$1,629.66 on June 28, 1926. From this judgment the substituted defendant, Maud K. Lowe, prosecutes this appeal. The facts of this case, as established by the evidence taken at the trial in the superior court, show that for some 30 years prior to his death W. O. Jones resided at Lawrence Station in Santa Clara county, Cal., having a ranch at that point on which he conducted farming operations; that he was an old-time intimate acquaintance of the appellant and members of her family, and that at the time of his death he was of the age of about 72 years; that appellant's mother lived at his place and took care of him for some 6 or 8 years; that appellant visited her mother at this ranch on frequent occasions; and that at her mother's death in July, 1923, said W. O. Jones told her that he had always intended that her mother should have \$2,000, but now that she had passed away that he wanted appellant to have that to make up for all that she had spent on her mother, and for what she had done for him.

When the account with the Bank of San Jose was opened, the person acting on behalf of the bank was Waldo H. Lowe, husband of appellant. The pass book issued was at various times left by the depositor at the bank in the possession of the husband of appellant, and on divers occasions various sums of money were drawn by W. O. Jones from the moneys deposited and the accruing dividends thereon, the last sum drawn being \$100, which was paid to the respondent administrator on the written order of deceased, executed two days before his death in January, 1926, at his ranch, he then having the pass book, No. 10,939, in his possession.

At the time W. O. Jones asked the husband of appellant, who was then cashier of the respondent bank, to add the name of appellant Maud K. Lowe to the pass book, and to make the changes thereon so that she could have the money, he gave the cashier the book, who took it to the bank and had the account changed from the name of W. O. Jones to the name of W. O. Jones or Maud K. Lowe; the account then being given the new number of 2095, and that number being

written upon the old pass book. This pass book was kept at the bank until about a year later, when appellant took the book from the bank to the ranch and delivered it to W. O. Jones. The book remained thereafter and until the time of the death of W. O. Jones in his possession, and during this time several withdrawals of money from said bank were made by or for the said W. O. Jones.

Appellant claims that the title to the money on deposit in the respondent bank passed from W. O. Jones to her upon the delivery of the pass book to her husband in January, 1924, and that the placing of the money in an alternative account did not affect the validity of the alleged gift. These claims of appellant the respondent administrator controverts, urging in answer to them that they cannot be upheld because appellant did not assert any claims to the moneys on deposit until after the death of W. O. Jones, and that W. O. Jones had dominion over the funds, and exercised dominion over them until the time of his death.

[1, 2] By section 1146 of the Civil Code a gift is defined as "a transfer of personal property, made voluntarily, and without consideration." One of the necessary essentials of a valid gift is a complete divestment of control by the donor. That the donor in the case at bar did not divest himself of control of the property in dispute is clearly shown by the evidence set forth in the transcript. That appellant did not regard the donor as divested of control of the moneys on deposit is evidenced by her delivery of the pass book to him after the alleged gift, for the admitted purpose of allowing him to draw moneys from the account, and she herself never asserting any right or claims to the moneys until after death of W. O. Jones. When a claim of gift is not asserted until after the alleged donor dies, clear and satisfactory evidence is required on every element for the sustaining of such claim. The retention in the donor of the right to withdraw the whole of the bank deposit is inconsistent with the idea of a gift.

The cases relied upon by appellant as supporting her claim that the moneys herein deposited were given to her by W. O. Jones do not support her contention; the facts on which they were decided being widely at variance from those in the case at bar. In *Fisher v. Ludwig*, 6 Cal. App. 144, 91 P. 658, and *Allen v. Smith*, 38 Cal. App. 409, 176 P. 365, the donors had irrevocably delivered the bank books in question to the donees, and yielded up all dominion over the funds long before the death of the donors. Here the donor had possession of the bank book after the gift, such possession being voluntarily given him by the donee. He had on many occasions after this delivery of the bank book drawn moneys from the deposit, and the book was in his

possession when he died. It is not disputed by appellant that at all times up to his death the donor here had a right to draw all or any of the funds, and no money was drawn from the funds prior to his death except by him or for him.

It cannot be held from the evidence in this case that a gift of the moneys in dispute was made by W. O. Jones to the appellant, and it is ordered that the judgment appealed from be, and the same is hereby, affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

82 Cal. App. 758

ROSS v. ALLEN et al. (Civ. 4530.)

District Court of Appeal, Second District, Division 2, California. May 5, 1927.

Cancellation of instruments — 59—On cancellation of deed executed to creditor under agreement for reconveyance on paying debt, purchaser from creditor held entitled to principal and interest paid.

Where owner conveyed property in consideration for legal services rendered under agreement that grantee would reconvey within one year on payment of \$1,250, with interest, and grantor did not pay within year, and grantee transferred property on cancellation of deed, purchaser, having constructive notice of condition of title, was entitled to reimbursement for principal of debt and interest therein paid grantee.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action for cancellation of deeds by Estelle M. Ross against Lawrence W. Allen and others. From the judgment, plaintiff appeals. Affirmed.

Chas. S. Darden and LeRoy D. Barnett, both of Los Angeles, for appellant.

Henry W. Mahan and Allen, Allen & Eagan, all of Los Angeles, for respondents.

CRAIG, J. This is an appeal from a judgment of the superior court of Los Angeles county decreeing that a deed executed by appellant to the defendant Lawrence W. Allen, and a deed executed by said Allen to the defendant Kingsbury be canceled, provided that within 90 days from the date of the judgment being entered the plaintiff pay to the clerk of the above-entitled court \$1,370, with interest thereon at the rate of 7 per cent. per annum from August 13, 1921, to the date of payment, but that, if said sum be not so paid, then said deeds to remain in full force and effect.

It appears that the defendants Lawrence W. Allen, W. S. Allen, and Herbut W. Swender, attorneys at law, performed legal services for the appellant in a certain case in the

superior court; that the compensation agreed upon between the parties for such services was \$1,250; that, as appellant was unable to pay this sum in money, she executed the deed above mentioned to a certain property, which was then a part of the estate of Sadie B. Boyer, deceased, of which the appellant was the sole legatee. At the time of the execution and delivery of the deed from appellant to Lawrence W. Allen, a written memorandum was made and signed by him, in which he agreed to reconvey the property within one year upon payment by appellant of the \$1,250 with interest at the rate of 7 per cent. per annum. A period of one year elapsed, and appellant did not offer to pay the sum agreed or make any request for reconveyance. Later Lawrence W. Allen had the property advertised for sale, and sold and executed a deed thereof to the defendant Kingsbury.

The above, among other facts, are found by the trial court. Certain allegations of the complaint charging fraud on the part of the defendants are expressly found to be untrue. In that behalf it was found that at all the times mentioned in the complaint appellant was sane, but that she did not know the nature or effect of the deed which she executed; that she did not understand that such deed together with an agreement for repurchase, would empower Lawrence W. Allen to sell the property so conveyed without his bringing a foreclosure proceeding. As we have said, the court expressly found that no fraud or undue influence was practiced upon the plaintiff by any of the defendants, and in that behalf it is said in the findings that appellant stated to them that she would consult with her husband, and that they believed she had done so before signing the deed. It is found that the reasonable market value of the property when conveyed to Kingsbury would be about \$5,200, if title thereto were clear, but that it was then involved in certain litigation commenced by one Edward H. Boyer, in which he sought to establish a trust in his favor upon the whole of the property deeded, and also the court found that the title to the property was affected by the fact that it was still in process of administration in the estate of Sadie B. Boyer. With respect to the knowledge of Kingsbury as to the condition of the title of the property which he purchased, the court found that he did not interview the tenants of the plaintiff and appellant then in actual possession of the property; that he knew of the litigation above mentioned, and of the fact that it was involved in administration, but was not informed of the agreement upon the part of Lawrence W. Allen to reconvey to Estelle M. Ross, the appellant.

Among the conclusions of law the court decided that the purchase price paid by Kings-

bury was so incommensurate with the intrinsic value of the property as to constitute constructive notice that there was some question as to the title and right of the plaintiff to have the deed executed by her to Lawrence W. Allen canceled, as well as that Kingsbury had constructive notice of the rights of appellant by having failed to make inquiry of her tenants in actual possession of the property before purchasing, and also because of having been informed that Lawrence W. Allen obtained the deed to the premises as payment of a legal fee. The amount required by the court to be paid to secure a cancellation of the deeds was established by the addition of interest at the rate of 7 per cent. per annum to the principal of \$1,250, which is conceded was due for legal services from the appellant to Lawrence W. Allen and his firm, as attorneys. The findings of the court are amply sustained by the evidence, as it appears in the transcript.

The alleged ground of appeal is that the findings of fact and conclusions of law are inconsistent. If respondents were appealing, a serious question might be presented as to whether or not upon such findings of fact a decree would be warranted directing the cancellation of the deeds even upon the terms specified by the judgment of the court. But since no appeal has been taken by the defendants and respondents, we assume, for the purposes of this opinion, that in that regard the decree was equitably authorized. Since the findings are not challenged as being unsupported by the evidence, the only question is whether the conclusions of law follow from such findings and are consistent.

Treating the transaction between appellant and Lawrence W. Allen, in the execution of the deed to the latter and the agreement to reconvey by him as having taken place under such circumstances as to give the appellant the right to a cancellation of the deed executed by her, it is obvious that on the plainest principles of equity such a right would be subject to the requirement that she repay to him the consideration for which the instrument was executed, to wit, the \$1,250, the agreed value of the services; and the least that can be said of Kingsbury's rights is that, although having constructive notice of the condition of the title to the property which he had purchased, he nevertheless acquired whatever title his grantor possessed, and stands in the shoes of the latter. Having paid, as the court found, \$1,370 principal and interest on the obligation of the appellant to Allen, he is entitled to reimbursement before the deed from Allen to Kingsbury is annulled.

The judgment is affirmed.

We concur: WORKS, P. J.; MURPHEY, Justice pro tem.

82 Cal. App. 719

Ex parte JACKSON. (Cr. 1496.)

District Court of Appeal, Second District, Division 1, California. May 5, 1927.

1. Extradition ⇨34—Extradition may be had against one accused of felony in Alabama, though warrant of arrest was issued by probate judge.

Extradition proceeding may be had against one accused of felony in Alabama, though warrant of arrest was issued by probate judge in such state.

2. Extradition ⇨32—In extradition proceeding, verified complaint before magistrate in Alabama held prima facie evidence that accused was in Alabama at time of offense.

In extradition proceeding, verified complaint against defendant, made before a magistrate in Alabama, held prima facie evidence that accused was in Alabama at time of alleged offense, subject to his right to prove he was not, and that therefore he could not have fled therefrom, and could not be fugitive from justice.

3. Extradition ⇨32—Accused held not entitled to resist extradition for felony in Alabama on ground that complaints were by accomplice (Code Ala. 1923, § 5635).

Accused cannot resist extradition for felony in Alabama under Code Ala. 1923, § 5635, on ground that complaints were by accomplice, where there was no evidence showing that such person was shown to be accomplice in proceeding before Alabama magistrate, since such question was fact issue to be determined at trial.

Application by John M. Jackson for a writ of habeas corpus prayed to be directed to the sheriff of Los Angeles County to secure the release of petitioner from custody under warrants for extradition. Writ discharged, and petitioner remanded.

C. M. Fickert, of San Francisco, and F. H. Bowers, of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., Tracy Chatfield Becker, Deputy Dist. Atty., and Willis I. Morrison, all of Los Angeles, for respondent.

CONREY, P. J. In response to petition of John M. Jackson, now in custody of the sheriff of Los Angeles county, a writ of habeas corpus was issued, to which return was duly made by the sheriff, and a traverse thereto by petitioner. Evidence was presented, and the matter was then argued and submitted for decision.

The subject-matter hereof rests upon an extradition proceeding. Petitioner has been arrested and is in custody pursuant to four certain warrants of arrest issued by the Governor of California, in accordance with representations and requisitions proceeding from the Governor of Alabama.

The petition herein alleged that said executive warrants and extradition papers are insufficient, and that the Governor of California was without jurisdiction to issue said

warrants for arrest of petitioner as a fugitive from justice, in this, that there was no evidence presented to the Governor of California or to the Governor of Alabama showing, or tending to show, that petitioner was a fugitive from justice; and in this, that no legal criminal proceedings have been instituted against petitioner in the state of Alabama as required by law, and that the judge of probate court in Alabama, by whom the original warrant of arrest was issued in that state, had no jurisdiction to issue a warrant in a felony case, and that the judge of said probate court has no criminal jurisdiction.

The requisitions presented to the Governor of California were accompanied by copies of the several affidavits, complaints, and warrants, all of which were by the Governor of Alabama certified to be authentic in accordance with the laws of that state. In each case the affidavit of the complaining witness charged against said John M. Jackson the commission of a felony in the county of Baldwin, state of Alabama, on the 7th day of July, 1926, and that said John M. Jackson on said date, and at the time of the commission by him of said offense, was physically present in said county of Baldwin. On the basis of that complaint, sworn to and subscribed before the judge of probate of the county of Baldwin, that judge issued his warrant of arrest. On the basis of those proceedings the Governor of Alabama issued his requisition, and on the same foundation, through said authenticated copies of the affidavits, complaints, and warrants, the Governor of California ordered the arrest of petitioner as a fugitive from justice.

[1, 2] It is true, as contended by petitioner, that under the Constitution of Alabama the offense charged against petitioner being in each case an indictable offense, he could not be proceeded against criminally by information, but could be prosecuted only by indictment. While it follows as a consequence that a magistrate would have no authority to order that a defendant be held in custody to be prosecuted by information for the felony charged against him, this does not prevent a magistrate from examining into a complaint and holding a defendant to await the action of a grand jury. In accordance with the statutes of Alabama which have been submitted for our consideration in connection with this matter, judges of probate are magistrates, authorized to act within their respective counties. Provisions are made by the statutes for complaints in criminal cases; for examinations and depositions to be taken before magistrates; and for warrants of arrest to be issued by such magistrates when reasonably satisfied from the depositions "that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant is guilty thereof." The purpose of the preliminary

examination and arrest is to secure the presence of the defendant to answer the charges brought against him if indicted by the grand jury. The complaint before the magistrate and warrant of arrest issued by him relate only to preliminary proceedings, and are not violative of the constitutional provision against prosecutions by information, of indictable offenses. We think that the direct evidence to which we have referred was sufficient to authorize the Governor of Alabama, and in turn to authorize the Governor of California, to find that petitioner was within the county of Baldwin, in the state of Alabama, at the time of the alleged commission of crime by him. This fact, and the fact that he is found within the state of California, and the further fact that the preliminary proceedings before the probate judge of Baldwin county and the warrant issued by the judge appear to have been in accordance with law, taken together, are sufficient to constitute a sufficient answer to the petitioner's attack herein on the extradition proceedings. While the verified complaint before the magistrate would not be accepted in this proceedings as conclusive proof that petitioner was in Baldwin county, Ala., at the date of the alleged offense, it is prima facie evidence of the fact, sufficient to authorize the action of the respective Governors, and likewise sufficient here; subject only to the right of petitioner in this proceeding to prove by satisfactory evidence that in fact he was not within the state of Alabama at the stated time, and that therefore he could not have fled therefrom and could not be a fugitive from justice. But he has made no effort to produce such evidence here. Therefore we are satisfied that for the purposes of this proceeding he should be considered as having been a fugitive from justice. In *re Thurber*, 37 Cal. App. 571, 174 P. 112; *Bassing v. Cady*, 208 U. S. 386, 28 S. Ct. 392, 52 L. Ed. 540, 13 Ann. Cas. 905.

[3] By his traverse to the return and by evidence produced at the hearing in this proceeding, petitioner has attempted to establish the fact that James M. Smith, who made the sworn complaints before the probate judge, was an accomplice in the commission of the alleged offenses, if any were committed, and that therefore his arrest on any complaint verified solely by such accomplice is contrary to law. Section 5635 of the Penal Code of Alabama provides that a conviction of felony cannot be had on testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and that such corroborative evidence, if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient. It has been held by the Supreme Court of Alabama that the effect of such statute is to stamp a policy

upon the administration of the law to such effect that a magistrate may not lawfully require a citizen to be held to the grand jury on testimony solely of an accomplice, since that is testimony upon which, without corroboration, no petit jury could possibly convict him. *State v. Smith*, 138 Ala. 111, 35 So. 42, 100 Am. St. Rep. 26.

Assuming, without so deciding, that under the above-cited decision of the Supreme Court of Alabama petitioner would not be subject to extradition under proceedings founded solely upon the complaint and testimony of an accomplice, we have considered his affidavit and the testimony which identifies J. M. Smith as the person signing certain exhibits of date July 15, 1926. Giving to this evidence full credit, it does not establish the claim of petitioner that Smith was an accomplice in the alleged crimes. As to three of the charges there is no evidence at all tending to connect Smith with them; and as to the fourth offense (the transactions with one Moorer) the evidence does not satisfactorily prove that Smith was an accomplice in the crime charged. Moreover, there is no evidence tending to show that in the proceedings before the magistrate in Alabama there was any evidence which would establish that Smith was an accomplice. This issue of fact is so related to the merits of the principal case that it should be determined in the court where that case is to be tried, and not in this proceeding.

The writ is discharged, and the prisoner is remanded to custody.

We concur: HOUSER, J.; YORK, J.

32 Cal. App. 778

PEOPLE v. SANDERS. (Cr. 970.)

District Court of Appeal, Third District, California. May 6, 1927.

1. Forgery $\S$ 26—Indictment charging defendant with forging name of one Curry as maker of check held to allege facts constituting offense (Pen. Code, $\S$ 470).

Indictment charging defendant with forging name of D. B. Curry as maker of check held to allege facts which constitute an offense, under Pen. Code, $\S$ 470, as against contention that it was not charged that such name was fraudulently or otherwise forged.

2. Criminal law $\S$ 683(1)—Rebuttal testimony that accused in forging check was not coerced held admissible, where testimony in chief thereon was not stricken out.

In prosecution for forgery, where defendant claimed she acted under coercion and testified that codefendant told her he would break her neck if she did not sign checks, and added, "I know that it was a mistake on my part to do it," and court ordered last part stricken out, court's order struck out only quoted

statement, and objection to court's action in thereafter admitting testimony to show that accused was not acting in fear was without merit.

3. Criminal law ⚡347—Where defendant claimed she was coerced in forging check, evidence that after signing check codefendant struck her held properly excluded.

Where defendant in forgery prosecution claimed that she acted under coercion of codefendant, evidence that some time after signing check codefendant struck her heavy blow on face, breaking her jaw, held properly excluded, since coercion, to be defense, must be present, active, and imminent peril.

4. Criminal law ⚡186(4)—Admission of forged checks, in addition to one for which defendant was being prosecuted, held not prejudicial where forgery was admitted (Const. art. 6, § 4½).

In forgery prosecution, admitting in evidence two forged checks in addition to one on which defendant was being prosecuted, where court limited testimony to question of intent, did not result in miscarriage of justice, within Const. art. 6, § 4½, where forgery was admitted but defendant relied on other defenses.

5. Criminal law ⚡38—Act must have been done under threats showing that defendant's life was in present danger, to make "duress" excuse for crime.

Instruction that, in order for "duress" or fear produced by threats to be valid, legal excuse for doing something otherwise criminal, act must have been done under such threats as showed that life of person threatened or menaced was in danger, or that there was reasonable cause to believe and actual belief that there was danger of present and immediate violence at time of commission of forbidden act, held correct.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Duress.]

6. Criminal law ⚡811(1)—Giving several correct instructions on insanity held not reversible error.

Mere giving of several instructions on subject of insanity in case where defendant claimed insanity as defense, all instructions being correct, did not constitute reversible error.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Mamie Evelyn Sanders was convicted of forgery, and she appeals. Affirmed.

Arthur M. Bundy and Ray Manwell, both of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of the crime of forgery upon an indictment charging that jointly with James Cosgrove and Charles Lovett, on or about the 22d day of November, 1926, she willfully, unlawfully, etc., with intent to defraud one D. B. Curry, did make and execute as true and

genuine a certain check and instrument of writing, in the following words and figures, to wit:

"Marysville, Cal., Nov. 22, 1926. No. 15.

"Decker-Jewett Bank 90-231:

"Pay to the order of W. D. Lovett, \$17.50, seventeen fifty dollars. D. B. Curry."

Her motion for a new trial being denied, the defendant appeals therefrom and from the judgment of conviction.

Three grounds for reversal are alleged: (1) That the indictment does not set forth facts sufficient to constitute a public offense; (2) that the court erred in ruling upon the admission of testimony; and (3) that the court erred in its instructions to the jury.

[1] The first allegation of error is based upon the fact that the indictment does not charge that the name of W. D. Lovett was fraudulently or otherwise forged or indorsed upon said check, and that, therefore, it fails to allege facts sufficient to constitute an offense. In support of this contention two cases are relied upon by the appellant: *People v. Cole*, 130 Cal. 13, 62 P. 274, and *People v. Thornburgh*, 4 Cal. App. 38, 87 P. 234. These cases, however, are readily distinguishable from the case at bar. In the *Cole* Case it was held that, in order to constitute the crime of forgery, it is essential that there should be the making of a writing which falsely purports to be the writing of another, and therefore that a check in the following form:

"Sacramento, Cal., Aug. 31, 1899.

"National Bank of D. O. Mills & Co.:

"Pay to E. J. Cole, or order, ten (\$10.00) dollars. [Signed] E. J. Cole."

Indorsed on back: "S. B. Smith,"

—did not set forth sufficient facts to constitute the crime of forgery, in that the check was drawn payable to the person who purported to be the maker of the check, and who actually was the maker of the check. Upon the trial it was claimed that the indorsement of S. B. Smith was forged, but the information in that case did not charge the forgery of the indorsement, and, consequently, the information was not supported by any allegation showing such forgery. The check did not purport to be the writing of any other person than E. J. Cole; that is, it was the check of the person who wrote and signed the same.

In the case of *People v. Thornburgh*, supra, following the *Cole* Case, it was held that a check payable to the order of the maker, without charging the forgery of the indorsement thereon, failed to set forth sufficient to establish the crime of forgery. These cases differ in their facts from the case at bar, in that the defendant in the instant case is charged with forging the name of D. B. Curry as the maker of the check, thus bringing the

offense clearly within the terms of section 470 of the Penal Code, which reads:

"Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any charter, * * * bank bill or note, postnote, check," etc., " * * * is guilty of forgery."

The name of D. B. Curry is alleged to have been forged and signed to the check as the maker, which sufficiently constitutes the offense of forgery.

The making of the fraudulent check and the forging of the name of D. B. Curry by the defendant appear to have been admitted. The defense was insanity and coercion, insanity induced by prolonged state of inebriety or drunkenness, and coercion exercised by a codefendant. The facts of the case are substantially as follows:

The defendant, Mamie Evelyn Sanders, obtained permission of W. D. Lovett to take his automobile on or about Saturday evening, November 21, 1926, at the town of Roseville, for the purpose of taking a drive to Marysville, and had her codefendant, Charles Lovett, a boy of 16, a son of W. D. Lovett, to accompany her for the purpose of driving the machine. The defendant Sanders and the boy Lovett then drove to a place in Roseville, not indicated in the testimony and there found the defendant Cosgrove. After picking up Cosgrove, the three left Roseville, proceeding in the direction of Marysville. It appears that they spent the entire night in the automobile; that during the night, the defendants Sanders and Cosgrove indulged in the use of intoxicating liquor; that shortly before daylight on Sunday morning of November 22d, they reached the residence of D. B. Curry, near Pleasant Grove, in the county of Sutter, where they stopped for a short period of time. The defendant Sanders alighted from the automobile, leaving the defendants Cosgrove and Lovett in the machine, and went into the residence occupied by D. B. Curry, and while there obtained three blank checks and also the signature of D. B. Curry from a canceled check, theretofore executed and signed by the defendant Curry. The defendant also obtained from D. B. Curry the sum of \$20. After obtaining the money, she returned to the automobile occupied by the other defendants, and, according to the testimony of the defendant Charles Lovett, James Cosgrove and the defendant Sanders proceeded to fill out the three blank checks which the defendant Sanders had obtained from the residence of D. B. Curry, and the defendant Sanders signed the name of D. B. Curry to said checks, one of the checks being the check heretofore referred to and copied in this opinion. After leaving the residence of D. B. Curry, the three proceeded to an oil station near Pleasant Grove, where the defendant

Lovett attempted to pass the check involved in this case, but failed to obtain any money thereon. The three then went to a village called Trowbridge, in Sutter county, where the defendant Lovett succeeded in passing the check involved in this case and obtained from Starkweather and Pritchard, storekeepers, the sum of \$17.50. The other checks referred to were made out and passed upon other people, and were admitted in evidence for the purpose of showing guilty intent, etc. The drinking orgy appears to have continued until some time late Sunday evening, November 22d, when the party reached Sacramento on the return trip from Marysville, where they remained overnight.

[2] Admitting the signing of the checks, the defendant, Mamie Evelyn Sanders, urged as a defense as hereinabove stated insanity and coercion, that the coercion consisted in force and threats exercised by the defendant Cosgrove. In this particular the testimony of the defendant was to the effect that she had signed the checks through fear. After so testifying, the defendant was asked the following question:

"Q. At the time that you signed those checks what did Jimmy Cosgrove say to you? A. Jimmie Cosgrove was abusing me and calling me a chippy, and he said that he ought to break my God damn neck, and he would if I didn't sign the checks. I know that it was a mistake on my part to do it.

"Mr. Coats: I ask that the last part be stricken out.

"The Court: That last part will be stricken out."

Appellant assigns this ruling of the court as error, and in so doing makes the mistake of assuming that the order of the court struck out the entire answer, but, as we read it, the last part relates only to the last sentence, which is:

"I know that it was a mistake on my part to do it."

That is the only portion which we think was stricken out by the order. It left the defendant the full benefit of whatever her testimony was worth, so that the objection to the action of the court in thereafter admitting testimony to show that the appellant Sanders was not acting in fear of Cosgrove is without any merit.

[3] The appellant then sought to introduce testimony to the effect that some time after the signing of the forged check, upon which this prosecution is had, the defendant Cosgrove struck the appellant a heavy blow upon the face, breaking her jaw. This testimony was not admitted, and the ruling of the court thereon is assigned as error. Coercion to be a defense must be a present, active, and imminent peril. Whatever takes place after the commission of the offense is wholly immaterial. Hence, any abuse which the appellant may have suffered at the hands of her code-

fendant Cosgrove, after the commission of the offense for which she was convicted, would not in any wise lessen or excuse the commission of the crime with which she stands charged. The rule is thus succinctly set forth in 16 C. J. 91, § 59:

"The compulsion which will excuse a criminal act, however, must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. A threat of future injury is not enough. Such compulsion must have arisen without the negligence or fault of the person who insists upon it as a defense."

To this statement of the law is appended a long list of authorities.

The facts which we have recited, taken from the transcript, show that the appellant obtained the checks, three in number, signed all of them, and that the one upon which prosecution is had was passed before any acts indicating bodily harm appeared to have taken place. All these matters were circumstances to be taken into consideration by the jury: The obtaining of the automobile, the planning of the trip, the securing of the checks, the forging of the name of D. B. Curry, and their subsequent passage to obtain money; from which we do not very well see how a jury could have come to any conclusion that the defendant participated in the forging of check upon which she is being prosecuted without any negligence on her part. The facts set forth certainly indicate that the jury might very well conclude that the appellant was the prime mover in the drunken, criminal carousal terminating in forging checks, as claimed by the prosecution.

[4] It is also argued by the appellant that the court erred in admitting in evidence two forged checks, in addition to the one on which the appellant was being prosecuted. We do not need to consider this allegation of error further than to state that, while the offer of the district attorney was not a proper one, the court, in its ruling, limited the testimony to the question of intent, but, whether this was or was not correct, there has been no miscarriage of justice, and section 4½ of article 6 of the Constitution applies. The forgery being admitted, there was nothing left for the jury to pass upon except the alleged defense of coercion and insanity, and everything that the defendant did at that time was admissible, in order that the jury might determine the merit or want of merit in either of the alleged defenses.

[5] The court instructed the jury upon the subject of coercion as follows:

"The court instructs you that a person, who commits an act under threats or menaces sufficient to show that he had reasonable cause to believe and did believe that his life would be endangered if he refused, is incapable of committing a crime.

"In order for duress or fear produced by

threats or menace to be a valid, legal excuse for doing anything, which otherwise would be criminal, the act must have been done under such threats or menaces as show that the life of the person threatened or menaced was in danger, or that there was reasonable cause to believe and actual belief that there was such danger. The danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act. The danger of death at some future time in the absence of danger of death at the time of the commission of the offense will not excuse. A person who aids and assists in the commission of the crime, or who commits a crime, is not relieved from criminality on account of fears excited by threats or menaces unless the danger be to life, nor unless that danger be present and immediate."

This instruction, we think, clearly sets forth the law.

[6] It is finally argued that the court erred in its instructions to the jury on the subject of insanity. We find no assignment of error specifically directed against the instructions given by the trial court on the subject of insanity. However, in appellant's brief upon this subject occurs the following paragraph:

"While we think that any one of these instructions, if taken alone, properly states the law, yet, we also think that the court in its numerous instructions on this plea laid too much stress upon it, and that its repeated cautions to the jury could not but have the effect of instilling in the minds of the jurors a suspicion that the court thought the plea was spurious, and that they would not be justified in bringing in a verdict of 'not guilty' upon the defense of insanity. It will be noted that the court's instructions on this defense requires seven pages for transcription."

We have read all the instructions given by the trial court on the subject of insanity, and we agree with appellant's counsel that not one of them, taken alone, is erroneous, but we cannot agree with counsel for appellant that the mere giving of several instructions, all of which are correct, constitutes reversible error. If all of the instructions taken singly are correct, it cannot logically follow that they are erroneous when taken as a whole. Instructions on the subject of insanity are necessarily somewhat longer than those usually given upon other subjects, but this lays no predicate for assignment of error. It would serve no useful purpose to set forth the instructions on the subject of insanity given in this case, and we will content ourselves with simply stating that a careful reading thereof shows that they are only the instructions which have been approved time without number, where the defense of insanity has been interposed.

Upon the hearing of this cause on appeal, it was suggested by the Attorney General that this court has no jurisdiction by reason of a failure of the appellant to comply with the provisions of section 1247 of the Penal

Code. There appears to be considerable merit in this contention, but as there appears to be no merit in the appeal, it does not seem necessary to prolong this opinion by a consideration thereof. A judgment of dismissal or affirmance will accomplish the same results. It is therefore ordered that the judgment and order appealed from be and the same are hereby affirmed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

82 Cal. App. 382

**FELTON WATER CO. v. SUPERIOR COURT
IN AND FOR SANTA CRUZ COUNTY
et al. (Civ. 5840.)**

District Court of Appeal, First District, Division 1, California. April 18, 1927.

1. Eminent domain ⇨187—Right of water company to possess easement sought in condemnation proceedings follows entry of judgment (Const. art. 1, § 14; Code Civ. Proc. § 1254).

Water company, seeking to condemn an easement, namely, the right to divert water from a brook, not being corporation within class mentioned in Const. art. 1, § 14, has no right to possess easement sought until after entry of judgment in the condemnation proceeding, as provided by Code Civ. Proc. § 1254.

2. Eminent domain ⇨274(4)—Taking private property before amount of compensation is ascertained will be enjoined.

Taking private property in condemnation proceedings before the amount of the compensation has been determined will be enjoined.

3. Dedication ⇨20(1) — Eminent domain ⇨270—Property owner's allowing property to be devoted to public use is considered "dedication," and his only remedy is action for compensation.

Where property owner has with knowledge and without protest permitted the property to be devoted to a public use, his conduct will be regarded as a "dedication" of the property to such use, and his only remedy will be an action for compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dedication.]

4. Eminent domain ⇨187—Superior court, in condemnation proceeding, can prevent plaintiff from taking possession of property until authorizing order is made (Code Civ. Proc. § 1256).

In view of Code Civ. Proc. § 1256, the superior court, in proceeding to condemn property for a public use, has jurisdiction, on motion, to prevent plaintiff from taking possession of the property sought to be condemned until an order is made authorizing it.

5. Eminent domain ⇨172—Where court has jurisdiction of subject and parties in condemnation proceedings, its decision, though erroneous, is an exercise of such jurisdiction.

Where court has jurisdiction in condemnation proceedings both of the parties and of the subject of the litigation, its conclusion as to whether the facts alleged or the pleadings in form are sufficient to warrant the relief sought, though erroneous, will nevertheless be an exercise of such jurisdiction.

6. Eminent domain ⇨172—That all relief prayed for in condemnation proceedings is not legally allowable does not deprive superior court of jurisdiction.

Fact that relief cannot be granted defendants in condemnation proceedings to the extent prayed for will not deprive the court of jurisdiction to determine and grant the relief to which they may be entitled.

7. Prohibition ⇨5(1), 11—Writ of prohibition will not lie to prevent subordinate court from deciding erroneously or to prescribe what court shall consider in case within its jurisdiction.

A writ of prohibition will not lie to prevent a subordinate court from deciding erroneously, and the writ cannot be used to prescribe what a court shall or shall not consider in a matter before it and within its jurisdiction.

Application for writ of prohibition by the Felton Water Company against the Superior Court in and for the County of Santa Cruz and others to arrest further proceedings on an order to show cause why petitioner should not be restrained from obstructing the flow and diverting the waters of a stream. Writ denied.

Peck, Bunker & Peck, of Oakland, for petitioner.

Ralph Smith, of Santa Cruz, and R. T. Harding, of San Francisco, for respondents.

CASHIN, J. An application for a writ of prohibition to arrest further proceedings in respondent court on an order requiring petitioner to show cause why it should not be restrained pending the trial of an action filed therein from further obstructing the flow and diverting the waters of a stream.

Petitioner, a corporation, was organized in 1889 for the purpose of supplying the inhabitants of the town of Felton and its vicinity with water for domestic and other uses. An action was filed in August, 1926, by petitioner in respondent court against Forest Lakes Mutual Water Company, Seminary Avenue Land Company, Santa Cruz Land Title Company, corporations, George H. Fetherston, and others to condemn an easement, to wit, the right to take, divert, and carry away as against the lands of defendants 150,000 gallons of water per day from Limestone brook, which is a branch of a stream called Gold gulch in Santa Cruz county, with the right to sell the same to the general public and to the inhab-

itants of the town of Felton for domestic and other uses at such rentals and charges as are fixed by the railroad commission of the state of California. The complaint alleges that at all the times since the month of June, 1925, plaintiff has diverted from the stream, when there was that quantity flowing therein, approximately 86,000 gallons of water per day; that the diversion was made by means of a dam constructed on the property of defendant Santa Cruz Land Title Company, and that the water has been taken for sale, rental, and distribution to the inhabitants of the town of Felton and its vicinity and to the inhabitants of the lands owned by the defendant last named, to be used for domestic and irrigation purposes; that the dam, pipe lines, and other instrumentalities used for that purpose have been devoted by plaintiff to a public use, namely, for the diversion and storage of the waters of the stream for sale and distribution to the inhabitants mentioned; that the right sought to be acquired is necessary to the public use referred to, in that the water which plaintiff has heretofore diverted is insufficient to supply the demands made upon plaintiff for the above purposes.

The foregoing averments, except those of a previous diversion of a portion of the stream and the quantity so diverted, were traversed by an answer filed by Forest Lakes Mutual Water Company, Seminary Avenue Land Company, and others of the defendants, not including Santa Cruz Land Title Company or George H. Fetherston. The answer alleges that none of the water was diverted by plaintiff prior to October, 1925, and that none has been diverted since, except as the agent and instrumentality of defendant Fetherston; that the latter is the owner of all the stock of petitioner except the qualifying shares thereof held by certain of its directors; and that all the water diverted by petitioner since the last-mentioned date has been diverted for the purpose of aiding Fetherston in the development and sale of his private lands and not for a public use nor for the benefit of the public; that the town of Felton is no longer a municipal corporation; and that the purpose of the proceeding is to acquire water, not for a public use, but for the purpose of maintaining swimming tanks, fish ponds, and otherwise beautifying the private property of Fetherston. The answer also contains allegations by way of special defense to the action which in substance are realleged in the pleading denominated a cross-complaint made a part thereof, in which latter pleading defendants Seminary Avenue Land Company and Forest Lakes Mutual Water Company, as against petitioner and defendant George H. Fetherston, aver the ownership in Seminary Avenue Land Company of certain lands described in the complaint, with the water and water rights appurtenant thereto which

are sought to be condemned; that a portion of these lands are riparian to the stream, and have been subdivided into lots and blocks, and large sums invested in the construction of a water system for supplying the present owners and prospective purchasers thereof with water from the stream for domestic and other purposes; that Forest Lakes Mutual Company was organized for the more convenient handling of the water rights owned by Seminary Avenue Land Company, which were conveyed to the former for the purpose of distributing the waters of the stream as a public use to the lot owners mentioned; that, in an action brought in respondent court by these defendants against Santa Cruz Land Title Company, George Fetherston, and others, not including petitioner, it was found and adjudged that the lands owned by Seminary Avenue Land Company were, and that the lands owned by Fetherston described in the complaint were not, riparian to the stream; that Fetherston was the owner of substantially the whole of the capital stock of petitioner, and that the latter was the agent and instrumentality of Fetherston in diverting and receiving from Fetherston the waters diverted by him from the stream; that Santa Cruz Land Company, Fetherston, and their agents particularly the petitioner, were therein enjoined from obstructing or diverting the flow of the stream at any point above the lands owned by Seminary Avenue Land Company or within the boundaries of the lands owned by Fetherston; that Fetherston and petitioner, since the entry of said judgment, and in violation of the injunction, and without the consent of defendants named, have continuously diverted large quantities of said water, and that petitioner intends and threatens to divert in addition thereto the 150,000 gallons thereof per day sought to be condemned without any judgment of condemnation having been given or any compensation awarded or paid.

This pleading concludes with a prayer for damages and that petitioner be restrained pending the trial of the action from taking any part of the property owned by these defendants and sought to be condemned.

A motion to strike out portions of the pleading filed by defendants was denied, and a demurrer thereto was overruled. The motion, following the filing of which the order to show cause was issued, was based on the answer and cross-complaint mentioned, and an affidavit served and filed.

Petitioner contends that respondent court is without jurisdiction to grant affirmative relief to a defendant in a condemnation proceeding or to entertain an application therefor.

[1-4] It is provided by section 14 of article 1 of the Constitution that private property shall not be taken or damaged for public use without just compensation being first made to or paid into court for the owner, further

provision being made therein for the immediate taking and use of property sought to be condemned by the state, a county, or certain enumerated corporations following the commencement of the action upon giving security for the payment of damages. Petitioner is not a corporation of the class mentioned in the section, and its right to the possession of the easement sought to be condemned will, as provided by section 1254 of the Code of Civil Procedure, depend upon and follow the entry of a judgment in the pending proceeding. The taking of private property before the amount of the compensation is ascertained will be enjoined (*Grigsby v. Burnett*, 31 Cal. 406; *Myers v. Daubenbiss*, 84 Cal. 1, 23 P. 1027; *Haynes v. Indio Levee Dist.*, 46 Cal. App. 436, 189 P. 475; *Marblehead Land Co. v. Superior Court*, 60 Cal. App. 644, 213 P. 718; *Stone v. Cordua Irr. Dist.*, 72 Cal. App. 331, 237 P. 554), unless the owner with knowledge has suffered without protest the property to be devoted to a public use by one engaged in administering such use, in which case his conduct will be regarded as a dedication of the property to such use, and his only remedy will be an action for compensation (*Katz v. Walkinshaw*, 141 Cal. 116, 136, 70 p. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; *Gurnsey v. Northern Cal. Power Co.*, 160 Cal. 701, 117 P. 906, 36 L. R. A. [N. S.] 185; *Miller & Lux v. Enterprise C. & L. Co.*, 169 Cal. 415, 147 P. 567). A proceeding to condemn property for a public use is a special proceeding in the superior court; and, except as otherwise provided, the provisions of part 2 of the Code of Civil Procedure are applicable to and constitute the rules of practice in such proceedings. Section 1256, Code Civ. Proc. The court in such a proceeding has jurisdiction on motion to prevent the plaintiff from taking possession of the property sought to be condemned until an order is made authorizing it. In *re Bryann*, 65 Cal. 375, 4 P. 304; *Neale v. Superior Court*, 77 Cal. 28, 18 P. 790. Moreover, it is invested with jurisdiction of all special proceedings not otherwise provided for, and in conducting such proceedings exercises the usual and ordinary powers in disposing of the issues necessarily involved, and may exercise the implied power to do all which is necessarily incident to the authorized proceeding. *City of Los Angeles v. Romero*, 124 Cal. 597, 57 P. 585.

[5] In the pending proceeding the court has jurisdiction both of the parties and of the subject of the litigation; and in the exercise of its power to hear and determine the issues

necessarily involved has the incidental power to prevent the plaintiff from taking possession prior to the entry of judgment. In *re Bryann*, supra; *Neale v. Superior Court*, supra. Having this power in a proper case, its conclusion as to whether the facts alleged or the pleadings in form are sufficient to warrant the relief sought, though erroneous, will nevertheless be an exercise of jurisdiction. *Amos v. Superior Court*, 196 Cal. 677, 239 P. 317; *Cassidy v. Cannon*, 18 Cal. App. 426, 123 P. 358, 359; *Kelsey v. Superior Court*, 40 Cal. App. 229, 180 P. 662; *McMorry v. Superior Court*, 54 Cal. App. 76, 201 P. 797.

[6, 7] The motion and order require petitioner to show cause why it should not be restrained from diverting the waters of the stream so as to interfere with or obstruct the flow thereof within the boundaries of certain described land. Petitioner alleges that before the filing of the action it commenced to divert, and is now diverting, certain of these waters, which have been impressed with a public use; but whether this portion is a part of that sought to be condemned does not appear. In *San Diego Land & Town Co. v. Neale*, 78 Cal. 80, 20 P. 372, 3 L. R. A. 83, an order made in a proceeding to condemn, requiring the plaintiff to restore property the subject of the litigation, possession of which had been taken by the plaintiff during the pendency of the proceedings without paying into court the compensation awarded the defendant, was reversed on appeal; it being held that relief must be sought in an independent proceeding. Should it appear on the hearing of the motion and order to show cause that as to a portion of the flow now being diverted defendants are entitled only to compensatory relief, or as to such portion the facts shown bring the case within the decision last cited, the fact that defendants have sought relief which to the extent prayed for cannot legally be granted will not deprive the court of the power to determine and grant the relief to which they may be entitled. A writ of prohibition will not lie to prevent a subordinate court from deciding erroneously, and the writ cannot be used to prescribe what a court shall or shall not consider in a matter before it and within its jurisdiction. *Wreden v. Superior Court*, 55 Cal. 504; *Van Hoosier v. Railroad Commission*, 189 Cal. 228, 207 P. 903.

For the foregoing reasons, the writ is denied.

We concur: TYLER, P. J.; KNIGHT, J.

82 Cal. App. 691

BIRD v. MURPHY et al. (Civ. 3218.)*

District Court of Appeal, Third District, California. May 3, 1927.

Hearing Denied by Supreme Court June 30, 1927.

1. Fraudulent conveyances $\Rightarrow$ 298(3)—Evidence warranted finding that conveyances to wife and from wife to plaintiff were not made to defraud judgment creditor.

In action to quiet title, evidence held to warrant finding that conveyance of lots from grantor to wife, in consideration of advances made to grantor, and from wife to plaintiff, were not made to defraud grantor's daughter having judgment against grantor for maintenance.

2. Judgment $\Rightarrow$ 762—Allowance payable in installments during indefinite period under judgment for maintenance does not become lien on real property, in absence of provision to that effect (Code Civ. Proc. § 671).

In absence of provision in judgment for maintenance to that effect, an allowance payable in monthly installments during an indefinite period of time does not become a lien on real property, Code Civ. Proc. § 671, having no application to such judgments.

Appeal from Superior Court, San Joaquin County; J. C. Needham, Judge.

Action by Eugenie R. Bird, executrix of the estate of Dan W. Bird, deceased, against Lulu Mignon Murphy, in which S. S. Murphy and another were made cross-defendants. Judgment for plaintiff, and defendant appeals. Affirmed.

A. P. Hayne and B. M. Bainbridge, both of Stockton, for appellant.

J. R. Cronin, of Stockton, for respondents.

FINCH, P. J. Judgment was entered herein quieting plaintiff's title to two lots in the town of Lodi. The defendant has appealed from the judgment. A prior judgment in the action in favor of the plaintiff was reversed on the ground that the court failed to find upon the defendant's allegation that the conveyance of the lots to plaintiff was fraudulent. *Bird v. Murphy*, 72 Cal. App. 39, 236 P. 154. On the retrial of the case the parties stipulated that the case be submitted upon the transcript of the evidence given at the former trial. The facts and circumstances out of which the controversy arose are stated in the opinion filed herein on the former appeal. It is there said: "These circumstances furnish at least some evidence of a fraudulent conveyance." The evidence given to the contrary was not stated, the only question for determination being whether there was sufficient evidence of fraud to require a finding thereon.

[1] As stated in the former opinion, the defendant, in an action for maintenance, was given judgment against her father, S. S. Murphy, July 2, 1914. Thereafter, and before the

judgment was docketed, Murphy conveyed the lots in question to his wife, who, after the judgment was docketed, conveyed the lots to Bird. Murphy testified that he was a retired minister, a veteran of the Civil War, and that at the time of the conveyance of the lots to his wife he had no other property and no income except a small pension; that he did not make the conveyance to defeat the judgment for maintenance, but that he conveyed the property to his wife in consideration of advances of money which she had made to him at different times; that some of "these advances were as much as \$1,200"; that the advances were "a good deal more than those lots were worth." A witness for defendant testified that at the time of the conveyance the lots were each worth \$200 or \$250. Mrs. Murphy testified that the conveyance to her was made in consideration of advances made by her of money which she had prior to her marriage to Murphy; that "what we had when we were married belonged to me, not to my husband." Bird testified that he bought the lots from Mrs. Murphy for \$500, for which he gave his promissory note; that he knew nothing about the judgment for maintenance in favor of defendant against her father at the time of the purchase; and that if he had then known "about that trouble" between them he would not have made the purchase. The court found that neither the conveyance from Murphy to his wife nor the latter's conveyance to Bird was fraudulent. It cannot be held that the evidence does not warrant the finding. The most that can be said is that a finding either way upon the issue of fraud would be conclusive on appeal. Even if the conveyance from Murphy to his wife were held to be fraudulent, the defendant could not succeed in this action without showing that the transfer to Bird was fraudulent and that he was a party to the fraud.

[2] Appellant contends that, assuming the conveyance from Murphy to his wife to be fraudulent, the judgment for maintenance was a lien on the lots at the time of Bird's purchase thereof, under the provisions of section 671 of the Code of Civil Procedure. That judgment required Murphy to pay his daughter \$15 a month for her maintenance, and provided that "the court reserves the right to modify this judgment at any time upon application of either party." The payments were not made a lien or charge upon any property. While there are statements in some of the decisions to the effect that such a judgment constitutes a lien upon the real property of the judgment debtor, no case has been cited in which it is so decided. Appellant relies on *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1083. But the judgment involved therein expressly made the installment payments a lien "on all the real estate owned by defendant, Goff." The same is true of *Isaacs v. Isaacs*, 115 Va. 562, 79 S. E.

1072, Id., 117 Va. 730, 86 S. E. 105, L. R. A. 1916B, 648. The statutes of some states expressly make judgments for alimony liens upon the real estate of judgment debtors. Decisions under such statutes are of no value in determining the question under consideration. It has been decided in a number of states that judgments for alimony, payable in installments and continuing indefinitely, do not constitute liens upon real estate. *Enoch v. Walter*, 209 Ill. App. 619; *Scott v. Scott*, 80 Kan. 489, 103 P. 1005, 25 L. R. A. (N. S.) 132, 133 Am. St. Rep. 217, 18 Ann. Cas. 564; *McGill v. McGill*, 101 Kan. 324, 166 P. 501; *Fey v. Johns*, 112 Kan. 385, 210 P. 1107; *Campbell v. Trosper*, 108 Ky. 602, 57 S. W. 245; *Olin v. Hungerford*, 10 Ohio, 268; *Mansfield v. Hill*, 56 Or. 400, 107 P. 471, 108 P. 1007; *Kerr v. Kerr*, 216 Pa. 641, 66 A. 107, 9 Ann. Cas. 89; *Beesley v. Badger* (Utah) 240 P. 458. It has always been held in this state that a decree in favor of a wife for maintenance or alimony may, by the terms of the decree itself, make the allowance a charge or lien on the husband's real property, or any part thereof. In *Gaston v. Gaston*, 114 Cal. 542, 546, 46 P. 609, 55 Am. St. Rep. 86, it is said that such a lien "does not derive its force" from section 671 of the Code of Civil Procedure. In *Robinson v. Robinson*, 79 Cal. 511, 515, 21 P. 1095, 1096, it is said that in case of an allowance payable in installments, "it would be possible, where no security had been required, for the husband to dispose of all his property, and then go away or die, and thus defeat the allowance altogether." It may be said of the decisions in this state generally that, while they do not decide the question here under consideration, it is to be implied therefrom that, in the absence of a provision in a judgment to that effect, an allowance payable in installments during an indefinite period of time does not become a lien on real property, and that section 671 has no application to such judgments. That section provides that:

"From the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases."

If appellant's contention be sound, then a judgment such as that involved herein, however small, becomes a lien on the judgment debtor's real estate, however extensive; and it is not apparent in what manner or by what procedure the lien can be released or discharged except by the voluntary act of the judgment creditor. The amount of such a judgment "for purposes of payment and discharge could not be ascertained because of the uncertain and indefinite period of the installments." *Beesley v. Badger*, supra. The case is altogether different where the decree

itself creates a lien, because it is then within the power of the court to limit the lien to specific property, and, where jurisdiction is reserved, to release such property from the lien and require other security in lieu thereof.

The judgment is affirmed.

We concur: HART, J.; THOMPSON, Justice pro tem.

MERCANTILE ACCEPTANCE CO. v. FRANK et al. (Civ. 4276.)★

District Court of Appeal, Second District, Division 2, California. May 2, 1927.

Hearing Granted by Supreme Court June 30, 1927.

Chattel mortgages §89—Mortgage lien on automobile created in another state follows car, when brought into California without notice to mortgagee (Civ. Code, § 2957.)

Mortgage lien on automobile, created in Minnesota, follows car into California, where it was brought without notice to mortgagee, notwithstanding failure to comply with Civ. Code, § 2957, and to record mortgage in California.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the Mercantile Acceptance Company against Albert L. Frank and others to enforce a chattel mortgage. Judgment for defendants, and plaintiff appeals. Reversed.

Lewinson & Barnhill, of Los Angeles, C. W. Mullins, of Seattle, Wash., and E. E. Morris, of Los Angeles, for appellant.

L. G. Shelton, of Glendora, for respondents Caulfield and Kling.

Charles L. Evans and Arthur Wright, both of Los Angeles, for respondents Trobert, Herberger and Myers.

THOMPSON, J. This appeal is prosecuted from a judgment for defendants and respondents, after the general demurrer of the appearing defendants, who are the respondents here, had been sustained without leave to amend.

The complaint alleges the execution by the defendant Albert L. Frank, who was not served with process and did not appear, of a chattel mortgage to plaintiff's assignor, upon the Studebaker automobile sought to be repossessed in the action from defendants, who it is alleged assert ownership by purchase, claiming to have purchased without notice of the mortgage. The complaint further alleges the execution and filing of the mortgage in accordance with the laws of Minnesota, which are set out in detail, and the removal of the automobile to California by Frank without the knowledge of the mortgagee. It also alleges the breach of the provisions of the mortgage entitling the mortgagee to possession, and sets out the mortgage in hæc

verba. It does not appear that the mortgage was recorded in California. The instrument discloses that it was not supported by the affidavits of the mortgagor and mortgagee, as required by the laws of California.

The sole question argued by counsel is whether the mortgage lien created in Minnesota follows the automobile into California, when it is brought here without notice to the mortgagee, and without compliance with the statutes of California. It was recently held in the case of *Motor Investment Company v. Breslauer*, 64 Cal. App. 230, 221 P. 700, that the lien of a chattel mortgage, valid by the laws of the state where executed, and where the personalty is situated at the time of its execution, is sufficient against incumbrances in good faith. The decision is based upon the rule of comity, and although the mortgage in question there was recorded in California, after discovery of the surreptitious removal of the mortgaged property into California, the mortgage was fatally defective according to the laws of California, because of not being accompanied by the affidavits of good faith required by section 2957 of the Civil Code. This authority is squarely in point and is supported by the weight of authority.

We are mindful of the fact that originally chattel mortgages were not sufficient unless attended by a change in possession (*Ruggles v. Cannedy*, 127 Cal. 290, 53 P. 911, 59 P. 827, 46 L. R. A. 371), and of the statute which requires recordation of a chattel mortgage in the county to which mortgaged property may be removed from another county of this state within 30 days, providing that for failure thereof the lien shall not be valid against creditors or purchasers in good faith (*Hopper v. Keys*, 152 Cal. 488, 92 P. 1017). Yet these items are not necessarily inconsistent with the result reached in the case of *Motor Investment Co. v. Breslauer*, supra. We are satisfied with the rule there announced.

Judgment reversed.

We concur: WORKS, P. J.; JOHNSON, Justice pro tem.

DRAPER v. HELLMAN COMMERCIAL TRUST & SAVINGS BANK.★
(Civ. 4662.)

District Court of Appeal, Second District, Division 1, California. April 29, 1927.

Hearing Granted by Supreme Court June 27, 1927.

1. Libel and slander §123(2)—In libel action, letter and telegram connected as parts of one transaction may be construed by jury as one publication.

Where bank wrote letter to plaintiff's employer suggesting that plaintiff was fugitive from justice, plaintiff's employer made inquiry, and bank directed telegram to be sent charg-

ing plaintiff with taking money while in its employ as bank teller, held that in libel action letter and telegram might be construed as one publication.

2. Libel and slander §7(1)—Publication imputing commission of crime not openly charged is "libel" if untrue and unprivileged.

Where publication and surrounding circumstances show that writer intended that it should be understood that person spoken of had committed crime, and such publication was made only to collect money, it is libelous if untrue and unprivileged though a direct charge is not made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Libel.]

3. Libel and slander §44(3)—Where publication insinuating that bank teller was fugitive from justice incited inquiry, answer charging dishonesty held not privileged.

Where bank wrote a letter to plaintiff's employer suggesting that plaintiff was a fugitive from justice and incited inquiry from plaintiff's employer, answer charging that plaintiff, while employed as bank teller had taken money held not privileged communication.

4. Libel and slander §6(2)—Publication implying dishonesty though not charging punishable offense is libelous if falsely and maliciously tending to subject person to public distrust.

A written publication which implies or may be generally understood to imply dishonesty, even though not charging a punishable offense, is libelous if it falsely and maliciously tends to subject the party to whom it refers to public distrust.

5. Libel and slander §123(1)—Whether allegations of innuendo in libel action are true held for jury.

Whether the evidence in a libel action supported the allegations of the innuendo held for jury; especially in view of defendant's requested instruction that the jury were to determine whether the publication was in fact libelous.

6. Libel and slander §4—Words written need not be written with malice to constitute "libel" (Civ. Code, § 45).

Under Civ. Code, § 45, malice is not necessary to the proof of libel if the words written are false and unprivileged, and if they expose a person to hatred or obloquy, or have a tendency to injure him in his occupation.

7. Libel and slander §4—Malice may be established by showing libelous publication to be without just cause.

Although actual ill will against plaintiff is not established, malice in libel action may be shown by proving a publication to be without just cause or reason.

8. Evidence §168—Admission of secondary evidence to prove telegram in libel action held not prejudicial error, where defendant's answer admitted sending telegram as alleged.

There was no prejudicial error in admitting secondary evidence to prove the contents of a telegram in a libel suit, where defendant's answer admitted sending the telegram as alleged

in plaintiff's complaint, and further alleged that it had reasonable cause to believe the charges therein contained were true.

9. Libel and slander ⚡19—In libel action, publication should be construed in light of surrounding circumstances.

Where publication is alleged to be libelous, it should be construed in the light of the circumstances of the situation to which it relates.

10. Libel and slander ⚡19—Publication alleged to be libelous must be construed as a whole.

To determine whether an article is libelous, it must be construed as a whole.

11. Libel and slander ⚡86(2)—Pleading by innuendo is necessary where publication is not libelous per se.

If a publication is not libelous per se, plaintiff in libel action must plead by innuendo.

12. Libel and slander ⚡100(6)—Where defendant in libel action denied plaintiff's good reputation, admission of evidence of plaintiff's reputation held not prejudicial error, though denial was on alleged lack of information and belief.

Where defendant in libel action denied plaintiff's allegation that prior to the libel plaintiff had a good reputation, though such denial was on alleged lack of information and belief, plaintiff's reputation was thereby put in issue, and admission of evidence of his reputation was not prejudicial error.

13. Libel and slander ⚡100(2)—Where defendant in libel action denied damage to plaintiff's business as bank teller, admission of evidence of damage held not prejudicial error, though denial was on alleged lack of information and belief.

Where plaintiff in libel action alleged that publication had a tendency to or did injure his business, and that defendant denied this, though denial was on alleged lack of information and belief, damage to plaintiff's business was put in issue and admission of evidence of such damage was not prejudicial error.

14. Libel and slander ⚡120(2)—Punitive damages in libel action held not allowable, where complaint did not allege actual malice.

Where complaint in libel action did not allege actual malice as to letters and telegram upon which jury's verdict was based, punitive damages held not allowable.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by C. M. Draper against the Hellman Commercial Trust & Savings Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Page & Hurt, Eugene D. Williams, and Albert M. Cross, all of Los Angeles, for appellant.

W. I. Gilbert, Raymond L. Haight, and Allen W. Ashburn, all of Los Angeles, for respondent.

YORK, J. This is an action for damages for libel. A trial was had before a jury and verdict was rendered for plaintiff for \$15,000 actual and \$5,000 punitive damages, and judgment was entered in accordance with such verdict. Defendant moved for a new trial, and after hearing such motion the court decided to grant same unless plaintiff would agree to remit \$10,000 of such judgment. Upon plaintiff complying therewith, from the judgment so reduced defendant appealed.

Among the facts of the case which the jury impliedly found from the evidence were: That plaintiff, a man about 27 years of age, came to Los Angeles from Brantford, Canada, and on the 20th day of April, 1921, entered into the employment of defendant, who was conducting a banking business in Los Angeles. He became a teller in defendant's bank and worked for defendant until the 15th day of October, 1921, when he resigned. He notified defendant that he intended to do so about two weeks prior to that date. On the last day of such service plaintiff worked until nearly 12 o'clock midnight adjusting his accounts. He was assisted by defendant's night teller, one Fulkerson. During the last day of plaintiff's service for defendant he received for deposit from two depositors \$100 each, one of which he entered in the proper deposit book of such depositor, and to the other he gave a duplicate deposit slip evidencing such deposit. The balance in his hands at the close of the day, together with his deposit slips, were turned over to Fulkerson for the defendant bank in the usual course of business, but neither the money nor the deposit slips for these two \$100 deposits were ever received by the bank, or at least placed with its deposits. The jury evidently believed that plaintiff did not retain any of the money or the deposit slips. The missing money has never been otherwise accounted for. Plaintiff after discontinuing his services to the bank remained in Los Angeles about two weeks and called at the bank to see some of his co-employees and informed them he was going back to his old home in Canada. He returned to Brantford and wrote from there to some of the employees at the defendant's bank. A few days after plaintiff's departure from Los Angeles, defendant discovered that said \$200 had not been accounted for, and found the entries showing the receipt thereof, one being in the handwriting of plaintiff and the teller's sheet bearing the handwriting of Fulkerson, the night teller. Mr. Cohen, a vice president of the defendant bank, acting for the bank and with full authority to do all that he did, then wrote and caused to be signed and transmitted the let-

ter herein set forth. It was his intention to induce plaintiff to pay the bank \$200, which he believed plaintiff had stolen. That letter was as follows:

"Hellman Commercial Trust & Savings Bank.

"Los Angeles, November 16, 1921.

"Manager Staff Department, Head Office, Bank of Montreal, Montreal, Quebec, Canada. Dear Sir: We had in our employ for several months C. M. Draper, who left us on October 31st, and whose references show that he was in the employ of your branch at Brantford, Toronto, for a long time. We have information to the effect that he left to return to your city. We are anxious to learn his present whereabouts and have requested Pinkerton's National Detective Agency to locate him for us. Should he present himself to you we will much appreciate it if you will send us a wire at our expense, telling us where he can be reached. Your attention will oblige,

"Yours very truly, Emanuel B. Lee,
"EC:EM. Vice President."

Cohen employed the Pinkerton Detective Agency ostensibly to assist in locating plaintiff, but the jury was justified in believing that the sole object of Cohen in employing such detective agency was to impress upon plaintiff that the defendant was intending to make a criminal charge against plaintiff if he did not voluntarily yield up \$200 to cover said shortage. Mr. Cohen testified that his purpose in writing the letter to the Bank of Montreal was that he thought Draper would admit that he took the money and would pay it back, and that when he employed the Pinkerton Detective Agency he had the same purpose, and any communication he made to such agency was for the same purpose. In view of all of the evidence, the jury were justified in finding that the letter to the Bank of Montreal was intended to incite inquiry by the Montreal bank as to what the inquiry about plaintiff was for and cause embarrassment to the plaintiff and regardless as to whether it would cause the dismissal of plaintiff from service with the Bank of Montreal or cause him embarrassment, distress, or loss. On receiving the foregoing letter, the Bank of Montreal telegraphed to the Hellman Commercial Trust & Savings Bank, asking whether that bank could give reason for requesting Pinkertons to locate plaintiff. Thereafter the bank, through Cohen, caused the Pinkerton Detective Agency to reply to the telegram of the Bank of Montreal, which that agency did in a telegram reading as follows (Plaintiff's Exhibit No. 8):

"San Francisco, Cal., Wed., Nov. 22nd, 1921.

"San Francisco office reports: At 1:40 p. m. the following telegram was received from Los Angeles: 'Hellman Commercial Trust & Savings Bank had teller named C. M. Draper quit there October 15th went to Montreal stop On last day employment received several deposits destroyed deposit slips kept money stop Hellman's wired Bank of Montreal, Montreal, Canada, asking if Draper in their employ advising

we looking for him and received reply from San Francisco branch Bank of Montreal asking for explanation stop You call personally Bank of Montreal immediately explain why inquiry being made regarding Draper Secure present address finis.'"

The bank, in its answer as amended, admits that it caused this telegram to be sent to the Bank of Montreal.

Plaintiff was at once suspended from employment by the said Bank of Montreal, and thereupon plaintiff commenced a telegraphic correspondence with the defendant, sending telegrams as follows:

"Brantford, Ont. 11:45 a 30 1921 Nov. 30 a. m. 9:26 Emanuel Cohen Hellman Commercial Trust & Savings Bank, Sixth and Main Sts. Los Angeles, Calif. Do you or do you not intend replying to my telegrams you know the alternative Draper."

"A 233 A. 15 1921 Nov. 25 a. m. 10:23 Brantford, Ont. 12 42 p. 25. Emanuel Cohen Hellman Commercial Trust and Savings Bank Sixth and Main Sts. Los Angeles, Calif. Unless matter is cleared immediately with Bank of Montreal, Montreal, will enter action against you. C. M. Draper."

Defendant made no reply to either of the communications from plaintiff.

It is claimed by appellant that the court erred in submitting to the jury the question of actual malice as a basis for punitive damages. But the defendant, as well as the plaintiff, asked for instructions on that subject. Among those instructions given at defendant's request, the jury were instructed:

"You are instructed that mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary damages in an action for libel." Instruction X.

"You are instructed that actual malice, or malice in fact, as defined in these instructions, does not arise as a legal presumption from the fact that you may consider the writings in question false and libelous. While it may be inferred from the intrinsic characteristics of an alleged libelous writing, still it is left for you to determine as a fact whether or not the publication complained of was made with such actual malice." Instruction XI.

"You are instructed that the defendant pleaded in this action his privilege by which it is claimed that the writings alleged to have been published by the defendant were privileged. A privileged publication is one made in a communication without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Instruction XXVIII.

A libel is a false and unprivileged publication by writing, which exposes any person to hatred, ridicule or obloquy, or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation.

[1] The letter first written by Cohen, together with the subsequent proceedings and the telegram of the Pinkerton Detective Agency, are so obviously connected together as parts of one transaction that they could, by the jury, have been construed together as constituting substantially one publication. The letter by Cohen to the Montreal bank contained no false statement, but did contain a statement intended to convey suspicions to the prejudice of the plaintiff to inform the Montreal bank that the Hellman bank did not know the address of Draper; that the Hellman bank had deemed it necessary to employ a detective agency to locate him; that finding his address immediately was a matter of so urgent importance that the Hellman bank would pay for a telegram giving the information of Draper's whereabouts. This letter was clearly an implication that Draper, who might have re-entered the employment of the Montreal bank, had become an important object of search and inquiry. The jury could very well find that it was intended to incite an inquiry as to why the Hellman bank was making such an investigation and as to why and in what manner a detective agency had been employed to locate Draper, and why a telegram giving Draper's address was wanted, and such inquiry was forthwith made by said Montreal bank. Then follows the reply, not from the Hellman bank, but from the detective agency, whom the Hellman bank had employed and had directed that it make the reply to such inquiry. It resulted that Draper was informed of the charge of embezzlement or larceny that the Hellman bank was making against him as implied in the letter of inquiry. Draper, who was in the employ of the Bank of Montreal, was suspended and put out of employment. Then Draper sent to defendant bank the foregoing telegrams, to which defendant made no reply.

[2] Whenever it can be collected from the publication and the circumstances connected with its publication that the writer intended that it should be understood that the person spoken of had committed a crime, the publication is libelous if untrue and unprivileged.

[3] Whenever a person by a publication ambiguously insinuates that another person has committed a crime and purposely incites an inquiry as to the meaning of the publication by the person addressed, and in pursuance to such inquiry the person addressed does make the inquiry, the answer to such inquiry so caused which states in plain terms that the person spoken of had committed a crime, is not a privileged communication. Newell on Slander and Libel (3d Ed.) p. 621. If all the statements of the published communication taken together are sufficient to convey the meaning to a reader that a person is suspected of having committed a crime and that a detective has been employed to locate him, and the communication is made only to col-

lect money, the insinuation is sufficient to establish the charge of libelous communication, if the charge is untrue and unprivileged, and it is a libel. Such a publication imputing the commission of a crime not openly charged is actionable.

[4, 5] A written publication which implies or may be generally understood to imply dishonesty, even though not charging a punishable offense, is libelous if it falsely and maliciously tends to subject the party to whom it refers to public distrust. If such a publication is not a libel per se, but is supported by innuendo, it is for the jury to say whether the evidence supports the allegations of innuendo.

In this case, not relying on the assumption that the letter was libelous per se, it was alleged in the complaint "that the words and printing in said letter were intended to mean that the plaintiff had committed some act of a felonious character, and that said plaintiff had concealed his whereabouts from the defendant herein and that said plaintiff was a fugitive from justice." At the request of the defendant, the court instructed the jury that they were to determine whether the publication was in fact libelous. And at the request of plaintiff the court instructed the jury that they were to determine whether the publication was in fact libelous. And at the request of plaintiff, the court instructed the jury that it was for them to determine from all the evidence whether the letter of the defendant to the Bank of Montreal was understood by readers of the letter to mean that the plaintiff had committed some act of felonious character, or that plaintiff had concealed his residence from the defendant, or that plaintiff was a fugitive from justice. Under the instructions given at the request of defendant, the jury could have found from the evidence that the innuendo was true.

[6] It was not necessary to the proof of the libel that the words written should be uttered with malice, if they are false and unprivileged and if they expose a person to hatred, contempt, ridicule, or obloquy, or cause him to be shunned or avoided, or have a tendency to injure him in his occupation. Civ. Code, § 45. Defendant in an action for damages for libel may plead and prove the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages whether he proves justification or not. Code Civ. Proc. § 461. A defendant is liable for what is insinuated, as well as for what is stated explicitly. *Morgan v. Republican Pub. Co.*, 249 Mass. 388, 144 N. E. 221. "It is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that the court can rule, as a matter of law, that the publication is not libelous, and withdraw the case from the jury, or order a verdict for the defendant."

Twombly v. Monroe, 136 Mass. 464, 469. This quoted portion being also quoted by the court in Morgan v. Republican Pub. Co., supra.

[7, 8] Malice may be established by proving a republication to be without just cause or excuse, although actual ill will against plaintiff is not established. *Butler v. Freyman* (Mo. App.) 260 S. W. 523. There was surely no prejudicial error in admitting the evidence concerning the telegram, for in an amendment to defendant's answer it admits as its own act the sending of the telegram as alleged in plaintiff's complaint and alleges that it "had reasonable cause to believe and did believe the said charges to be true." The jury impliedly found, as under the evidence it might do, that the telegram was false, and that in the sending thereof was a careless disregard of the consequences to plaintiff, and that the act was done for the purpose of forcing the payment of money. In such cases, though there may have been no ill will, malice is presumed because of the reckless and wanton disregard of the rights of another. Words may be libelous if they are reasonably susceptible of a defamatory meaning as well as an innocent one. *Oklahoma Pub. Co. v. Kendall*, 96 Okl. 194, 221 P. 762; *Brown v. Tregoe*, 236 N. Y. 497, 142 N. E. 159.

[9, 10] Each publication should be construed in the light of the circumstances of the situation to which it relates. Malice imputed to the publisher of a libel is not necessarily personal ill will, but merely legal malice implied from willfully and wantonly doing an unlawful act which results in injury. *Vicknair v. Daily States Pub. Co.*, 153 La. 677, 96 So. 529. To determine whether an article is libelous, it must be construed as a whole. *Lyon v. Fairweather*, 63 Cal. App. 194, 218 P. 477; *Flaks v. Clarke*, 143 Md. 377, 122 A. 383.

"It is further said that actual malice may be inferred from the publication of a defamatory charge that is false in fact and not within the realm of absolute privilege defined in subdivisions 1 and 2 of section 47 [Civ. Code]. Actual malice may be inferred by the court or jury where the charge is false and is libelous per se and the defendant publishes it without having probable cause for believing it to be true, and such inference is sufficient to defeat the defense of qualified privilege. *Smedley v. Soule*, 125 Mich. 192, 84 N. W. 63; *Quinn v. Scott*, 22 Minn. 456; *Carpenter v. Bailey*, 53 N. H. 590." *Snively v. Record Publishing Co.*, 185 Cal. 565, 577, 198 P. 1, 6.

[11] If the publication was not libelous per se, then the pleading by innuendo was necessary.

[12, 13] In the second paragraph of defendant's answer was set out a denial, it is true, upon alleged lack of information or belief, but nevertheless a denial that prior "to the committing of the several or any of the acts alleged to have been committed by the de-

fendant, or at any time or at all, was always or at all reputed, estimated or accepted by or among all or any of his neighbors, or others to whom he was known, to be a person of good name, fame, honesty or credit. * * * Defendant also in its answer denies that the publication had a tendency to or did or does injure his "good name, reputation, or business." *Scott v. Times-Mirror Co.*, 178 Cal. 691, 174 P. 312. Therefore plaintiff's reputation and the damage to his reputation and business were put in issue by the pleadings, and therefore there was no prejudicial error in the rulings of the court in the admission of evidence to establish good reputation before the publication of the libel and injury to that reputation by the publication, with its incidental injury to his business, he having always been engaged in the banking business as a teller handling money, a business possibly more susceptible than the average business to the effects of a good or bad reputation. It was said in *Scott v. Times-Mirror Co.*, 178 Cal. 688, 691, 692, 174 P. 312, 313:

"In other words, it is an action by plaintiff for damage for that form of libel which, according to the definition found in section 45 of the Civil Code, tends 'to injure him in his occupation.' It is and has always been true that every suitor or party to an action or proceeding in a court of justice comes into court with the presumption of a good reputation as an individual, upon which presumption he is entitled, and in some cases is bound to rely, until his said reputation as such has been assailed. This rule is well stated and its application to libel cases clearly defined, with the authorities supporting it fully collated, in the case of *Davis v. Hearst*, 160 Cal. 143 (116 P. 530). While this is, therefore, the undoubted rule in respect to the reputation of the litigant as an individual, we know of no such rule nor of any such presumption with respect to the reputation of a litigant in his capacity as an attorney at law or in any other business or professional capacity, and we are cited to no cases which pretend to assert the existence of such a presumption. On the contrary, our attention is directed to the case of *Aston v. Examiner Printing Co.* [D. C.] 226 F. 496, which was an action for a libel uttered against the plaintiff in his profession as an engineer. The plaintiff offered evidence of his good reputation in that capacity, which was admitted over the defendant's objection. In passing upon the question thus presented, Judge Van Fleet said: 'It is at once apparent, I think, not only from the form of the questions themselves, although somewhat inartificial, but from the general nature of the subject about which the witness was being examined, that the inquiry was not addressed to the personal character or reputation of the plaintiff, of which complaint was made in *Davis v. Hearst*, 160 Cal. 185 (116 P. 530), relied on by plaintiff, but was solely with reference to his standing as an engineer, his professional character, as to the propriety of which there can be no question.'

"It would seem to be obvious that such a presumption as the appellant contends for could

not exist, since an individual may have a perfectly good reputation as such and yet may have no reputation at all as a lawyer or doctor or engineer, though he may also be such, for the simple reason that he has not practiced his profession to the extent or with the degree of success necessary to acquire such a reputation. It would also seem to be obvious that the plaintiff would not have been entitled to claim and recover damages for an injury to his professional reputation as an attorney at law without alleging in his complaint that he was such attorney at law and that he had acquired a reputation as such. If this be true, it would follow that the rule of pleading in ordinary libel cases to the effect that it is not necessary for the plaintiff in the first instance to allege his possession of a good reputation could have no application to a complaint in which the pleader seeks to recover damages for injuries to his reputation in respect to a particular trade, occupation, or profession. In the latter case the averment would be essential and its denial would raise a material issue so as to require affirmative proof on the part of the plaintiff as to his possession of the particular kind of business or professional reputation which he asserted had been injured by the publication. In the instant case the plaintiff did allege his possession of a professional reputation as an attorney at law. The defendant denied specifically the plaintiff's averments in that regard. A material issue was thus presented, upon which the plaintiff had the affirmative and was bound to offer evidence. He did so and the trial court properly admitted the evidence thus offered. * * *

In the case at bar, if defendant had not desired to controvert or meet the allegation of the complaint as to the good reputation and business standing of the plaintiff, it could have moved to strike out that portion of the complaint as to general reputation, or could have ignored that allegation and then objected to evidence of general reputation on the ground the same was admitted, but it elected to put it in issue by making a denial.

The verdict of the jury was reviewed by the trial court, and the award by it was modified in accordance with the opinion of the trial court. It is settled law that passion or prejudice of a jury cannot be established by the action of the trial court in requiring a reduction of the judgment to correspond with the court's opinion as to what the verdict should have been. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 254, 116 P. 513; *Lynch v. Southern Pacific Co.*, 24 Cal. App. 112, 140 P. 298. The actual damage to a plaintiff by the publication of a libel cannot be accurately estimated, and punitive damages are therefore largely in the discretion of the jury or the court.

We find no improper ruling or instruction which adversely affects the substantial rights of the defendant.

Judgment affirmed.

CONREY, P. J. [14] I concur in the judgment. It is necessary to say, however, that in my opinion the plaintiff is not enti-

tled to any judgment awarding exemplary or punitive damages. The complaint, although drawn in one count, sets out three instruments, all alleged to be libelous. The letter of November 16 did not contain anything at all susceptible of a libelous interpretation. But it was framed in words which invited inquiry. When that inquiry came, the questions were answered, through the detective agency, by the telegram of November 22. The argument of appellant, in support of its contention that the court erred in allowing the contents of the telegram to be proved by secondary evidence, is quite convincing. But in view of the defendant's answer, as amended by it on the first day of the trial, I think that there could have been no prejudicial error. For by that amendment the defendant admitted, in effect, that said telegram was by it, or by its authority, communicated to the Bank of Montreal. The amendment admits that, the Bank of Montreal having made its inquiry, "thereafter, if at all, and in response to said inquiry, and not otherwise, and without malice or intent to injure the plaintiff, there was, as defendant is informed and believes and therefore alleges the fact to be, stated to the Bank of Montreal and to no other person, the matter set forth in paragraphs V and VI of the complaint." The telegram was set out in said paragraph V. The amendment then says that the defendant "had reasonable cause to believe and did believe the said charge to be true, and did not in any other way publish the same." While this was not a direct and frank admission of the essential fact of the sending of the telegram, it does in substance amount to the same thing. And as for the telegram itself, it contains charges against the plaintiff which, if false and unprivileged, are libelous on their face. I agree with Mr. Justice YORK in his conclusion that under the circumstances which led up to the telegram, that communication was unprivileged. That it was false the verdict implies, and there is sufficient evidence to justify the jury in so finding.

It follows that the plaintiff was entitled to recover compensatory damages at least. There remains for consideration the award of punitive damages. "The plaintiff cannot recover punitive damages without pleading and proof of actual malice." (By the Supreme Court, in denying rehearing, in *Longworth v. Curson*, 56 Cal. App. 489, 498, 206 P. 779.) This actual malice is the malice of evil intention. The complaint in this action did not allege actual malice in relation to the letter of November 16 nor in relation to the telegram of November 22d. As to those documents the complaint did allege that the defendant "willfully and maliciously" wrote the letter, and that thereafter the defendant, through its agent, sent the telegram. This is not an allegation of intent or design to injure the plaintiff. In contrast with this lan-

guage, we have in the complaint an allegation of actual malice in sending a letter or telegram (the third document set out in the complaint) on the 15th of December, 1921. Of this "letter or telegram" the plaintiff alleged that it was printed, published, etc., "with express * * * malice and * * * with design or intent to injure," etc. Manifestly, the pleader here intended to allege actual malice with reference to this third document only. But the case appears to have been submitted to the jury without reference to said third document, as well as without any evidence thereof, and respondent is not claiming that the verdict rests at all upon the said "letter or telegram." This being so, I am of the opinion that the award of punitive damages was erroneous.

But I do not think that in the judgment as it now stands after reduction from \$20,000 to \$10,000, there are included any punitive damages. That reduction was made by consent of the plaintiff pursuant to the court's order on the motion for a new trial, whereby the court denied a new trial upon condition that the plaintiff remit the sum of \$10,000 from the judgment and ordered that if the plaintiff did not consent to such reduction the motion for a new trial would be granted. I must assume that the court's order was made on the theory that the only valid reason for granting a new trial was some reason applying directly to the amount of the verdict, which had awarded \$15,000 as actual damages and \$5,000 as penal damages. The motion had been presented on various grounds, including that of excessive damages appearing to have been given under the influence of passion and prejudice, and including also the specification that there was no evidence to justify the jury in awarding the plaintiff \$5,000, or any sum, as punitive damages, and a like specification in relation to \$20,000 or any sum, against defendant." In view of the fact that, as I think, the primary and most obvious error in the award was the allowance of punitive damages, I assume that the trial judge intended, as he should have intended, to entirely erase those damages when he made the order which led to the reduction of the judgment. This left the sum of \$15,000, which the judge appears to have thought excessive as compensatory damages, and for that reason there was a further reduction of the judgment. I think that the judgment, as it now stands, should be affirmed.

HOUSER, J. I dissent. While I am in accord with the greater part of the opinion expressed by Mr. Presiding Justice CONREY, nevertheless I am unable to agree with his conclusion that the action by the trial court in reducing the verdict from the sum of \$20,000 to the sum of \$10,000 had the effect of curing the error which was included in the

allowance in the verdict of the sum of \$5,000 as punitive damages.

The reduction of the damages by the judge of the trial court was the sum of \$10,000 from the gross amount of \$20,000 allowed by the jury, which included \$15,000 compensatory damages and \$5,000 punitive damages. So far as the record discloses, no attempt was made by the judge of the trial court to segregate the \$10,000 reduction so as to show the amount deducted from the compensatory damages and the amount (if any) deducted from the punitive damages. For aught that appears, the judge may have concluded that any sum over \$5,000 awarded by the jury as compensatory damages was excessive, and accordingly deducted the entire amount of \$10,000 from the item of \$15,000 allowed as compensatory damages, leaving the \$5,000 item awarded by the jury as punitive damages to stand; or, the trial judge may have had it in his mind that the two items making up the total reduction of \$10,000 from the verdict should be produced by deducting from each of the original items of the verdict in the proportion that one bore to the other. Again, he may have assumed wholly independent figures as to each item of damages; or yet, the question of the relationship between the two items may have received no consideration whatsoever, so far as the trial judge was concerned. For this court to say that he did the only thing which he might have done, and thus, so far as punitive damages are concerned, the legality of the verdict as reduced was preserved, to my mind amounts to a conjecture, for the exercise of which I have been unable to discover any authority.

82 Cal. App. 739

PEOPLE v. MOORE et al. (Cr. 1447.)★

District Court of Appeal, Second District, Division 1, California. May 5, 1927.

Hearing Denied by Supreme Court June 30, 1927.

1. False pretenses ☞30—Indictment, averring defendants did not own and could not deliver property, substantially charged that they did not do so, as agreed.

Indictment for obtaining money by false pretenses, averring that defendants were not owners of and were unable to turn over, convey, or deliver house and lot, sufficiently charged, by necessary inference at least, that they did not do so.

2. False pretenses ☞12—Money was obtained by false pretenses, when owner was induced to part with it by defendants' false representations of property ownership; "obtaining money by false pretenses."

Crime of "obtaining money by false pretenses" is complete when fraud intended is consummated by obtaining possession of property sought, and hence was consummated when complaining witness was induced to part with money by defendants' false representations that

they were owners of property they agreed to convey.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

3. False pretenses §7(5)—To constitute crime of "obtaining money by false pretenses," representations must be of present or past fact, though accompanied by promise.

To constitute crime of "obtaining money under false pretenses," representations must be of present or past fact, not mere expression of opinion or representation of act to be performed in future or mere promise to pay or perform some act, but representation of present or past fact is within the statute, though accompanied by promise.

4. False pretenses §7(5)—Indictment charging false representation that defendants owned lot held sufficient, though accompanied by promise to convey and deliver.

Indictment for obtaining money by false pretenses, charging false representation of existing fact that defendants owned lot agreed to be conveyed by them, was sufficient, though accompanied by promise to convey and deliver lot in future.

5. False pretenses §26—Indictment, alleging false representation that defendants would convey lot when complaining witness paid stated sum, sufficiently alleged when promises were to be performed.

Indictment for obtaining money by false pretenses, alleging representation that if complaining witness would pay defendants stated sum, by reason of their ownership of tract free of incumbrances, they were "then and there in a position to and would turn over, convey, and deliver" certain lot in such tract, sufficiently alleged when promises were to be performed.

6. False pretenses §29—Indictment for obtaining money by false pretenses, averring agreement to convey lot free of incumbrances, held sufficient, though alleging money was to be delivered as part payment.

Indictment for obtaining money by false pretenses, averring that defendants agreed to convey house and lot free of incumbrances, held sufficient as against objection that, since it alleged that money was to be delivered as part payment, it cannot be inferred that title was to be conveyed immediately, as property could be conveyed free of incumbrances, subject to mortgage securing payment of balance.

7. False pretenses §30—Indictment, alleging that defendants' representations were false and known to them to be false when made, sufficiently alleged falsity at such time.

Allegation of indictment for obtaining money by false pretenses, that "said pretenses and representations * * * were in all respects utterly false, fraudulent, and untrue," and that defendants "then and there well knew" them "to be utterly false * * * at the time of making the same," held sufficient allegation that representations were false and untrue when made.

8. False pretenses §49(3)—Evidence held to justify finding, in trial for obtaining money by false pretenses, that false representations were made, consented to, and authorized by defendants.

In trial for obtaining money by false pretenses, evidence held sufficient to justify finding that some representations were consented to and authorized by defendants and many directly made by them.

9. False pretenses §5—Good-faith attempt to clear title and offer of other lots held not absolute defenses to charge of obtaining money by false pretenses.

Good faith in attempting to clear title to lot agreed to be conveyed and offering other lots to complaining witness is not absolute defense to charge of obtaining money therefor by false pretenses; crime consisting in false statements that defendants owned property and would convey it free of incumbrances, thereby obtaining complaining witness' money.

10. False pretenses §51—Fraudulent intent is for jury, in trial for obtaining money by false pretenses.

Question of fraudulent intent is for jury to determine from all circumstances, in trial for obtaining money by false pretenses.

11. False pretenses §14—One induced to part with property by false pretenses is defrauded thereof, though eventually compensated in mode not then contemplated.

One induced to part with property by false pretenses and misrepresentations is defrauded thereof within statute denouncing crime of obtaining money by false pretenses, though he eventually makes himself whole in mode not then contemplated.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

L. M. Moore and F. M. Lynch were convicted of obtaining money by false pretenses, and they appeal. Affirmed.

Warren L. Williams, Seymour S. Silverton, and I. Henry Harris, all of Los Angeles, for appellant Moore.

R. P. Congdon, of Los Angeles, for appellant Lynch.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

McLUCAS, Justice pro tem. The defendants were convicted under six counts of the indictment, each count charging the crime of obtaining money by false pretenses. They prosecute this appeal from the judgments and from orders denying motions for new trials.

It is claimed by the appellants that their general and special demurrers to each count should have been sustained. Count 1 of the indictment is similar to the other counts, differing only as to dates, names of the complaining witnesses, amounts received, and other minor details. The indictment was presented and filed on the 2d day of February, 1926. In count 1 it is charged that on or about the

22d day of May, 1924, the defendants falsely represented to the complaining witness, Mrs. H. L. Dunning, that they were the owners of a company known as Economy Home Builders; that the defendants were the owners of a tract known and described as tract No. 4901, and owned said tract free and clear of incumbrance; that they owned forests and sawmills, a furniture factory, and a furniture warehouse; that if Mrs. Dunning would pay to the defendants the sum of \$1,366.67, "that the defendants were in a position to and would turn over, convey, and deliver to the said Mrs. H. L. Dunning a certain lot in said tract, together with a house completely furnished thereon, free and clear of all incumbrances"; that, in truth and in fact, neither the defendants nor Economy Home Builders owned said tract No. 4901, nor any tract of land at all, free and clear of incumbrances, nor any forests, nor sawmills, nor any furniture factories, nor a furniture warehouse; that "defendants were not then and there or at any other time able to turn over, convey, or deliver any lot, together with a house completely furnished or furnished at all, or any lot or house in said tract, or at any other place, or at all"; that the said Mrs. Dunning believed said false representations to be true and relied thereon and was deceived thereby, and by reason thereof did pay over to the defendants the sum of \$1,366.67, as part payment on lot No. 95, tract No. 4901, and a house to be built thereon and completely furnished, to be conveyed and delivered to her; that, in truth and in fact, the said representations so made were false and untrue and defendants well knew said representations to be false and untrue; that defendants by the means aforesaid did cheat and defraud the said Mrs. H. L. Dunning, and did make said false pretenses for the purpose of inducing Mrs. Dunning to pay over to the defendants the said money as part payment on said lot and said house to be built thereon and completely furnished.

[1] In support of the general demurrer, appellants contend that the indictment does not aver facts sufficient to constitute actual fraud, and that the indictment contains no averment as to whether the complaining witnesses in the respective counts received just what it was agreed they were to receive. The indictment charges, in count 1:

"That the said Mrs. H. L. Dunning had no other or different information, and then and there believed the said false and fraudulent pretenses and representations, and each of them, so made as aforesaid by the said L. M. Moore and F. M. Lynch, to be true, and relied thereon, and was deceived thereby, and because of said representations and their falsity, and of her, the said Mrs. H. L. Dunning's belief in their truth, and each of them, she, the said Mrs. H. L. Dunning, was then and there deceived and misled, and caused to pay over and deliver, and did then and there pay over and deliver to the said L. M. Moore and F. M. Lynch, the sum of \$1,366.67, lawful money of the United

States, as part payment on lot No. 95, tract No. 4901, contracted to be conveyed and delivered to her, the said Mrs. H. L. Dunning, by the said defendants, and as part payment on a house to be built and completely furnished on said lot by said defendants, and to be conveyed and delivered to her, the said Mrs. H. L. Dunning, by said defendants."

The indictment further charged:

"That, in truth and in fact, neither the said L. M. Moore and F. M. Lynch, or Economy Home Builders, or either of them, owned said Lilliandale tract, more particularly described as tract No. 4901, located in the said county of Los Angeles, or any tract of land at all, free and clear of incumbrances; that, in truth and in fact, neither the said L. M. Moore or F. M. Lynch, or the Economy Home Builders owned any forest or sawmills in the north, or at any other place; that, in truth and in fact, neither L. M. Moore or F. M. Lynch, or the Economy Home Builders owned any furniture factory in the city of Los Angeles, or at any other place; and that, in truth and in fact, neither the said L. M. Moore or F. M. Lynch or the Economy Home Builders owned a furniture warehouse in the city of Los Angeles, or at any other place; and that, in truth and in fact, the said defendants were not then and there or at any other time, able to turn over, convey, or deliver any lot, together with a house completely furnished, or furnished at all, or any lot or house in said tract, or at any other place, or at all."

There is no direct averment in the indictment that defendants did not turn over, convey, or deliver any lot, together with a house completely furnished thereon, free and clear of all incumbrances; but the indictment does aver that defendants were not the owners of said tract and were not at any time able to turn over, convey, or deliver any lot, together with a house completely furnished. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements, but what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that defendants did not turn over, convey, or deliver any lot, together with a house completely furnished thereon, free and clear of all incumbrances. *People v. Griesheimer*, 176 Cal. 44, 167 P. 521. In *People v. Flowers*, 54 Cal. App. 214, 216, 201 P. 468, where the allegations in the information were similar to those contained in the indictment in the instant case, and counsel for defendant had urged that no causal connection was shown between the alleged false pretenses and the effect attributed to them, the court said:

"The information presented in this case is not deficient in the respect suggested. It is plain enough in its charging part to enable a person of ordinary understanding to comprehend that the defendant, by pretending to be the owner of property, procured another to deliver to him money and merchandise in exchange for

an interest therein. It is clearer in its statement of the facts constituting the alleged offense than was the information considered in the case of *People v. Griesheimer*, 176 Cal. 44, 167 P. 521, which the Supreme Court sustained as against the precise contention that is now advanced."

[2] The crime of obtaining money by false pretenses is complete when, by means of such false pretenses, the fraud thereby intended is consummated by obtaining possession of the property sought. In the case at bar the crime was consummated when the money of the complaining witness was obtained, when she was induced to part with it by reason of the false representations of defendants that they were the owners of the property. In *People v. Bryant*, 119 Cal. 595, it is said, at page 597, 51 P. 960, 961:

"Section 532 of the Penal Code provides: 'Every person who knowingly and designedly, by false or fraudulent representations or pretenses, defrauds any other person of money or property * * * is punishable in the same manner and to the same extent as for larceny of the money or property so obtained.' It is contended in support of the demurrer to the indictment that an offense against this provision of the section is not committed unless it appears that the person to whom the representations were made has been deprived of his property by reason of the fraud committed against him; that as the fraudulent representations charged in this indictment related solely to the property described in the mortgage, and as the mortgage is only a security for the payment of the promissory note, and as it is not charged that the maker of the note is unable to pay the same, or that it has not been paid, the indictment fails to show that she has been defrauded of any of her property. We cannot concur in this construction of the statute. If a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated. It is not necessary to show that the property has been absolutely lost to him in order to sustain the charge. He is defrauded of his property when he is induced to part with it by reason of the false and fraudulent pretenses and representations, and the offense is complete when by means of such false pretenses the fraud thereby intended is consummated by obtaining possession of the property sought."

In support of their contention that the demurrers should have been sustained for the reason that the indictment fails to allege facts showing the complaining witnesses were defrauded in that they did not receive just what it was agreed they were to receive, appellants cite the case of *People v. Bliss*, 47 Cal. App. 503, 190 P. 1046. That case is to be distinguished from the instant case in that in that case it was not alleged that the defendants' representations as to ownership were false.

[3, 4] Appellants further urge in support of the demurrers that the indictment sets forth

the performance of an act in the future by the defendants, to wit, the conveyance and the building of a house. It is settled that the representations must be of a present or past fact, not the mere expression of opinion or a representation of an act to be performed in the future, or a mere promise to pay or perform some act. A representation of a present or past fact is within the statute, however, even though it may be accompanied by a promise, as a concurrent promise does not overcome the force of the pretense. 12 Cal. Jur. 453; *People v. Bowman*, 24 Cal. App. 781, 142 P. 495; *People v. Green*, 22 Cal. App. 45, 133 P. 334. In the present case, the indictment charges a false representation of an existing fact, to wit, ownership of the lot, accompanied by a promise, to wit, to convey and deliver a furnished house and the lot.

[5] Appellants further assert that the indictment does not state when the promises were to be performed. The indictment contains the following allegation:

"That, if the said Mrs. H. L. Dunning would pay to the said defendants L. M. Moore and F. M. Lynch the sum of \$1,366.67, by reason of said defendants' ownership of said tract, free and clear of all incumbrances, and of said forests and sawmills and of said furniture factory and of said warehouse, the said defendants L. M. Moore and F. M. Lynch were then and there in a position to and would turn over, convey, and deliver to the said Mrs. H. L. Dunning a certain lot in said tract, together with a house completely furnished thereon, all free and clear of all incumbrances."

[6, 7] The only meaning to be gathered from the above allegation is that defendants, upon the payment of the sum of \$1,366.67, would then and there convey and deliver said lot, together with a house completely furnished thereon, free and clear of all incumbrances. Appellants further insist that, since the indictment alleged that the money was to be delivered as part payment, it cannot be inferred that the title was to be immediately conveyed. We see no difficulty in this objection. The indictment avers that the defendants agreed to convey, free and clear of all incumbrances. If there was any balance remaining on the purchase price, the property could be conveyed free and clear of all incumbrances, subject to a purchase-money mortgage to secure the payment of the balance of the purchase price when due. Appellants state that there is no averment in the indictment that the representations were false or untrue at the time they were made. The indictment contains this allegation:

"That, in truth and in fact, the said pretenses and representations so made as aforesaid by the said defendants L. M. Moore and F. M. Lynch, and each of them, were in all respects utterly false, fraudulent, and untrue, and, in truth and in fact, the said defendants L. M. Moore and F. M. Lynch then and there well knew said pretenses and representations, and each of them so made by them, as aforesaid, to the said Mrs.

H. L. Dunning, to be utterly false, fraudulent, and untrue at the time of making the same."

We believe the foregoing to be a sufficient allegation that the representations were false and untrue at the time they were made. We conclude that the demurrers were properly overruled.

[8] Appellants contend that the evidence was insufficient to sustain the verdicts and judgments thereupon. It appears from an examination of the record that many representations were made by agents. In *People v. Green*, 22 Cal. App. 45, 50, 133 P. 334, 336, it is said:

"Before one can be convicted of a crime by reason of the acts of his agent a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. 1 McLain on Criminal Law, § 188. While false pretenses may be made to an agent of the person defrauded, yet when made by an agent they must be directly authorized or consented to in order to hold the principal, for authority to do a criminal act will not be presumed. 1 McLain on Criminal Law, § 683."

The record discloses the fact that in some instances the false representations were made directly by the defendants, while in many other cases the jury were justified in finding that the false representations were directly authorized or consented to by the defendants. Appellant Moore testified that some of the sales agents were Rust, Fullerton, Walt, and McAlpine. Several of the witnesses testified that Moore told them that he and Lynch owned the property, that the title was good and the property clear. Many similar statements were made by the aforementioned agents in Moore's presence. Green, the complaining witness of count 8 of the indictment, testified that he told Moore that McAlpine had told him the tract was absolutely free of all debts, and that he asked Moore if that was right, and Moore said:

"I verify everything that they say; they are my right-hand men; they are special men; they are right on the ground; I can't do business without them."

Some of the complaining witnesses testified that defendant Lynch stated that he owned the property and that the title was clear. Other witnesses and purchasers testified to the same effect. Rust, a salesman, testified that Lynch told him he bought the property and that it was free and clear. We believe the evidence to be amply sufficient to justify the jury in finding not only that the false representations were consented to and authorized by both defendants, but that in many cases such representations were directly made by the defendants.

[9-11] Appellant Lynch attempts to justify the defendants by arguing as to their good

faith in attempting to clear the title and in offering lots in another tract to the complaining witnesses. These are not matters of absolute defense to a charge of obtaining money by false pretenses. The crime consisted in the false statements that defendants owned the property and would convey the same free and clear of all incumbrances, thereby obtaining the money of the complaining witnesses. *People v. Wieger*, 100 Cal. 352, 34 P. 826. The question of fraudulent intent is with the jury and is to be determined from all the circumstances of the case. *People v. Bowman*, 24 Cal. App. 781, 142 P. 495. If a person is induced to part with his property by reason of false pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated. *People v. Bryant*, supra.

There being no prejudicial error, it is ordered that the judgments and the orders denying motions for new trials be affirmed.

We concur: CONREY, P. J.; YORK, J.

82 Cal. App. 618

PEOPLE v. MOCK MING FAT et al.★
(Cr. 1459.)

District Court of Appeal, Second District, Division 1, California. April 30, 1927.

Hearing Granted by Supreme Court June 27, 1927.

1. Assault and battery §96(8)—In prosecution for assault with intent to commit murder, defendants were entitled to instruction on assault with deadly weapon, notwithstanding jury resolved issue of self-defense against defendants (Pen. Code, § 1159; Code Civ. Proc. § 1962, subd. 1).

In prosecution for assault with intent to commit murder, defendants held entitled to requested instruction on assault with deadly weapon under Pen. Code, § 1159, where there was evidence upon which conviction of lesser offense might be based, notwithstanding fact that jury resolved issue of self-defense against defendants, and notwithstanding Code Civ. Proc. § 1962, subd. 1, providing that deliberate commission of unlawful act for purpose of injuring another raises conclusive presumption that act was done with malicious and guilty intent.

2. Criminal law §24—Law presumes that act, if knowingly done, was done with criminal intent only when intent is not made affirmative element of crime (Code Civ. Proc. § 1962, subd. 1).

Under Code Civ. Proc. § 1962, subd. 1, providing that deliberate commission of unlawful act for purpose of injuring another raises conclusive presumption that such act was done with malicious and guilty intent, it is only when intent is not made affirmative element of crime that law presumes that act, if knowingly done, was done with criminal intent.

3. Criminal law — 830—Court was not justified in refusing requested instruction on account of form (Pen. Code, §§ 1093, 1127).

In prosecution for assault with intent to commit murder, court was not justified, under Pen. Code, §§ 1093, 1127, in refusing instruction requested on assault with deadly weapon, to which defendants were entitled under evidence, because requested instruction referred to complaining witness by mistake instead of defendants, but it was trial court's duty to modify requested instruction.

4. Criminal law — 1186(4)—Refusal of instruction on assault with deadly weapon, in prosecution for assault with intent to commit murder, held not harmless (Const. art. 6, § 4½).

In prosecution for assault with intent to commit murder, where court refused instruction on assault with deadly weapon, to which defendants were entitled under evidence, Const. art. 6, § 4½, prohibiting setting aside judgment unless error has resulted in miscarriage of justice, did not justify affirmance.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Mock Ming Fat and others were convicted of assault with intent to commit murder, and they appeal. Reversed and remanded.

W. P. Butcher, Jr., of Santa Barbara, for appellants.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

McLUCAS, Justice pro tem. Appellants were found guilty of the crime of assault with intent to commit murder.

This case presents but a single question on appeal. Appellants assign as error the refusal of the trial court to give the following instruction:

"If you believe from the evidence that defendants, or any of them, did not commit an assault upon the person of Yee Moon with a deadly weapon, with intent to commit murder, and if you believe from the evidence that defendants, or any of them, did commit an assault upon Yee Moon with a deadly weapon without the intent to commit murder, then it is your duty to find the said Yee Moon guilty of an assault with a deadly weapon."

It appears from the evidence that on the 19th day of August, 1926, a "state of war" existed between certain Chinese tongs, the Hop Sing Tong and Bing Kong Tong; that Yee Moon, the complaining witness, knowing that the defendants were driving an automobile through Santa Barbara, armed himself with a revolver, left the headquarters of the Hop Sing Tong in said city, and proceeded in his automobile to a point in the streets of Santa Barbara, where shooting commenced between the defendants and the prosecuting witness. The testimony is in conflict as to whether the defendants or the prosecuting

witness first started shooting. The defense was that the defendants fired in self-defense and to protect themselves. One of the defendants, Quang Shick, testified that in firing at the complaining witness he did not intend to kill him. The jury resolved the issue of self-defense in favor of the prosecution. Defendants contend that the trial court erred prejudicially in refusing to give the requested instruction, in that the evidence of the defendants, if believed by the jury, would justify a verdict of an assault with a deadly weapon, that being an offense necessarily included within the charge of an assault with intent to commit murder.

[1, 2] We believe the position of defendants to be correct. Defendants were entitled to the requested instruction where there was evidence upon which a conviction of the lesser offense might be based. Section 1159 of the Penal Code provides:

"The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

The charge of assault with a deadly weapon is necessarily included within the charge of assault with a deadly weapon with intent to commit murder. The suggestion of the respondent that the refusal of the court to give the requested instruction was proper, because the crime was the greater one or none at all, is without merit, since here an assault with a deadly weapon is directly charged, and, if no assault with a deadly weapon was made, the higher offense could not be committed. *People v. Demasters*, 105 Cal. 670, 39 P. 35. And this is true, notwithstanding the fact that the jury resolved the issue of self-defense against the defendants. It was possible for the jury not to accept the plea of self-defense, and yet to believe the testimony of Quang Shick that he fired without intent to hit the complaining witness. Under such circumstances the jury had no opportunity to bring in a verdict of assault with a deadly weapon, as it might have done had the case been submitted under proper instructions. *People v. Maciel*, 71 Cal. App. 213, 234 P. 877. In *People v. Griffith*, 146 Cal. 339, 80 P. 68, it was held that an instruction such as requested in the instant case was properly given. Neither are these views overcome by the provisions of subdivision 1 of section 1962 of the Code of Civil Procedure to the effect that the deliberate commission of an unlawful act for the purpose of injuring another raises a conclusive presumption that such act was done with a malicious and guilty intent. In *Davis v. Hearst*, 160 Cal. 143, 116 P. 530, it was held that, before this presumption arises, the jury has to find as to facts (1) the commission of an unlawful act; (2) that its commission was deliberate; and (3) that it

was committed with the deliberate purpose of injuring another. In *People v. Maciel*, supra, the trial court instructed the jury that—

"When the act committed by the accused is of itself an unlawful act, the law, in the first instance, presumes the criminal intent, and the burden of proof falls upon the defendant to show the absence of criminal intent."

But it was held that the giving of this instruction was prejudicial, for the reason that the instruction was broad enough to include the presumption that defendant not only intended to discharge his pistol, but that he discharged it with the specific intent to commit murder, and that the burden was on him to show the absence of such specific intent. It is only when the intent is not made an affirmative element of the crime that the law presumes that the act, if knowingly done, was done with criminal intent. When specific intent is an element of the offense, it presents a question of fact which must be proved like any other fact in the case. *People v. Maciel*, supra.

[3] At the time of oral argument, our attention was called to a clerical error in the above instruction, in that the instruction charges the jury under the circumstances given "to find the said Yee Moon guilty of an assault with a deadly weapon." Yee Moon was the prosecuting witness, and the name of Mock Ming Fat, the defendant, should have been used instead of Yee Moon. As already stated, it is evident that this error was purely clerical. If the instruction had been given as requested, we do not see how the jury could have failed to understand that the instruction applied only to the defendant Mock Ming Fat, who was on trial, and not to Yee Moon, the prosecuting witness. In fact, the error was not discovered by counsel for respondent at the time of the filing of the original briefs, and was first mentioned at the time of oral argument. Respondent cites the case of *People v. Smith* (Cal. App.) 251 P. 958, as authority for the rule that, if any part of a single instruction should not have been given, the action of the court in refusing the whole will be affirmed. In that case there was no testimony to support the requested instruction. In the case at bar there was testimony that the shots were fired without intent to kill. Moreover, in the instant case the attention of the trial court was called to the issue of a lesser or included offense by the subject-matter of the requested instruction and by the voir dire examination of jurors. Under such circumstances it was the duty of the trial court to modify the requested instruction. When a man's liberty is at stake, and with such a condition of evidence as is here exhibited, the court is not justified in refusing to instruct at all upon the paramount and vital question in the case simply because a particular form of instruction asked by counsel may be refused. *People v. Tapia*, 131 Cal.

653, 63 P. 1001; *People v. Frey*, 165 Cal. 140, 131 P. 127. Sections 1093 and 1127 of the Penal Code provide that the court, in charging a jury, must state to them "all matters of law necessary for their information," and must charge "on any points pertinent to the issue, if requested by either party." In the present case the defendants certainly requested an instruction on a point clearly and paramountly "pertinent to the issue"; and, considering the peculiar circumstances of the case, we do not think the court was justified in ignoring the point entirely on account of the form in which the requested instruction was made. *People v. Tapia*, supra. In *People v. Demasters*, supra, an instruction was requested orally after the argument had been concluded, yet it was held error to refuse the instruction; it being one usually given by courts of their own motion. In the present case the requested instruction was submitted in writing before the argument of counsel, and the nature of the instruction was one usually given by the courts of their own motion. In *State v. Hyams*, 64 Utah, 285, 230 P. 349, it is said:

"* * * Courts, we think, without exception, have held that, where the accused is charged with a greater offense, he is nevertheless entitled to an instruction that the jury may convict him of a lesser offense if included within the greater; that is, he may be found guilty of simple assault, or assault and battery, unless the evidence is of such character as will necessarily require a finding that the greater offense was committed by him. * * *"

In *Watkins v. State* (Okl. Cr. App.) 218 P. 895, where the charge was assault with intent to kill, it was held that an instruction as to assault with a deadly weapon without intent to kill should have been given; the court saying:

"Where the evidence raises an issue as to different degrees of a crime or of an included offense, all of the issues so raised should be submitted to the jury."

To the same effect is *Windle v. State*, 102 Ohio St. 439, 132 N. E. 22.

Respondent claims that the instruction as requested would eliminate from the jury the question as to whether the assault was justified or excusable. We cannot agree with this contention, as the court otherwise instructed the jury fully on self-defense. Had the requested instruction been given, the jury could not have been misled by the instructions taken as a whole.

[4] For the reasons stated, we cannot say, after a consideration of the entire evidence, that, if the instruction had been given as requested, the jury would have returned a verdict that the defendants were guilty of an assault with intent to commit murder rather than an assault with a deadly weapon. Therefore the provisions of section 1½ of

article 6 of the Constitution do not justify an affirmance in this case.

It is ordered that the judgment be reversed and the cause remanded for a new trial.

We concur: CONREY, P. J.; HOUSER, J.

82 Cal. App. 411

PEOPLE v. JOHNSON. (Cr. 962.)

District Court of Appeal, Third District, California. April 18, 1927.

1. Indictment and information ⇐144—Jury cannot pass upon motion, unsupported by evidence, to dismiss for former jeopardy.

Even though motion to dismiss on ground defendant had been once in jeopardy be treated as a plea of former jeopardy, the jury cannot pass upon issues raised thereby without evidence to support plea.

2. Criminal law ⇐199—Offense of practicing medicine without license is not included in charge of abortion as regards plea of former jeopardy (Pen. Code, § 654).

As regards plea of former jeopardy, offense of practicing medicine without a license is not included in a charge of crime of abortion; Pen. Code, § 654, being unavailable.

3. Criminal law ⇐196—That evidence is same in both cases, and that proof in former case may warrant conviction of latter, does not establish plea of jeopardy.

That evidence may have been same in prosecution for procuring an abortion and for practicing medicine without a license, and that proof in former case may have been sufficient to warrant a conviction in the latter, does not necessarily establish the claim that defendant has been once in jeopardy or had been acquitted of the second charge.

4. Criminal law ⇐196—Former prosecution is not bar to conviction on another charge, if evidence to warrant conviction upon latter charge is insufficient without additional proof.

An acquittal or a conviction upon one charge is not a bar to a conviction upon another, if the evidence required to support the former is not sufficient to warrant a conviction upon the latter without proof of any additional fact.

5. Criminal law ⇐196—As regards plea of former jeopardy, proof of practicing without license does not tend to prove crime of abortion.

As regards plea of former jeopardy, alleged fact that defendant committed offense of practicing medicine without license does not tend to prove that he committed crime of abortion.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

G. D. Johnson was convicted of practicing medicine without a license, and he appeals. Affirmed.

Eicke & Warren, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the offense of practicing medicine without a license. This appeal is from the judgment of conviction and the order denying his motion for a new trial.

But one ground is urged for a reversal. It is stated by counsel for appellant as follows:

"Two indictments were found against appellant by the same grand jury, upon the same date, based upon the testimony of the same witnesses, and upon identically the same facts and circumstances. In other words, the prosecution carved out of the same facts, acts, and circumstances two offenses; the first charge being that of abortion, and the second, practicing medicine without a license. The appellant was tried upon the charge of abortion and acquitted, and was thereby placed once in jeopardy of the charge of practicing medicine without a license; said charge being based upon the same alleged facts, acts and circumstances."

The defendant did not plead a former acquittal or that he had been once in jeopardy. After the jury had been selected, and after the first witness for the prosecution had been sworn, counsel for defendant requested the court to excuse the jury temporarily in order that he might present a motion during their absence. Upon the retirement of the jury, and during their absence, counsel for defendant moved the court "for a dismissal of this action against the defendant on the ground he has been once in jeopardy, and in that matter we ask leave to present the indictment in the former trial of People v. Johnson, number 4325, wherein the defendant herein was charged with the crime of abortion." Counsel thereupon introduced in evidence the record in the case referred to, including the evidence taken at the trial thereof. The court denied the motion. Thereupon the jury returned into court, and the trial of this case proceeded.

[1, 2] The record of the trial in case No. 4325 was not introduced in evidence at any time during the trial before the jury herein. Even if the motion to dismiss be treated as a plea of a former acquittal or that the defendant had been once in jeopardy, it is clear that the jury could not pass upon the issue raised thereby without evidence to support the plea. It is also perfectly clear that the offense of practicing medicine without a license is not included in a charge of the crime of abortion, but the two offenses are unrelated to each other. Appellant relies on section 654 of the Penal Code, which provides:

"An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such

provisions, but in no case can it be punished under more than one."

[3-5] Appellant has confused the criminal act referred to in the section cited with the evidentiary facts tending to prove such act. The fact that the evidence may have been the same in both cases and that the proof in the former case may have been sufficient to warrant a conviction in the latter does not necessarily establish the claim that the defendant had been once in jeopardy or had been acquitted of the second charge. An acquittal or a conviction upon one charge is not a bar to a conviction upon another, if the evidence required to support the former is not sufficient to warrant a conviction upon the latter without proof of any additional fact. *Ebeling v. Morgan*, 237 U. S. 625, 35 S. Ct. 710, 59 L. Ed. 1151. "The true test is: * * * Could the defendant have been convicted upon the first indictment upon proof of the facts, not as brought forward in evidence, but as alleged in the record of the second." *State v. Nash*, 86 N. C. 650, 41 Am. Rep. 472; *People v. Brannon*, 70 Cal. App. 225, 233 P. 88; *People v. Mehra*, 73 Cal. App. 162, 238 P. 802. The alleged fact that the defendant committed the offense of practicing medicine without a license does not even tend to show that he committed the crime of abortion.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

83 Cal. App. 16

UNG v. STEIN et al. (Civ. 4335.)

District Court of Appeal, Second District, Division 2, California. May 10, 1927.

Landlord and tenant $\Leftrightarrow$ 139(2)—**Lessee can give against lessor no right of removal of crop beyond time limited in agreement terminating tenancy.**

Tenancy from month to month having been terminated by agreement of the parties as of the middle of a month, with right given to lessee till the 1st of the following month to remove the crop, any subsequent attempt of lessee in selling the crop to give the buyer right of removal beyond the time so limited was ineffectual against the lessor.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action for injunction and conversion by William Ung against M. H. Stein and others. From a judgment for plaintiff, defendant E. S. Flansberg appeals. Reversed.

Frank R. Carrell, of Los Angeles, for appellant.

THOMPSON, J. The defendant M. H. Stein had a lease upon 9 or 9½ acres of land

near Los Angeles, belonging to the defendant and appellant E. S. Flansberg, which lease expired by limitation of time on December 1, 1921. Upon the acreage so leased the lessee, prior to the last-named date, had raised a crop of lettuce which is the subject-matter of the present action. Stein made arrangements with Flansberg to continue the lease from month to month until the lettuce was harvested upon payment of a monthly rental of \$50. About the middle of January, 1922, a severe frost occurred and a considerable portion of the lettuce was frozen. On the 20th of that month Stein, being apparently of the opinion that the lettuce was worthless and having paid no rental for December, 1921, or January, 1922, went to the appellant Flansberg and told him that the lettuce was worthless, that he wanted "to throw it back onto" Flansberg, and that he would pay no more rent for the property. He and the appellant had a settlement by which he paid Flansberg \$75 rental or up to January 15, 1922, and appellant then told Stein that if he could realize anything out of the lettuce he could have a few days or until February 1, 1922, to remove it from the property; that after February 1, 1922, he (the appellant) wanted to seed the land to alfalfa. On January 23 Stein sold the lettuce on this particular piece of property, together with lettuce growing on additional property, amounting in all to 27 acres, for the sum of \$50, to the plaintiff, and executed a memorandum which read: "I hereby agree to sell 27 acres of Lett to Wm. Ung and aloud 30 days to take crope off the land." Stein and another witness for him testified that at the time Stein signed the memorandum the words, "and aloud 30 days to take crope off the land," were not written thereon. Stein also testified that he told plaintiff that he must remove the lettuce by February 1, 1922, or make arrangements with the owner of the property for the payment of additional rental. Ung harvested for two or three days in the latter part of January, and then, on account of rain, according to his testimony, which is denied by other witnesses, ceased cutting. On February 15 Flansberg sold what lettuce was left on his property to the defendant Caramelli for the sum of \$30, and about February 17 refused to permit the plaintiff to proceed further with the harvesting or to take any of the lettuce. Whereupon plaintiff brought the present action for injunction and for conversion, resulting in a judgment in plaintiff's favor in the sum of \$500, interest, and costs. From this judgment the defendant Flansberg prosecutes this appeal and argues that the testimony is insufficient to support the finding of conversion by Flansberg.

The respondent has filed no brief. From a reading of the transcript we add the additional statement that it appears that after Caramelli purchased the lettuce on the land

he rented the teams of the defendant Stein and secured the assistance of the driver to assist him in harvesting, which gives rise to the suspicion that Stein's action and perhaps Flansberg's sale of the crop to Caramelli was not in good faith. But it can only amount to a suspicion. There is nothing to justify the inference that so far as the tenancy is concerned between Stein and Flansberg it was not just exactly as testified to by these witnesses, except the clause, "and aloud 30 days to take crope off the land," but this construction is absolutely at variance with the undisputed testimony that the sale was made at a price equal to the monthly rental which would be entailed by a 30 days' delay, and does not fit in with the undisputed fact that the tenancy had been terminated by agreement as of January 15, 1922, with the right to remove the crop limited to February 1, 1922. It must also be borne in mind that the appellant here was not a party to the agreement or memorandum and could not be bound thereby. So far as he was concerned, final settlement had been made with Stein on January 20, and no agreement made by Stein could alter or affect that agreement. It is not necessary to discuss the law relative to the right of a tenant to remove growing crops or when that right terminates, for the reason that the rights here were fixed and determined by the agreement of January 20, and the tenant could sell to the plaintiff nothing more than he had.

Judgment reversed.

We concur: WORKS, P. J.; MURPHEY, Justice pro tem.

**BRUNSKI v. INDUSTRIAL ACCIDENT
COMMISSION OF CALIFORNIA et al.★**
(Civ. 5753.)

District Court of Appeal, First District, Division 2, California. May 7, 1927.

Hearing Granted by Supreme Court July 5, 1927.

1. Master and servant $\S$ 417(1)—Law requiring petition for rehearing to authorize review of compensation proceedings held inapplicable to decisions on rehearing (Workmen's Compensation Act 1917, $\S$ 64 [a] [b]).

Workmen's Compensation Act (St. 1917, p. 873) $\S$ 64 (a) (b), to effect that appellate court may not review proceedings or order of Industrial Accident Commission in absence of petition for rehearing, has no application to decisions on rehearing.

2. Master and servant $\S$ 416—Attack for fraud on Industrial Accident Commission's order approving settlement held unauthorized, in absence of application for rehearing within 20 days (St. 1917, pp. 850, 874, 875, $\S$ 20 [d], $\S$ 65 [a], subd. 2, $\S$ 66 [a], subd. 2, St. 1913, p. 293, $\S$ 25 [d]).

Under St. 1917, pp. 874, 875, $\S$ 65 (a), subd. 2, $\S$ 66 (a), subd. 2, attack on ground of fraud

on order of Industrial Accident Commission approving compromise held unauthorized, where application for rehearing was not filed within 20 days after service of such order; St. 1917, p. 850, $\S$ 20 (d), and St. 1913, p. 293, $\S$ 25 (d), relating to continuing jurisdiction of Industrial Commission over its awards, being dependent on occurrence of new facts and inapplicable.

Proceeding under the Workmen's Compensation Act by Anton Brunski against the Pacific Gas & Electric Company. From an order of the Industrial Accident Commission setting aside an order approving a compromise settlement, claimant brings certiorari. Order annulled.

Warren H. Pillsbury, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

John J. Briare, of San Francisco, for respondent Pacific Gas & Electric Co.

STURTEVANT, J. [1] The petitioner applied to the Industrial Accident Commission to adjust his claim for damages sustained through an injury arising during his employment by, and growing out of his employment by, the Pacific Gas & Electric Company. After a hearing had the Commission rendered a decision on October 22, 1925. The Gas Company applied for and was granted a rehearing on December 4, 1925. Thereafter further evidence was taken. Thereafter the employee and the employer entered into a written agreement of settlement and release compromising the petitioner's claim in the sum of \$1,500. That compromise "was approved by the Industrial Accident Commission on December 16, 1925. Both parties concede it became final upon the expiration of 20 days, to wit, on January 5, 1926, no petition for rehearing having been filed in the meantime. On January 16, 1926, defendant filed a purported petition for rehearing asking for a rehearing of the proceeding and claiming that the original award of October 22, 1925, and the order approving the settlement agreement were procured by the fraud of Brunski. On January 28, 1926, the Commission entered an order (designating defendant's petition as a petition to set aside the order approving settlement) suspending the order of December 16, 1925, and setting the case for further hearing." On April 19, 1926, the Commission filed a decision against the petitioner, but made no finding on the issue of fraud. Thereafter the petitioner applied for a rehearing, which was granted May, 25, 1926. Thereafter, on October 20, 1926, the Commission filed a decision "setting aside and annulling the order approving the settlement agreement, finding that said order was procured by extrinsic fraud and providing that the case should be submitted on rehearing on the record unless good cause be shown to the contrary in writing within 20 days." It should be noted that

the Commission merely entered an order of approval of the compromise agreement. It did not adopt the agreement and, using it as a basis, make an award thereon. Section 27, subd. (c), c. 586, Stats. 1917. The petitioner did not apply for a rehearing, but filed in this court an application for a writ of review. The respondent makes a preliminary objection, saying:

"No petition for rehearing was ever filed by petitioner following the issuance of this final order of October 20, 1926, and under the provisions of section 64(a) and 64(b) of the Workmen's Compensation Act this court has no power to review the proceedings or the order of October 20, 1926, made by the Commission."

The petitioner concedes the general scope of that rule, but contends that the rule does not apply to decisions on rehearing. *Harlan v. Industrial Acc. Com.*, 194 Cal. 352, 228 P. 654; Compensation Act, § 67a. The authorities so cited by the petitioner certainly sustain his contention.

When the order was made by the Commission December 16, 1925, approving the compromise, and no petition for a rehearing was filed, this petitioner contends that the Commission lost jurisdiction to hear the application which was made on January 16, 1926, and which was the attack alleging fraud on the part of Brunski. The respondents contend that their jurisdiction was continuing, and they cite and rely on Statutes of 1917, p. 831, § 20, subd. (d). The power vested in the Commission by that portion of the statute, it has been held, is the power to make an examination into "the occurrence of new facts arising after the date of its original decision." *Georgia C. Co. v. Industrial Accident Com.*, 177 Cal. 289, 293, 294, 170 P. 625. But the respondents reply that case was based on the statute as it formerly stood. Stats. 1913, p. 279, § 25d. That is a distinction without a difference so far as the point under discussion is concerned. The section of the statute as amended is:

"(d) The Commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, *such power including the right to review, grant or regrant, diminish, increase or terminate, within the lim-*

its prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury. Any order, decision or award rescinding, altering or amending a prior order, decision or award shall have the same effect as is herein provided for original orders, decisions or awards."

The insertions and italicized portions included and constituted all of the amendments. The effect of "fraud" is dealt with in sections 82, 83, and 84 of the act of 1913 and in sections 65, 66, and 67 of the act of 1917. It is not mentioned in any of the earlier sections. As stated above, before the amendment, and in the absence of the italicized portion, it was held that the exercise of the continuing jurisdiction depended on "the occurrence of new facts." Now, when we look at the amendments of the statute we see that the amendments deal solely with "the occurrence of new facts"; that is, that the disability has "recurred, increased, diminished, or terminated." It is patent, therefore, that the amendment is not helpful to the respondents in the instant case. The respondents cite many cases from other jurisdictions. They are not helpful. They are based on statutes not identical with our statutes, and in some instances not similar.

[2] It is not controverted but what the Commission may, under certain circumstances, entertain attacks on orders and awards which were procured by fraud. Section 65 (a), subd. 2, and section 66 (a), subd. 2, c. 586, Stats. 1917. But according to the wording of those sections the attacks should be in the form of applications for rehearing and such applications should be filed within 20 days after the service of the order or decision which is being attacked. As the employer did not file its application within 20 days it did not bring itself within the provisions of either of the sections cited. It is unnecessary, therefore, for this court at this time to go into the subject of whether the fraud mentioned in section 65 or section 66 is limited to extrinsic fraud.

For the reasons stated, the order of October 20, 1926, is annulled.

We concur: KOFORD, P. J.; NOURSE, J.

82 Cal. App. 762

BAKER v. JACKSON et al. JENNINGS v. SAME. BLANCHARD v. SAME.
(Civ. 5644.)

District Court of Appeal, First District, Division 2, California. May 6, 1927.

Venue ⚡66—Affidavit of merits for change of venue need not allege that affiant believes counsel's advice that he has good defense to merits.

Where party has alleged, in affidavit of merits for change of venue, that he has stated all facts to his counsel and has been advised by him that he has a good and substantial defense on merits, affidavit is not defective because it fails to allege that affiant believes advice of his counsel.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Actions by Henry Baker, by James J. Jennings, and by John N. Blanchard and others against J. M. Jackson, doing business under the name of J. M. Jackson & Co., and another to recover money paid for corporate stock. From orders denying motions for change of venue, defendant named appeals. Reversed.

John E. Bennett, of San Francisco, for appellant.

John F. Davis, of San Francisco, for respondents.

NOURSE, J. Plaintiff sued in San Mateo county to recover \$650 alleged to have been paid the defendant Jackson for corporate stock. The grounds of the action were that the stock was purchased from Jackson, who was a licensed stockbroker, through fraudulent representations of the assets and liabilities of the corporation by which the stock had been issued. The defendant National Surety Company was joined as the surety on Jackson's bond as a stockbroker.

In due time the defendant Jackson, with the consent of his codefendant, moved for a change of the place of trial to San Francisco, the county of his residence and the county where the surety company maintained its principal place of business in this state. An affidavit of merits was served and filed with the notice of motion, but no counter affidavits were presented by the plaintiff. The motion was denied, and from this order the defendant has appealed on the printed record.

The respondent has not appeared on this appeal other than to stipulate that the cause may be submitted on the transcript, but we are informed that the only ground of opposition to the motion made below was that the affidavit failed to state that the affiant believed the advice of his counsel that he had a good and valid defense to the merits of the action. On this point, the rule is settled that

when a party has alleged that he has stated all the facts to his counsel and has been advised by him that he has a good and substantial defense on the merits, the affidavit is not defective because it fails to allege that the affiant believes the advice of his counsel. *Watt v. Bradley*, 95 Cal. 415, 417, 30 P. 557; 25 Cal. Jur. p. 801, § 32.

In accordance with the stipulation of the parties an order of this court was duly entered on December 8, 1925, consolidating this appeal with the appeals in two similar cases designated by the superior court Nos. 10807 and 10808, and directing that the judgment herein should include an order including each of the other two cases.

In accordance with the foregoing order of this court, the orders appealed from in each of the three cases are reversed.

We concur: **KOFORD, P. J.; STURTEVANT, J.**

83 Cal. App. 8

COVINGTON v. LEWIS et al. (Civ. 4236.)

District Court of Appeal, Second District, Division 2, California. May 9, 1927.

Sales ⚡479(2)—Conditional seller's demand and action for conversion held election to retake, precluding action for price.

Where conditional seller on buyer's default demanded redelivery, to which buyer assented, and thereupon another converted property and seller sued him and recovered judgment for conversion, there was election to retake, preventing action for the price or that part of it in excess of the judgment for conversion.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by H. L. Covington against J. D. Lewis and another to foreclose a crop mortgage. From adverse judgment, plaintiff appeals. Affirmed.

Earl D. Finch, of Redlands, for appellant.
W. A. McGinn and Thomas Scott, Jr., both of Bakersfield, for respondents.

THOMPSON, J. On July 17, 1920, plaintiff sold to defendant Lewis an automobile for the agreed price of \$1,400 on a conditional sales contract containing the following language:

"Should the second party make default in the payment of any of the said several amounts when due, or in the event of the second party's failure to perform any of the conditions and covenants herein contained, or in the event that the second party shall become financially involved or insolvent, or in the event the second party shall fail to pay the cost of said insurance, without notice or demand, all payments herein provided for shall be due and payable at once, or the first party may immediately take possession of said property, whenever and wherever found, without process of law using all neces-

sary force to do so, and all payments previously made by the second party shall be construed to be and applied as compensation for depreciation in value and for the use of said property, and the second party hereby waives and relinquishes all rights to the moneys so paid and all rights against the first party for taking possession of said property."

Contemporaneously therewith defendant Lewis executed a chattel mortgage on certain cotton to secure his note for \$1,400, the price of the automobile. The two instruments, of course, must be construed together as constituting one agreement. About March 22, 1921, the defendant Lewis being in default under the contract, which provided that the entire purchase price should be payable December 15, 1920, the plaintiff met Lewis on the road and demanded redelivery of the automobile, to which demand Lewis assented. Thereupon the plaintiff asked the defendant Lewis, who, according to the testimony, had alighted from the machine during the conversation, to drive the car into town. Mrs. Lewis testified that after they reached town Covington told her to take it to some little garage, the name of which she could not remember. Mrs. Lewis told plaintiff that she had some eggs to deliver to Nugent and that they would have to go there first, to which plaintiff replied that it was all right. Lewis drove the automobile in front of Nugent's garage. Nugent thereupon asserted a lien for repairs, and, according to some of the testimony, had one of his helpers drive the car into his garage. Shortly thereafter plaintiff filed action against Nugent and Lewis to recover possession of the automobile or its value, the exact nature of the action being uncertain, and at the same time commenced this action to foreclose the crop mortgage. However, the uncertainty of the exact nature of the action is not important, because the maintenance of either action involved as a prerequisite the right of immediate possession. In the last-named action the respondent bank was made a party because of a lien claimed by it on the cotton. The action against Nugent and the defendant Lewis was first tried, in which it was found that Lewis had no interest in the automobile; that Nugent had converted the automobile to his own use; and judgment was rendered for plaintiff against Nugent in the sum of \$500, the value of the automobile as found by the court. In the present action, in which the findings in the former action were introduced, the court found that the plaintiff had exercised the option given to him by the contract on March 22, 1921, and ordered judgment to be entered for defendants. From this judgment plaintiff has appealed.

The question presented is whether or not the assent of the defendant Lewis to the demand for redelivery and his subsequent action with respect thereto, plus the action against Nugent, amounts to an election un-

der the contract such as to defeat the present action. We think it does. The law is well established in this state, where we have followed the Massachusetts rule, that in those cases in which the seller under a conditional sales contract is given the option to retake possession or sue for the entire purchase price, he must elect which of the remedies he will pursue. *Parke, etc., Co. v. White River L. Co.*, 101 Cal. 41, 35 P. 442; *Silverstin v. Kohler and Chase*, 181 Cal. 53, 183 P. 451, 9 A. L. R. 1177; *Holt Mfg. Co. v. Ewing*, 109 Cal. 356, 42 P. 435; and *Muncy v. Brain*, 158 Cal. 300, 110 P. 945. Assuming that the finding of the court that Covington took possession of the automobile from Lewis is without support, yet if the judgment is otherwise supported and appellant's action amounted to an election, the error is not fatal.

Plaintiff recognizes this rule and argues that by reason of the fact that he did not actually recover possession from Nugent that he is entitled to the difference between the amount of the judgment against Nugent and the selling price. There seems to be equity in this assertion, but the court has found from sufficient evidence that plaintiff exercised his option on March 22, 1921; that on March 23, 1921, Nugent converted the automobile, which was of the value of \$500. Presumably the value fixed by the court was its actual value. If so, plaintiff's loss is not as great as would first appear. And, of course, plaintiff could not have maintained his action against Nugent unless he were entitled to possession (*Hilmer v. Hills*, 138 Cal. 134, 70 P. 1080; *Suttori v. Peckham*, 48 Cal. App. 88, 191 P. 960; and *Carvell v. Weaver*, 54 Cal. App. 734, 202 P. 897), and while he was entitled to possession upon default, an action founded upon that right was tantamount to an election. There are instances where the rule is not applicable, such, for example, as where an action is commenced for the installments as they fall due, which does not preclude the seller from subsequent repossession for default occurring thereafter (*Silverstin v. Kohler and Chase*, supra), or in those cases where the contract constitutes a lease and provides for redelivery to the seller on a day certain, with option thereafter to the lessee to purchase (*Muncy v. Brain*, supra; *Adams v. Anthony*, 178 Cal. 158, 172 P. 593), or in a case where the vendor retains a lien under section 3049 of the Civil Code with the contractual right to retake possession and enforce the lien (*Matteson v. Equitable Min. & Mill. Co.*, 143 Cal. 436, 77 P. 144). None of these cases assist the plaintiff in this action. He is governed by his contract and cannot bring himself outside the application of the rule.

Judgment affirmed.

We concur: CRAIG, J.; JOHNSON, Justice pro tem.

82 Cal. App. 710

MAHANA et al. v. LOS ANGELES ENGINEERING & MFG. CO. (Civ. 4469.)★

District Court of Appeal, Second District, Division 2, California. May 4, 1927.

Rehearing Denied June 3, 1927. Hearing Denied by Supreme Court June 30, 1927.

1. Appeal and error ⇨169(1)—That testimony and exhibits made it impossible for judge to properly decide case after 10 months' delay is not ground of appeal or reversal.

Where case was taken under advisement March 21, 1922, and findings were signed January 5, 1923, that the mass of testimony, pleadings, and exhibits made it impossible for the judge to properly decide the case and give it deserved consideration after such delay is not ground of appeal or reversal.

2. Evidence ⇨415—Where contracts for flashers pertained to single transaction, admitting evidence to prove, but not vary, them held not error (Code Civ. Proc. § 427).

Where contracts for constructing model of sign flasher, for manufacturing 1,000 flashers, and for making tools therefor, pertained to a single transaction, and where defendants' liability for moneys paid on contract for manufacture of flashers was pleaded under separate counts, under Code Civ. Proc. § 427, admitting evidence to sustain allegations and provisions of contracts for manufacturing the model and for making the tools, but not varying them, held not error.

3. Appeal and error ⇨1071(6)—Where evidence did not sustain cross-complaint, alleging modification of contract, failure to find on issue thereof held not reversible error.

In action for moneys paid on contract for manufacture of electric flashers, consideration of which had failed, where there was no evidence to sustain defendants' cross-complaint that the original contract was modified, and if finding had been made it would have been adverse to defendant, failure of trial court to find on issue thereof held not ground for reversal.

4. Sales ⇨417—Loss of profits on flashers to be furnished for plaintiffs' trade held not proved by evidence showing plaintiffs had filled contracts.

In action for breach of contract to manufacture electric sign flashers, plaintiffs' alleged loss of profit of \$20 each on 300 flashers which they had, with defendant's knowledge, contracted to furnish their trade, held not proved, where evidence showed they had not lost their contracts with the trade, but had filled them by supplying another type of flasher.

5. Sales ⇨415—Plaintiffs had burden to prove loss of profits on flashers contracted with defendant's knowledge to be furnished their trade, and amount thereof.

In action for breach of contract to manufacture sign flashers, plaintiffs had burden to prove allegations of loss of profits on flashers which they had, with defendant's knowledge, contracted to furnish their trade, and also amount thereof.

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

Action by George T. Mahana and others against the Los Angeles Engineering & Manufacturing Company. From a judgment for plaintiffs, defendant appeals. Judgment modified, and, as modified, affirmed.

Fred Horowitz, of Los Angeles, for appellant.

Duke Stone and Perry F. Backus, both of Los Angeles, for respondents.

CRAIG, Acting P. J. The defendant appeals from a judgment in favor of the plaintiffs for moneys alleged to have been paid by the latter upon a contract for the manufacture of electric lighting mechanism, the consideration for which the court below found to have wholly failed.

It appears that the defendant corporation undertook to do certain experimental work upon a proposed electric sign flasher, to construct a model, and thereafter make 1,000 flashers in accordance therewith; by the use of certain specified tools and dies, also to be made by defendant. The negotiations and experiments continued from the month of June, 1920, until November 22, 1920, when the parties reduced to writing their final agreement for the manufacture of the instruments in quantities. The testimony tended to show that the plaintiffs contemplated purchasing the state rights of a machine known as the McCash type, but that an officer of the defendant suggested that a better instrument could be developed, which would operate successfully, whereas the original sample under consideration had not been perfected.

On August 16, 1920, the defendant executed a contract to design and construct the sample sign flasher for patent "with improvements on magnetic sign flasher, McCash type, and to furnish model of the same and to apply for patents covering improvements; to make necessary dies and equipment for manufacture of same." On November 22, 1920, the parties made and executed an instrument in writing whereby the defendant agreed to manufacture 1,000 flashers, and in which it was recited that they had on the same date made and executed an agreement that the defendant should manufacture all necessary dies, jigs, and special tools therefor; and at the same time the parties executed an instrument whereby the defendant agreed to manufacture such implements, and in which it was recited that they had on that date made and executed an agreement that the defendant should manufacture for the plaintiffs the 1,000 electric sign flashers. Said instruments when completed were to be delivered in certain specified lots, and at stated intervals, and the plaintiffs agreed to pay therefor at various stipulated periods, at the rate of \$12 each.

In the contract providing for the manufacture of the flashers it was agreed that the

manufacturer might "use any material or materials suitable for the purpose, the parties of the second part [plaintiffs herein] being interested in securing a flasher as serviceable as, and that will perform as well as, the model"; and "the party of the first part [defendant] guarantees each flasher to be in perfect working order when delivered, * * * and to function properly when operated on proper voltage, current, cycle, and condition as designated on each flasher," and to replace without charge any faulty or defective parts upon 90 days' demand. The manufacturer also agreed to furnish bond for the faithful performance of the contract, which it did, in the sum of \$6,000.

Many of the machines were manufactured and delivered, but plaintiffs' witnesses testified that it was impossible to use them, owing to poor materials, imperfect construction, and faulty electrical contact as constructed by the defendant. The parties experimented with various processes and materials without avail. An expert witness for the plaintiffs testified that the flashers were worthless; that representatives of the defendant sought his advice as to what could be done to render the machines serviceable, but that he informed them that he did not know. The plaintiffs ultimately declined to receive further deliveries, and instituted this action by a complaint consisting of two counts, for the sum of \$10,405, alleged to have been paid to the defendant, for which they received no consideration, and for \$6,000, representing an alleged loss of profit of \$20 on each of 300 flashers which the plaintiffs claimed that they had, with full knowledge of the defendant, contracted to furnish to their trade. The case was tried before the court without a jury, and was taken under advisement on March 21, 1922. On January 5, 1923, the trial court signed its findings and judgment in favor of the plaintiffs for the sum of \$16,405, with interest from June 1, 1921, and for costs.

[1] It is persistently argued throughout the appellant's briefs that the "mass of testimony, pleadings, and exhibits made it impossible for the learned judge to properly decide the case, and to give it the consideration and attention that it deserved after such delay." This is not a ground of appeal, nor can we say as a matter of law that such delay was not for the purpose of, or that it failed to facilitate, an exhaustive and careful consideration of the mass of pleadings and evidence with which the trial judge was burdened, in addition to the performance of the regular duties of trial work known to continually occupy our superior courts, and which followed the conclusion of the contest in question. Appellant does not attempt to infer that its case was neglected, nor is our attention called to any theory upon which it might be assumed that an extended consideration of the case could have prejudiced a judicious determination of the issues before the court.

[2] The principal point urged by appellant arises from the fact that the parties provided for the manufacture of the first model, the dies, jigs, and tools, and of the flashers in quantities, by three separate instruments. It is insisted that, while the complaint was based only upon the main contract for the production and delivery of flashers, the court below received in evidence, over the defendant's objection, oral and documentary evidence as to the contract for the manufacture of the model, and of the dies and implements, and awarded judgment accordingly, as though each constituted a component part of a single transaction. It is asserted that this was error, and many of appellant's assignments must stand or fall by the determination of this issue.

The line of demarkation between entire and severable contracts has been definitely drawn in this state, and the case before us differs little from those heretofore reported, which hold that it is a question of interpretation to be determined according to the intention of the parties, upon consideration of all of the circumstances. *Los Angeles Gas, etc., Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 P. 55; *Goorberg v. Western Assurance Co.*, 150 Cal. 510, 89 P. 130, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801; *Sterling v. Gregory*, 149 Cal. 117, 85 P. 305; *Mitchell v. Samuels*, 39 Cal. App. 134, 178 P. 336. While it is true that the written contract of August 16th only provided for the furnishing by defendant of a model flasher, and contained no express guaranty, nevertheless, from the oral testimony which was given and properly received to explain the contract, and from the subsequent written agreements between the parties, it is apparent that the stipulation of the subsequent agreements were within the contemplation of the parties at and prior to August 16th. It must be conceded, therefore, that the experiments, formulation of plans, construction of a model, and manufacture of special dies, jigs, and tools, were all intended to be initiatory steps toward the production of electric sign flashers, and that the manufacture and delivery of the machines received by the respondents was but a direct result of such preliminary preparations for a prospective profitable undertaking. Without the latter the model and the tools would have been worthless, and without them the final product would have been impossible. If, acting upon the suggestion of the defendant corporation, the plaintiffs expended sums of money for experiments, materials, model, and tools to be employed in the production of an appliance which ultimately proved to be inoperative and unmerchantable, though the manufacturer had guaranteed the same "to be in perfect working order when delivered, * * * and to function properly," all moneys so expended toward the contemplated end were a loss, and the consideration failed.

It is not contended that the amount of dam-

ages alleged to have been suffered by the plaintiffs embraced other than the amounts actually paid, and profits which they would have earned had the consideration not failed. Hence, since, as we have shown, there was but one transaction, and the alleged liability was pleaded in accordance with the facts, in separate counts, as provided by section 427 of the Code of Civil Procedure, the complaint was not in this respect insufficient, and rulings of the trial court admitting evidence which tended to sustain the terms of such allegations and the provisions of each instrument, but not to vary them, were proper.

[3] By its cross-complaint the defendant alleged that the original contract was modified, and that materials different from those at first deemed most serviceable were substituted by others, but that the trial court erred in failing to find upon that fact. As we have just indicated, the contract provided that the defendant might "use any material or materials suitable for the purpose." It appears that representatives of the defendant consulted with the plaintiffs and their agents regarding ways and means of attempting to produce an instrument that would operate in accordance with the agreement of the parties, and it appears that different materials were used at various times, but it is obvious that this did not constitute a modification of the terms of the contract. We find no evidence to sustain the allegation of the cross-complaint. While it is true that an issue was thereby presented upon which there should have been a finding, in this instance it appears that, if a finding had been made, it would have been adverse to the appellant. Under such circumstances the judgment will not be reversed upon the ground of a lack of such a finding.

[4, 5] It is contended that, inasmuch as the plaintiffs admit that they filled their forfeited contracts with the trade with other and different instruments, the judgment for \$6,000 upon the second count of the complaint is not sustained by the evidence. The evidence showed that they did not lose their contracts with the trade, but that they filled them by manufacturing and supplying another type of electric flasher. To make even a prima facie case on this count it would have been necessary for the plaintiffs, not only to have shown the amount of profit which they would have made, had they been able to furnish the article contracted for, but, since another article was substituted and accepted by the plaintiffs' customers, to have further shown what profit, if any, was received therefrom, was requisite, and should obviously have been deducted from the loss otherwise sustained. It may well have been that the plaintiffs gained by the change. The burden of proof was on the plaintiffs to establish their loss and the amount thereof. It was no part of the defendant's duty to produce evidence as to the

profit or loss sustained by the plaintiffs upon the sale of the substituted article, any more than upon the same element involved in a failure of the plaintiffs to furnish to their customers the article contracted to be sold. It is the loss sustained on the entire transaction which may be recovered, if a recovery is to be had, and not what would have been the loss had the plaintiffs' customers refused to accept a substitute flasher. The proof as to the damage sustained in this behalf was incomplete. The amount awarded on this count must be deducted from the judgment.

As so modified, the judgment is affirmed.

We concur: THOMPSON, J.; JOHNSON, Justice pro tem.

82 Cal. App. 700

PEOPLE v. BAILEY et al. (Cr. 1417.)★

District Court of Appeal, Second District, Division 1, California. May 4, 1927.

Rehearing Denied May 27, 1927. Hearing Denied by Supreme Court June 30, 1927.

1. Conspiracy $\S$ 43(6)—Indictment charging conspiracy to steal whisky held not subject to objection that proposed larceny covered whisky in which no property right existed (National Prohibition Act tit. 2, $\S$ 25 [U. S. Comp. St. $\S$ 10138½m]).

Indictment charging defendants with unlawfully conspiring to take, steal, and carry away from one John Shepek whisky worth \$10,000, and that it was personal property of John Shepek, held not subject to objection that proposed larceny covered illegally possessed whisky, and that it consequently had no value, and that no property right existed in it, under National Prohibition Act, tit. 2, $\S$ 25 (U. S. Comp. St. $\S$ 10138½m), and indictment was sufficient.

2. Criminal law $\S$ 422(1)—Where evidence showed conspiracy and that witness was co-conspirator, evidence regarding statements made by alleged coconspirator to witness held admissible.

Where evidence had shown existence of conspiracy charged in indictment and that M. was coconspirator with defendants on trial, testimony by M. in regard to statements made over telephone by an alleged coconspirator held admissible.

3. Criminal law $\S$ 423(1)—After conspiracy has been formed and before its consummation, acts or declarations of conspirators in furtherance of conspiracy are admissible.

After a conspiracy has been formed and before its consummation, any act or declaration of either of conspirators in furtherance of conspiracy is admissible.

4. Criminal law $\S$ 419, 420(11)—Where evidence had shown existence of conspiracy charged, evidence of conversation between witness and conspirator's secretary, delegated to hold conversation, held admissible.

Where evidence had shown existence of conspiracy charged in indictment, evidence of alleged conversation, which took place between

witness and conspirator's secretary, delegated to hold such conversation, *held* admissible.

5. Criminal law ⚡810—Instruction covering law affecting general conspiracy and instruction limiting conspiracy to definite object held not conflicting.

Instruction covering law affecting general conspiracy and instruction to effect that intoxicating liquor illegally possessed did not constitute property and was not subject to larceny and that it was not criminal to specifically agree with others to take illegally possessed liquors *held* not conflicting.

6. Criminal law ⚡742(2)—Where each of witnesses had testified to participation in crime, instruction that witnesses were accomplices held not error.

Instruction, "You are instructed that the witness Calvin Warren and the witness Frank Bailey are accomplices," *held* not error, where each of said witnesses freely testified to his participation in commission of offense, and there was no conflict in evidence on that point.

7. Criminal law ⚡784(2)—Instruction on distinction between circumstantial and direct evidence held correct.

In prosecution for conspiracy to commit crime of grand larceny, instruction that law makes no distinction between circumstantial evidence and direct evidence in degree of proof required for conviction *held* not error.

8. Criminal law ⚡511(2)—Evidence as to details connected with overt acts of defendants, with identification of defendant as participant in crime, held sufficient to corroborate accomplice (Pen. Code, § 1111).

In prosecution for conspiracy to commit grand larceny, testimony and corroboration of accomplice as to many details connected with overt acts of defendants in connection with commission of offense, together with satisfactory identification of defendant as participant in crime, *held* to meet requirement of Pen. Code, § 1111, relating to corroborating testimony.

9. Conspiracy ⚡44½—Burden of proving that liquor defendants conspired to take was lawfully acquired, possessed, and used by possessor rested on prosecution (National Prohibition Act, tit. 2, § 33 [U. S. Comp. St. § 10138½t]).

In prosecution for conspiracy to commit grand larceny by taking whisky, burden of proving that liquor was lawfully acquired, possessed, and used by possessor rested on prosecution, under National Prohibition Act, tit. 2, § 33 (U. S. Comp. St. § 10138½t).

10. Conspiracy ⚡47—Evidence held to establish lawful ownership of whisky, in prosecution for conspiracy to steal such whisky (National Prohibition Act, tit. 2, § 33 [U. S. Comp. St. § 10138½t]).

Testimony of owner and wife that whisky, which was subject of alleged conspiracy, was owned and possessed as part of stock of liquor owned before National Prohibition Act (U. S. Comp. St. § 10138½ et seq.) went into effect, and that at all times thereafter whisky

was kept and possessed in his own home for his own use and that of his family and for bona fide guests, *held* to establish lawful ownership of whisky in question, under title 2, § 33 (U. S. Comp. St. § 10138½t).

11. Conspiracy ⚡25—"Conspiracy" exists when two or more persons conspire to commit unlawful act or to commit lawful act by unlawful means.

A criminal "conspiracy" exists when two or more persons conspire to commit an unlawful act or to commit a lawful act by unlawful means.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

12. Conspiracy ⚡47—Evidence held to warrant conviction of conspiracy to commit grand larceny by taking whisky.

Testimony by owners of whisky that defendants proposed to take whisky by virtue of forged search warrant, and that, after being informed that whisky was prewar, defendants stated that they would have to take it, corroborating accomplice's testimony, *held* to warrant conviction of conspiracy to commit grand larceny.

13. Criminal law ⚡741(5)—Testimony to effect that witness identified defendant by his walk as one who participated in crime sufficiently corroborated accomplice's testimony to warrant submission of guilt to jury.

In prosecution for conspiracy to commit grand larceny, testimony to effect that three days after offense was committed S. identified defendant by his walk as being one of men who were present at S.'s home at time in question, and who participated in commission of crime, *held* to sufficiently corroborate accomplice's testimony to warrant submission of defendant's guilt to jury, since man may be identified by his walk, and also because statement, "That is the man," was made in defendant's presence and he made no reply.

14. Criminal law ⚡511(7)—Accomplice's testimony may be corroborated by admission of defendant.

Testimony of accomplice may be corroborated by admission of defendant.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Frank Bailey, Frank J. Warren, and others were convicted of conspiracy to commit grand larceny, and defendants named appeal. Affirmed.

MacDonald & Thompson, of Los Angeles, for appellant Warren.

James E. Fenton, of Los Angeles, for appellant Bailey.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

HOUSER, J. Defendants appeal from a judgment of conviction of the crime of con-

spiracy to commit the crime of grand larceny, and from an order denying them and each of them a new trial.

Briefly, the facts appear to be that the defendants with two others agreed among themselves that they would go to a certain place where a considerable quantity of whisky was stored, and, by pretending to the owner of the premises that they were officers engaged in the enforcement of the National Prohibition Act (U. S. Comp. St. § 10138¼ et seq.), and by virtue of a forged search warrant, take the whisky and convert it to their own use.

The gist of the accusation against the defendants, as set forth in the indictment, is that they did unlawfully conspire " * * * to take, steal, and carry away from one John Shepek, whisky of the value of \$10,000, lawful money of the United States. * * * "

The first specification of error, in effect, is that the indictment fails to state facts sufficient to constitute a public offense in that the whisky which was the subject of the proposed larceny in law did not constitute property or anything of value in which the person from whom it was proposed to be taken had any property right.

[1] While it is true that as to whisky illegally possessed the statute (section 8352, Barnes' Fed. Code, 1921 Supp. [U. S. Comp. St. § 10138½m]) provides, in effect, that no property right shall exist therein, and which statute in the case of *People v. Spencer*, 54 Cal. App. 54, 201 P. 130, has been construed in accordance with the general contention of appellants, nevertheless we think that the language of the indictment herein, to which attention has been directed, sufficiently covers whisky legally possessed. It will be noted that the words of the indictment, in effect, are that the whisky was of the value of \$10,000 and the personal property of John Shepek. According to the language of the statute, if the whisky had been illegally possessed by Shepek, it would have had no value, nor would Shepek have had any property right therein. The words of the indictment that the whisky was worth \$10,000 and that it was the personal property of John Shepek in effect constituted a contradiction that it was illegally possessed whisky, and that consequently it had no value. It therefore follows that the indictment was sufficient.

[2] It is next specified as error that certain testimony, given by one McDonald on behalf of the people regarding statements made over the telephone by an alleged coconspirator of the defendants, was hearsay and improperly admitted on the trial of the action. The evidence having shown the existence of the conspiracy charged in the indictment and that McDonald was a coconspirator with the defendants on trial, it is well settled that such evidence was admissible. *People v. Tomlinson*, 102 Cal. 19, 36 P. 506; *People v. Bunkers*, 2 Cal. App. 197, 84 P. 364, 370.

[3-5] A somewhat similar objection to testimony given by a witness regarding an alleged conversation which took place between the witness and a man delegated by one of the alleged conspirators to hold such conversation is subject to the same rule. Specifically, the only material part of the conversation was as to the location of the place where the whisky was stored.

That after a conspiracy has been formed, and before its consummation, any act or declaration of either of the conspirators in furtherance of the conspiracy is admissible in evidence is so well established as to require no citation of authority therefor. All that occurred, in substance, was that one of the conspirators, in the presence of two of his coconspirators, directed his secretary to inquire of the witness the location of John Shepek's home. The evidence shows that the secretary performed the duty assigned to him and immediately thereafter and within the presence and hearing of the said alleged conspirators reported the desired information thus acquired to his employer. In reason, we can see no valid objection to the evidence.

Appellants complain of alleged prejudicial error in the giving by the court to the jury of two instructions, of which it is contended that each of them is in conflict with the other. The first of such instructions was to the effect that if at all events and regardless of whether the whisky was either legally or illegally possessed by Shepek, or, if without any agreement or understanding among the conspirators regarding the legality or illegality of the possession of the whisky by Shepek, the defendants conspired to steal the whisky, they should be found guilty as charged. The effect of the second instruction was that intoxicating liquor, which was illegally possessed, did not constitute property and was not the subject of larceny, and consequently that it was "not criminal to specifically agree with others to take such illegally possessed liquors." The first instruction covered the law affecting a general conspiracy, and the second limited the conspiracy to a definite object. If the jury found a general conspiracy to have existed among the defendants, it was authorized to find the defendants guilty, but if the jury found that the defendants conspired to steal a certain kind of whisky only, to wit, illegally possessed whisky, the jury was informed that its duty was to acquit the defendants. Appellants fail to point out in what respect either of such instructions conflicts with the other, nor is this court, independent of advice of counsel representing appellants, able to discern the conflict of which general complaint is made.

[6] By appellant Bailey, error is also predicated on the giving by the court of the following instruction to the jury:

"You are instructed that the witness Calvin Warren and the witness Frank Bailey are accomplices."

In the case of *People v. Coffey*, 161 Cal. 433, 436, 119 P. 901, 902 (39 L. R. A. [N. S.] 704) it is said:

"* * * But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice.
* * *"

To the same effect are *People v. Truax*, 30 Cal. App. 471, 158 P. 510; *People v. Howell*, 69 Cal. App. 239, 230 P. 991; *People v. McDermott* (Cal. App.) 243 P. 485.

In view of the fact that each of said witnesses freely testified to his participation in the commission of the offense, and that there is no conflict in the evidence on that point, the court was justified in giving to the jury the instruction of which complaint is made.

[7] Further complaint is made by appellants that the trial court erred in giving to the jury the following instruction:

"* * * There is nothing in the nature of circumstantial evidence that renders it less reliable than the other class of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow.
* * * The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction.
* * *"

An instruction of practically the same import has been passed upon by the appellate tribunals in each of the following cases: *People v. Morrow*, 60 Cal. 142; *People v. Urquidas*, 96 Cal. 239, 31 P. 52; *People v. Wilder*, 134 Cal. 182, 66 P. 228; *People v. Howard*, 135 Cal. 266, 67 P. 148; *People v. Ung Sing*, 171 Cal. 83, 151 P. 1145; *People v. Watts*, 198 Cal. 797, 247 P. 884; *People v. Watts*, 198 Cal. 776, 247 P. 884; *People v. Simmons*, 7 Cal. App. 559, 95 P. 48; *People v. Lim Foon*, 29 Cal. App. 270, 155 P. 477.

As in none of such cases was it held that the giving of such an instruction was ground for reversal of the judgment, we are constrained to follow the rule therein indicated and to declare that the trial court committed no error in giving to the jury the instruction to which exception is taken herein.

[8] It is next urged by appellant Bailey that the court erred in denying his motion to advise the jury to find him not guilty on the ground that no offense against the laws of the state of California had been made out by the proof presented by the prosecution, and on the further ground that the indictment failed to state facts sufficient to constitute a public offense against the laws of the state of California.

As hereinbefore stated, we are of the opinion that the indictment was sufficient. However, appellant discusses the sufficiency of the corroboration of one of the accomplices to warrant the verdict. All that apparently is

required by the provisions of section 1111 of the Penal Code is that the corroborative evidence tends to connect the defendant with the commission of the offense, provided that it must do more than merely show the commission of the offense and the circumstances thereof. But it appears that both Mr. and Mrs. Shepek gave testimony in corroboration of one of the accomplices as to many of the details connected with the overt acts of the defendants in connection with the commission of the offense, together with a very satisfactory identification of defendant Bailey as a participator in the crime. The general rule as to the sufficiency of corroborative evidence is discussed and authorities cited in the case of *People v. Kelly*, 69 Cal. App. 558, 570, 231 P. 767, and the principle laid down that all that is required is that, standing alone, such corroborative evidence tends to connect the defendant with the commission of the offense, and that such evidence may be slight and of itself entitled to but little consideration. Measured by such rule, in the instant case we entertain no doubt but that the requirements of the statute were fully met.

Appellant Bailey also advances the point that the corpus delicti was not established in that the evidence failed to establish the fact that Shepek was the lawful owner of the whisky which was the subject of the alleged conspiracy.

[9, 10] The burden of proving that the liquor was lawfully acquired, possessed, and used by Shepek rested on the prosecution. Section 8352h, Barnes' Fed. Code, 1921 Supp. (U. S. Comp. St. § 10138½t). With reference thereto, the record herein shows that both Mr. and Mrs. Shepek testified that the whisky in question was owned and possessed by Shepek as a part of a stock of liquor which he had owned before the National Prohibition Act went into effect, and that at all times thereafter the whisky was kept and possessed by Shepek in his home for his own use, that of his family and their bona fide guests. It is therefore clear that the position of appellant cannot be sustained.

Appellant Warren contends that no sufficient corroboration of the testimony given by one of the accomplices to establish the conspiracy alleged in the indictment was shown in evidence, and that no evidence was introduced which tended to prove that the alleged conspiracy had for its object anything other than the taking of whisky illegally possessed, and hence that the evidence failed to show that any crime was committed. The record herein shows that Mrs. Shepek testified that after defendant Bailey had been informed by her that the whisky was "prewar," Bailey stated that "they would have to take it"—which fact, at least, has a tendency to corroborate the testimony given by the accomplice to the effect that he told Bailey that the whisky was legally possessed by Shepek. But, even assuming the fact (which cannot be

conceded) that the testimony of the accomplice to the effect that he told his coconspirators that the whisky was "prewar," or legally possessed whisky, was not sufficiently corroborated, nevertheless it appears that the proposed means of taking the whisky (legally or illegally possessed) was by virtue of a forged search warrant; which fact, although testified to by an accomplice, was sufficiently corroborated by both Mr. and Mrs. Shepek.

[11, 12] As stated in 5 California Jurisprudence, page 495, where in support thereof several cases are cited:

"The authorities declare that a criminal conspiracy exists when 'two or more persons conspire to commit an unlawful act, or to commit a lawful act by unlawful means.'"

It must have been either lawful or unlawful to conspire to take the whisky. If it was unlawful, the statute covers the act of the conspirators; and if lawful, the means by which the whisky was proposed to be taken was unlawful, which would also bring the act within the terms of the statute. The agreement among the conspirators to obtain possession of the whisky through the pretended authority of a search warrant, which in fact was forged and of no validity, was an effort to take the whisky from the possession of the owner thereof by unlawful means; from which it follows that the conspiracy was established by the evidence, and consequently that the contention of appellant in this regard cannot be sustained.

Finally, it is contended by appellant Warren that the testimony of two of the accomplices in the commission of the offense was not corroborated as to said appellant.

The evidence shows that the corroboration was to the effect that three days after the offense was committed John Shepek identified Warren by his walk as being one of the men who were present at Shepek's home at the time in question, and who participated in the commission of the crime. At the time of the trial Shepek testified that at the time he identified defendant Warren the peculiarity of Warren's walk was fresh in his memory; that the particular and peculiar walk of the man that he noticed coming up out of the cellar in Shepek's home at the time the offense was committed was similar to the walk of the man whom he later identified; and that at the time he made the identification he was positive that the man he then identified was the man he saw at his home at the time in question. On the trial of the action Shepek declined to state positively that defendant Warren was the man whom he had formerly identified, or that he was one of the men who were at his home at the time the offense was committed. Although defendant Warren did not take the witness stand in his own behalf, it appears from the evidence that at the time when Shepek identified Warren he did so by

stating, in the presence and hearing of Warren, "That is the man," to which statement Warren made no reply. The arresting officer testified that Warren was the man whom Shepek identified two or three days after the offense was committed.

[13, 14] Having in mind the rule hereinbefore stated to the effect that the corroboration of the accomplice may be slight and of itself entitled to but little consideration, and that a man may be identified by his walk (People v. Wilson [Cal. App.] 245 P. 781), together with the further rule that the testimony of the accomplice may be corroborated by the admission of the defendant (People v. Richardson, 161 Cal. 552, 120 P. 20; People v. Henson, 32 Cal. App. 600, 163 P. 685; People v. Kelly, 69 Cal. App. 558, 231 P. 767), we are constrained to hold that the corroboration was of sufficient strength to warrant the submission of the question of the guilt of defendant Warren to the jury.

No prejudicial error appearing in the record, it is ordered that the judgment and the order denying the motion for a new trial be and they are affirmed.

We concur: CONREY, P. J.; YORK, J.

82 Cal. App. 723

BRUSH v. APARTMENT & HOTEL FINANCING CORPORATION. (Civ. 4848.)

District Court of Appeal, Second District, Division 1, California. May 5, 1927.

1. Mortgages  **469—Order appointing receiver pending foreclosure of leasehold mortgage held proper on allegation that security was deteriorating, without specific allegation that property was insufficient (Code Civ. Proc. § 564, subd. 2).**

Order appointing receiver pending foreclosure of mortgage of leasehold of apartment house held proper, though motion therefor did not allege in language of statute that property was insufficient to discharge the mortgage debt as provided by Code Civ. Proc. § 564, subd. 2, where it alleged that security was deteriorating and by time matter came to trial would be deteriorated and wholly worthless.

2. Mortgages  **469—To authorize receivership pending foreclosure, specific facts sufficient to confer jurisdiction must be alleged (Code Civ. Proc. § 564, subd. 2).**

To authorize appointment of a receiver under Code Civ. Proc. § 564, subd. 2, pending foreclosure of a mortgage, facts must be alleged in complaint or affidavit sufficiently specific to confer jurisdiction on court to appoint; bare statement that the property is insufficient to discharge the mortgage debt being insufficient.

3. Appeal and error  **955—Determination of appointment of receiver pending foreclosure rests with trial court (Code Civ. Proc. § 564, subd. 2).**

Determination of question whether showing is sufficient to authorize appointment of a re-

ceiver under Code Civ. Proc. § 564, subd. 2, pending foreclosure, rests with trial court.

4. Appeal and error ⚡955—Trial judge's discretion in appointing receiver pending foreclosure can be challenged on appeal only on showing that it was abused (Code Civ. Proc. § 564, subd. 2).

Discretion of trial judge in appointment of a receiver pending foreclosure of a mortgage under Code Civ. Proc. § 564, subd. 2, may be challenged and overturned on appeal only where it unmistakably appears, not merely that discretion may not have been wisely exercised, but that it was actually abused.

5. Appeal and error ⚡762—That order erroneously appointed one of defendants receiver pending foreclosure cannot be considered where first mentioned in closing brief.

That because person appointed receiver pending foreclosure of mortgage was one of parties defendant the order of appointment should be reversed cannot be considered, where first mention thereof was in appellant's closing brief.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Renno Brush against the Apartment & Hotel Financing Corporation to foreclose a mortgage on a leasehold of an apartment house. From an order appointing a receiver, defendant appeals. Affirmed.

E. O. Leake, of Los Angeles, for appellant.
Harry Lyons, of Los Angeles, for respondent.

HOUSER, J. [1] This is an appeal from an order appointing a receiver in an action brought to foreclose a mortgage of a leasehold on an apartment house, together with the furniture and furnishings therein contained. It is contended by appellant that the court abused its discretion in making the appointment and that the court was without jurisdiction in the premises.

By subdivision 2 of section 564 of the Code of Civil Procedure, it is provided in effect that a receiver may be appointed by the court in an action by a mortgagee for the foreclosure of his mortgage " * * * where it appears * * * that the property is probably insufficient to discharge the mortgage debt." It is urged by appellant that the court was without jurisdiction in the premises because in the motion for appointment of the receiver plaintiff failed to make an allegation in the language of the statute that the value of the mortgaged property was "insufficient to discharge the mortgage debt." In that connection, it appears that by allegations contained in the complaint and in affidavits presented by plaintiff in his motion for the appointment of a receiver it was shown "that plaintiff's security is deteriorating and will so continue to deteriorate," and

"will by the time the within matter comes to trial be deteriorated and be practically worthless." However, the facts as stated in the affidavits presented by plaintiff in support of such allegation in substance were that the amount of the mortgage debt was the sum of \$6,044; that the value of the furniture and furnishings covered by the mortgage was \$3,500; "that if defendants are permitted to continue in possession of the premises for another 12 months, that the furniture, furnishings, and equipment will not bring in over the sum of \$2,000"; also, the fact of the pendency of an action for the condemnation of real property, in which action the cancellation of the leasehold here in question was sought, and that by reason of such condemnation action plaintiff's security "will be greatly if not totally extinguished and impaired."

[2] It is clear that a bare statement in the language of the statute would be insufficient to confer jurisdiction. What is necessary, and to which the court must look for its authority, is that there be not mere conclusions, but specific facts as alleged either in the complaint or in the affidavits supporting the motion. If such facts bring the case of the applicant within the language of the statute, it is just as immaterial that the plaintiff failed to correctly label them as it would have been impotent that with the greatest of care he used the exact wording of the statute, but failed to set up the facts which established such conclusion. In other words, it is substance, rather than form, that is required and upon which the conclusion of the court must rest.

[3] While it is true that counter affidavits were presented by the defendants to the court by which it was alleged that the value of the leasehold and the furniture and furnishings of the apartment house was largely in excess of the amount stated in the affidavits and pleading of the plaintiff as being the value of such property, it is well settled that the determination of the question rested with the trial court.

In the case of *Doak v. Bruson*, 152 Cal. 17, 19, 91 P. 1001, 1002, it is said:

"In the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established. [Citing cases.] And as error is not presumed, and all intendments are in favor of the action of the lower court, it follows that the affidavits in behalf of the successful party are to be deemed to establish not only the facts directly stated therein, but also all facts which may reasonably be inferred or presumed from the direct and positive statements."

The case of *Fox v. Flood*, 44 Cal. App. 786, 187 P. 68, like the instant case, was one in which an appeal was taken from an order appointing a receiver in an action for the foreclosure of a mortgage. Touching the point here under consideration, the court said:

"The power to appoint a receiver is very largely within the discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion except in cases of palpable abuse. *Whitley v. Bradley*, 13 Cal. App. 720, 724, 725, 110 P. 593. In reviewing an appeal from an order made upon affidavits, in which the determination of a question of fact is involved, the court is governed by the same rules applicable to oral testimony. If the affidavits are conflicting, the facts stated in the affidavits favorable to the prevailing party must be considered as established"—citing cases.

See, also, *McCarthy v. Kurkjian*, 69 Cal. App. 682, 232 P. 161.

[4] From a consideration of the foregoing authorities it is apparent that in the instant case the determination of the issue presented by the affidavits of the respective parties lay within the discretion of the judge of the trial court. He had a right to adopt as true the facts stated in the affidavits presented by plaintiff, together with all inferences and presumptions reasonably deducible therefrom, and to reject in toto the facts contained within the affidavits presented in behalf of the defendant. With such rule in mind, if it be assumed that the judge of the trial court believed from the evidence before him that the amount owed on account of the mortgage was the sum of \$6,044; that the value of the furniture and furnishings covered by the mortgage in question was either \$2,000 or \$3,500; and that by reason of the pendency of the condemnation proceeding, to which reference herein has been had, the security of the leasehold held by plaintiff for the payment of the debt secured by the mortgage would be "totally extinguished" so that by the time the action would come on for trial the entire mortgaged property would "be deteriorated and be practically worthless" and therefore probably would be "insufficient to discharge the mortgage debt" (subdivision 2, § 564, Code Civ. Proc.), it is manifest that the conclusion of whether a receiver should be appointed, resting, as it did, wholly within the discretion of the judge of the trial court, may be challenged and overturned on appeal only if it clearly and unmistakably appears, not merely that the discretion may not have been wisely exercised, but that it was actually abused. In the order here in question we are unable to perceive that the powers of the judge of the trial court were in any manner overstepped, or that a jurisdiction not possessed by the trial court was exercised in the premises.

[5] In appellant's closing brief it is contended that because the person appointed re-

ceiver was one of the parties defendant in the action, the order appointing the receiver should be reversed. In connection with such alleged error, it may be said that neither in the specifications of errors contained within the bill of exceptions, nor in appellant's opening brief, is any mention made of the point to which reference has been had; in other words, the point is first mentioned in appellant's closing brief. Whatever merits might ordinarily be attachable to appellant's contention, it is clear that in the premises the practice of appellate tribunals forbids its consideration. For aught that appears, the appointment of one of the defendants in the action may have been altogether regular and fully authorized in all respects. In fact, the record fails to show that the receiver ever was a party to the action.

The order is affirmed.

We concur: CONREY, P. J.; YORK, J.

82 Cal. App. 641

ALFALFA GROWERS OF CALIFORNIA, Inc., v. ICARDO et al. (Civ. 4227.)

District Court of Appeal, Second District, Division 2, California. May 2, 1927.

1. Agriculture ⚡6—Nonprofit association to distribute products of members, having no capital stock, cannot levy assessments (Civ. Code, §§ 331, 653m-653sc).

Nonprofit association or corporation, having no capital stock, organized under Civ. Code, §§ 653m-653sc, for purpose of distributing product of its members, who are alfalfa growers, held to have no statutory power to levy assessments under sections under which it was organized, nor under section 331, relating to assessments by corporations.

2. Evidence ⚡6—Court takes judicial notice that quantity of alfalfa produced per acre of land is widely divergent.

Court will take judicial notice that quantity of alfalfa produced per acre of land is widely divergent, even that amount produced upon two acres lying side by side is often greatly different.

3. Agriculture ⚡6—Articles of incorporation of nonprofit association for distribution of product of members must be construed in light of statute (Civ. Code, §§ 653m-653sc).

Articles of incorporation of nonprofit association organized under Civ. Code, §§ 653m-653sc, for purpose of distributing product of its members, who are alfalfa growers, must be construed in light of statute under which it was organized.

4. Agriculture ⚡6—Nonprofit association, to distribute product of members could not enforce contract for assessments, where exactions would result in unjust discrimination (Civ. Code, §§ 653m-653sc).

Nonprofit association or corporation, having no capital stock, organized under Civ. Code,

§§ 653m-653sc, to distribute product of its members, who are alfalfa growers, could not enforce alleged contract for assessments, provided for by its articles of incorporation and by-laws, where exactions would result in unjust discrimination between its members, since exactions must be equal and uniform.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by the Alfalfa Growers of California, Inc., against A. Icardo and others to enforce collection of unpaid assessment. Verdict was rendered for plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

Johnson & Lemmon, of Sacramento, and Emmons & Aldrich, of Bakersfield, for appellant.

Dorsey & Campbell and Kaye & Siemon, all of Bakersfield, for respondents.

WORKS, P. J. Plaintiff is a nonprofit association or corporation, organized under the provisions of the Civil Code for the purpose of distributing the product of its members, who are alfalfa growers. The defendants, as copartners, owned a membership in the organization. This action was commenced for the purpose of enforcing the collection of an unpaid assessment against the membership held by them. The cause was tried by a jury and a verdict was rendered in favor of plaintiff, but the trial court later made its order granting a new trial. From this order plaintiff appeals.

It is contended by respondents that appellant was without authority to levy assessments against its members, and we think the contention must be upheld. The statute is searched in vain for such authority. There are no provisions whatever directly relating to assessments in the sections of the Civil Code (sections 653m to 653sc) under which appellant was organized and pursued its existence. It is provided, however, in section 653m that the associations contemplated by it shall have all the "powers granted to private corporations by the laws of this state, except such powers as are inconsistent with those granted by this title."

Section 653q reads, in part:

"Each association incorporated under this title shall have the powers granted by the provisions of this Code and other laws of California relating to private corporations. * * *

Section 653sb provides:

"Nothing in this title shall be deemed to prohibit any co-operative association formed or existing hereunder from having and exercising the same powers in carrying out its purposes as are enjoyed or exercised by corporations which issue capital stock."

[1] We think these three provisions are not sufficient to clothe appellant with statutory power to levy assessments. The enactments

which provide for the levy of assessments by corporations relate exclusively to assessments upon capital stock. To begin with, the article of the Civil Code upon the subject (article 2 of chapter 2 of title 1 of part 4 of Div. First) is headed "Assessment of Stock," and section 331, which confers the power, reads in part, with our italics:

"The directors of any corporation formed or existing under the laws of this state, *after one-fourth of its capital stock has been subscribed*, may * * * levy and collect assessments *upon the subscribed capital stock* thereof. * * *

Appellant has no capital stock, and it would seem, therefore, whatever is the force to be attributed to those portions of sections 653m, 653q, 653sb which are above quoted, that the language employed is not of sufficient potency to import the provisions of the Code relating to assessments of capital stock. In corporations like appellant, the basis upon which the right to assess rests is simply nonexistent. And there are particular reasons for the inapplicability of provisions of law relating to assessments to such corporations as appellant. That corporation was organized under a "Title" of the Code (sections 653m to 653sc), which provides for the organization of associations by "persons engaged in the production, preserving, drying, packing, shipping, manufacturing, preparing for market, or marketing of agricultural, viticultural, or horticultural products, or all of them" (section 653m). It is feasible to provide for assessments of capital stock, for each share of the stock of a given corporation is like all the other shares and an equitable basis exists upon which to make a levy; but what similarity exists, as a foundation for a just and equal assessment, between those members of a corporation like appellant who, respectively, produce, or preserve, or dry, or pack, or ship, or manufacture, or prepare for market, or market either an agricultural, or a viticultural, or a horticultural product? We can see none, and, on the whole, we are convinced that appellant is possessed of no statutory authority to levy assessments upon its memberships.

There are many decided cases to the effect that the power to levy assessments may be created by contract between a corporation and its members. It is insisted by appellant that it enjoys a power so created, as both its articles of incorporation and by-laws contain provisions attempting to confer the authority.

The difficulties pointed out during our consideration of the question whether appellant enjoyed statutory authority to levy assessments are illustrated and intensified when we come to examine the contention that the right existed by virtue of contract. Appellant's articles of incorporation provided that the purposes of the organization, in part, were "to promote, foster and encourage the busi-

ness of growing alfalfa and other hay and straw," and to aid "in the marketing, processing, warehousing, storing, and distribution thereof of alfalfa products, and by-products, and of other hay products and straw and its products and by-products"; that each member should "be entitled to one vote and to one unit of interest in the property of the association, and to one additional vote, and one additional unit of interest, for each and every ton of alfalfa, or major portion thereof, produced by him or upon his ranch or in affiliated activities owned, operated, and controlled by him and sold or listed for sale by the association for him in each year"; that "any person, firm, or corporation or manager, or officer of any corporation or member of any firm engaged in the business of producing alfalfa or controlling the production thereof or having any interest in such production * * * may be admitted to membership in the association, and shall have voting power and property rights therein on the same basis as all other members"; that every member should pay "an entrance or membership fee based upon a specified amount per acre for each and every acre of lands planted to alfalfa and represented by him"; and that the directors should have the right to levy assessments and that notices of assessment "shall be mailed to all of the members and such assessment shall become valid and binding upon all of the members" unless within a certain time "members owning a majority of the property rights herein shall file * * * written dissents or objections thereto."

It was provided in the by-laws of appellant, in addition to some matters which are practically repeated from the articles of incorporation, that members of the association were of two classes, active members, "to include all members who have any interest, direct or indirect, in the production of alfalfa," and associate members, "including all other members," and that the active members were divided into two subclasses, marketing members, "to include all active members whose alfalfa acreage is to be marketed, in whole or in part," and nonmarketing members, "to include all other active members"; and that the board of directors should have the right to levy assessments "to carry out any of the legitimate purposes of the association, each member to be liable prorata in accord with the alfalfa acreage owned, controlled, or represented." Particularly it is to be noticed that the by-laws repeated the clause of the articles of incorporation to the effect that notices of assessment were to be mailed to all members and that assessments were to be enforceable against all.

[2] It will be observed that the articles of incorporation and the by-laws provided a scheme for the levying of assessments which could operate neither justly nor equitably

between the members. The memberships in the association were not like memberships in the ordinary social club, under which each member enjoys privileges exactly like those enjoyed by all the others, and under which, therefore, all are equal. Appellant was organized for the purpose of fostering and advancing the financial welfare of its members, and each membership was valuable to the holder of it to an extent which depended upon the value and importance of the enterprise or interest, which, through his membership, he placed under appellant's care. It was unavoidable, therefore, that some memberships should be of a value different from that attaching to all the others. Under the articles of incorporation all memberships were treated as alike upon the score of liability to assessment, even if members were allowed a number of votes and a number of unities of interest proportioned to the tonnage of alfalfa produced by each. If we concede for the sake of argument that the provisions of the by-laws in a respect about to be mentioned were not an illegal and unwarranted departure from the articles, we may observe that the by-laws provide for the prorating among the members of the amount of assessments upon the basis of the "alfalfa acreage owned, controlled, or represented." But this arrangement could not make assessments equal even as between those who were strictly of one class upon the score of the protection afforded them by their memberships, those, for instance, who were all growers of alfalfa. It is a notorious fact, and one of which we will take judicial notice (*Ex parte Kohler*, 74 Cal. 38, 15 P. 436; *Wingard v. Industrial Acc. Com.*, 57 Cal. App. 674, 207 P. 1030), that the quantity of alfalfa produced per acre of land is widely divergent, even that the amount produced from two acres lying side by side is often greatly different.

[3] If we drop consideration of those who are similarly situated to the extent of being growers, we are confronted with greater inequalities and uncertainties. The prorating of the amount of assessments between the members is made to depend, as we have already noticed, upon "the alfalfa acreage owned, controlled, or represented," but those who become members need neither own, control, nor represent acreage. The statute (*Civ. Code*, § 653m) provides for a membership composed of "persons * * * preserving, drying, packing, shipping, manufacturing, preparing for market, or marketing" alfalfa, in so far as the substantives employed in the enactment may be applied to the alfalfa industry. The articles of incorporation of appellant, which must be construed in the light of the statute, provide that those "engaged in the business of producing alfalfa or controlling the production thereof or having any interest in such production" may become members of the association. One section of

the by-laws provides, it is true, that membership in appellant shall be limited to the state market director "and any and all alfalfa growers in the state of California, or the owner or lessor or lessee of any land in California whereon alfalfa is grown." This language, it is obvious, furnishes some considerable possibility, if not the certainty, of an inequality of assessments as between owners, lessors and lessees. Owners may not be growers of alfalfa, and lessors will not be, except where leases provide for a growing by lessees upon shares. Further, however, the clause just quoted from the by-laws, in its attempt to limit memberships to those interested in growing, is not in accord with the statute, it is a departure from the articles of incorporation, and it is out of harmony with a later section of the by-laws themselves. As we have observed, the by-laws provide for active members, "to include all members who have any interest, direct or indirect, in the production of alfalfa," these being subdivided into, first, those "whose alfalfa acreage is to be marketed, either in whole or in part," and, second, "all other active members." Associate members are also provided for, to include all who are not active members.

If for a moment we pay regard to these classifications of memberships, it seems obvious that they, taking statute, articles of incorporation, and by-laws together, are based upon the idea that different members have differing degrees of interest in the welfare of appellant, and that, therefore, their memberships are different in value. And yet, it is not possible, even forgetting the difference in quantity of production from different acres of alfalfa land, equitably to prorate assessments among the various classes of members, as it necessarily appears that they cannot all be graded upon the score of comparative acreage in production.

Another peculiar condition arises from the provisions of the articles of incorporation and by-laws. Suppose we limit ourselves now to a consideration of those who are growers or who are "directly or indirectly" interested in growing. Suppose we view a copartnership like that of which the four respondents are members. Suppose the copartnership has ten acres of alfalfa lands in production. The articles provide that "any * * * firm * * * or member of any firm engaged in the business of producing alfalfa," etc., is eligible to membership in appellant. Undoubtedly, under this provision, the copartnership and each of its four members might "join" appellant. Suppose they did so. Here, then, arise five memberships. Each of them must be assessed alike, if an assessment be attempted, for the by-laws provide (italics ours) that upon assessments "*each* member to [shall] be liable prorate in accord with the alfalfa acreage owned, controlled, or repre-

sented." Here are five separate assessments upon one ten acres, while a second ten acres, "owned, controlled, or represented" by one member, say the owner, is burdened with but one assessment.

[4] The paper organization of appellant is subject to further dissection upon the subject here under inquiry, but we refrain from a further prosecution of the task. We are convinced that any attempt upon the part of appellant to levy an assessment upon its members, under the machinery which it has attempted to provide for the purpose, could not but result in an unjust discrimination between them. It is of the very essence of the law of assessments of the capital stock of corporations that the exactions shall be equal and uniform (6 Cal. Jur. 957), and the rule must of necessity apply to corporations which have no capital stock, even when the power is claimed to exist by contract. We determine that such a corporation cannot enforce by action alleged contract for assessments, where the exactions will result in unjust discrimination between its members.

Order affirmed.

I concur: THOMPSON, J.

CRAIG, J. I concur in the conclusion reached in the foregoing opinion upon the ground that the corporate structure of the Alfalfa Growers of California, Incorporated, is not such as to permit of the assessment upon which suit in the instant case was based, and for the reasons set forth by Presiding Justice WORKS. Concerning the other ground upon which his decision is founded, I prefer to express no opinion. It is unnecessary to do so, since, if the assessment in question is void, it is unimportant whether under section 653m to 653sc of the Civil Code a co-operative association might be so organized as to assess its members.

82 Cal. App. 786

HANSEN v. HANSEN.

SAME v. HANSEN et al.

(Civ. 5455.)

District Court of Appeal, First District, Division 1, California. May 9, 1927.

1. Deeds ⚡208(3)—Finding that deeds were delivered to grantor's mother, with intent to divest him of title, held sustained by evidence.

In action by widow to quiet title to land alleged to have been owned by husband at time of his death, finding of trial judge that husband had delivered deeds to land, with intent to divest himself of title thereto, and vest same in his mother, held sustained by evidence.

2. Deeds ⚡54—Generally, it is essential to validity of deed that there be a delivery.

Generally, it is essential to the validity of a deed that there should be a delivery of the instrument.

3. Deeds ⚡56(2)—Anything manifesting grantor's intention that deed become operative and effective, and that grantee becomes possessed of estate, constitutes sufficient "delivery."

Anything which manifests intention of grantor that his deed shall presently become operative and effective, and that he loses control of it, and that grantee becomes possessed of estate, constitutes sufficient "delivery"; question thereof being determined on facts of each case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deliver—Delivery.]

4. Deeds ⚡56(2)—Valid delivery depends on act or declaration from which intention to deliver may be inferred.

It is essential to valid delivery of deed that there must be act or declaration from which intention to deliver may be inferred.

5. Deeds ⚡56(2)—Formal or manual delivery is not required, if grantor's intention to treat deed as his and to make delivery is apparent.

Neither formal delivery, express words, nor manual delivery of instrument to grantee is necessary if it is apparent either from words or acts of grantor that it was his intention to treat deed as his and to make delivery thereof.

6. Deeds ⚡56(2)—Test under which delivery is determined is to ascertain whether in parting with possession grantor intended to divest himself of title.

True test under which delivery of deed is to be determined is in ascertaining whether in parting with possession of conveyance grantor intended to divest himself of title; if he did, there being effective delivery, and, if not, there is no delivery.

7. Deeds ⚡56(2)—Delivery is sufficient, if grantor makes known intention irrevocably to part with control over instrument to presently vest title in another.

No set form of delivery of a deed is necessary; it being sufficient if from circumstances grantor has made known his intention to part with his dominion and control of the instrument to the end that it may presently vest title in another.

8. Appeal and error ⚡842(8)—Whether requisite intent of grantor in parting with control of instrument is to pass title is question of fact.

Whether requisite intent of grantor in parting with dominion and control of instrument to end that it vest title in another is to pass title is purely question of fact for trial court or jury.

9. Deeds ⚡56(2)—If grantor indicates will that instrument pass into possession of grantee, conveyance inures as grant, although it never comes into grantee's hands (Civ. Code, § 1059).

In view of Civ. Code § 1059, if grantor indicates will that instrument pass into possession of grantee, then conveyance inures as grant, although it never comes into grantee's hands.

10. Deeds ⚡208(3)—Evidence held to show grantor's intention to treat deed in grantee's possession as his act, and to make delivery thereof.

Where son had previously executed and acknowledged conveyance of property to his mother, and deed was in her possession with his knowledge, evidence held to show his intention to treat the deed as his act, and to make delivery thereof.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Separate actions by Anna Hansen against Marie N. Hansen and against Albert M. Hansen and another. Actions tried together. From judgments for defendants, plaintiff appeals. Judgments affirmed.

Harry I. Stafford and Wm. F. Stafford, both of San Francisco, for appellant.

Gillogley, Crofton & Payne, of San Francisco, for respondents.

TYLER, P. J. [1] Action to quiet title to certain real property. Appellant Anna Hansen commenced independent actions affecting two distinct parcels of land, claiming that the deeds thereto made by one Charles J. Hansen to his mother, Marie N. Hansen, were void for want of sufficient delivery, and praying that plaintiff be adjudged to have an interest as an heir at law in the real property described therein. The actions were tried together and submitted on the same testimony. The trial court found in each case that the deeds had been delivered to the grantee named therein, and that plaintiff had no interest in the property. The sole question upon which a reversal is sought is that the evidence is insufficient to support the finding of delivery. It was stipulated between counsel that both appeals should be heard on one bill of exceptions, and that the record in both cases might be printed in one transcript, and both appeals considered thereon. It appears in evidence that one Charles J. Hansen intermarried with plaintiff in the year 1917. Prior thereto he had made his home with his mother, and during this time he was the owner of the real property here involved. One of the parcels of land, described in the record as the "Church street" property, was improved with four flats, and the mother and son resided in one of them. The other parcel was situated on Carolina street, and it was improved with

a small dwelling which deceased rented out to tenants. During his lifetime, and prior to his marriage, Hansen conveyed the Church street property to his mother. This deed was dated June 24, 1911, and it was recorded on the 8th day of January, 1919. The Carolina street property was also conveyed to her prior to his marriage. This deed was dated August 23, 1913, and it was recorded May 6, 1919. Hansen and his mother had a joint safe deposit box in the Anglo California Bank, and the deed to the Church street property was kept therein. The deed to the Carolina street property was kept in a safe at the home of the parties. It may be stated in passing that no claim is here made that any title passed to respondent by reason of either of these conveyances. On July 2, 1919, about a year and a half after his marriage, Hansen was taken seriously ill, and shortly thereafter his condition became such that he believed he was about to die. He sent for his mother on January 4th, and instructed her to go to their joint box and bring to him its contents. The mother did as directed. She placed the contents in a small satchel and returned with the same to her son. The satchel contained the deed to the Church street property, Liberty bonds, shares of stock, and insurance policies. She was told by Hansen to return in a couple of hours. This she did, whereupon Hansen handed her the satchel into which he had replaced the deed to the Church street lot and the other property, saying, "Mama, I give you the deeds to all my income property. The Carolina property is back to me again, and the same man that collects from the other will collect for that too. I want you go to the safe deposit box and get a box in your name and take all the papers from the box we have got and put them in your box, except my will and the papers from the shop. You shall leave them there, as they are to be probated." About this time Hansen had executed his will, and this, together with certain bonds and other property he desired his mother, wife, brothers, and nephew to receive, he had replaced in the satchel in separate envelopes, with the name of each person written on a piece of paper and pinned to each envelope. These documents were deposited by the mother in the joint safe deposit box. By the terms of the will his brother Albert M. Hansen was appointed without bonds to act as trustee of the estate. To his wife Anna he gave one-half of a described estate, the other half to his mother, Mrs. M. N. Hansen, his brothers Louis F. and Albert M. Hansen, and his nephew W. J. Davenport, share and share alike. The will provided that an automobile owned by him should go to his wife and mother jointly, and the furnishings of the home to his wife, the wish being expressed in the will that she be permitted to remain in their home rent free as long as she desired, and until such time as she might remarry. On the same day

Albert M. Hansen visited his sick brother, and during a conversation had between them Charles informed Albert that he was going to die; that he had made his will, and there would be nothing to probate except the stock in the business and the automobile, as he had fixed up his real estate; that he knew a delivery was necessary in order to pass title to his real property, and to accomplish this result he had required their mother to get a new box and to place therein the papers he gave her, and to keep in their joint box the will and stock certificates only; that, while the deed to the Carolina street property was not there, their mother had it in her safe at home, and it was all right. It appeared in evidence that Charles Hansen had studied law for about two years, and knew that delivery of a deed was necessary to pass title to real property. On January 6, 1919, the mother again visited her son, and while there plaintiff, who evidently had become aware of her husband's disposition of his property, complained to the defendant Marie Hansen that the latter had received more from her son than he had given to her. She complained of the fact that Charles had given to his mother all of his real estate and a \$2,000 life insurance policy. Defendant knew nothing about this policy. She spoke to her son concerning the same, and informed him of what his wife had told her. He responded that he had given his wife \$3,000 in cash, one-half interest in his business, and certain government bonds. The mother requested that she be permitted to give the wife the life insurance, as she feared trouble. The son responded, "You had better give her the flat," but the mother objected to this plan. The life insurance was however, transferred to plaintiff after the death of Hansen. On January 7th the mother again visited her son, who was then unconscious. She was of the opinion he was about to die, and in conformity with his wishes she proceeded to the bank and procured a box in her own name and transferred to it all of the papers with which she had been intrusted, except the will and the stock representing her son's share in his business, which she left in their joint box. That evening Charles Hansen died, and on the following day the mother took the deed to the Church street property from the box and recorded it. On January 10th, following the funeral, the mother called the members of the family together for the purpose of delivering to them the contents of the satchel. It was found to contain a deed to Marie N. Hansen of the Church street property, together with a bond for \$200; a deed to Louis Hansen of a lot in Berkeley, and a bond worth \$200; bonds of the value of \$200 to Albert Hansen; and a sealed package for Anna Hansen, the contents of which was not disclosed. Respondent, on May 10th, recorded the deed to the Carolina street property, which she subsequently conveyed to her

son Albert M. Hansen, a party to the action. Probate proceedings were had in the estate, and none of the property included in the papers delivered by the deceased to his mother was inventoried in the estate, nor was the real property. Plaintiff accepted distribution as provided in the will without objection, and she retained the proceeds of the \$2,000 life insurance policy which the deceased had given to his mother, and which she had transferred to plaintiff after her son's death. Four years thereafter these actions were instituted.

[2-5] Under all these facts the trial court found that the deceased had delivered the deeds to the property in question with intent to divest himself of all title thereto, and vest the same in his mother. We are of the opinion that the findings are fully supported by the evidence. It is a general rule that it is essential to the validity of a deed that there should be a delivery of the instrument. Anything, however, which clearly manifests the intention of the grantor that his deed shall presently become operative and effectual, that he loses control over it, and that the grantee is to become possessed of the estate, constitutes a sufficient delivery. It is obvious that this rule rests upon the intention of the grantor, as manifested by the circumstances surrounding the transaction. The question of whether or not there has been a delivery must therefore be determined upon the facts of each particular case. It is essential to a valid delivery that there must be some act or declaration from which an intention to deliver may be inferred. A formal delivery is not required, nor are express words necessary. Nor is a manual delivery of the instrument to the grantee required, it being sufficient if it is apparent either from the words or the acts of the grantor that it was his intention to treat the deed as his, and to make a delivery of the same. 18 Cor. Jur. p. 198.

[6-10] The true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there is an effective delivery. If not, there is no delivery. The solution of this question is grounded entirely on the intention of the grantor to be determined by the trial court from a consideration of all the evidence in a given case bearing on the question. *Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703. Nor is any set form of delivery necessary, it being sufficient if from any or all of the cir-

cumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument to the end that it may presently vest title in another. *McCully v. McArthur*, 187 Cal. 191, 201 P. 323; *Wilcox v. Hardisty*, 60 Cal. App. 206, 212 P. 633; *McCarthy v. Security Trust, etc., Bank*, 188 Cal. 229, 204 P. 818. Whether or not the requisite intent shall pass title is purely a question of fact for the trial court or jury. *Hefner v. Sealey*, 175 Cal. 18, 164 P. 898. Here it clearly appears that it was the intention of the grantor that his mother should have all his real property, which produced an income which included the parcels in question, and all the facts and circumstances as above recited show beyond question that a complete delivery was made which effectuated such intention. Counsel for appellant specially urges his contention of the insufficiency of the evidence to support the finding of delivery as to the Carolina street property, and our attention is particularly drawn to the evidence to the effect that the deed to this property was not in the satchel when it was delivered to the mother. Actual manual tradition or change of possession of the deed, however, was not necessary. As above indicated, delivery is a question of intent, and to complete it no precise form of words and no particular character of act is necessary. A deed may be good by constructive as well as by actual delivery. The main thing which the law looks at is whether the grantor indicates his will that the instrument should pass into the possession of the grantee, and, if that will is manifest, then the conveyance inures as a valid grant, although the deed never comes into the hands of the grantee. *Moore v. Trott*, 162 Cal. 268, 122 P. 462; *Black v. Sharkey*, 104 Cal. 279, 37 P. 939; 9 Cal. Jur. p. 160. And this general principle is enunciated by our Code. Civ. Code, § 1059. Here the grantor had executed and acknowledged a conveyance of the property to his mother and it was in her possession, a fact with which he was familiar as evidenced by his statements to his mother and brother. It is clearly apparent from the words and acts of the grantor that it was his intention to treat the deed as his act and to make a delivery of the same. 18 Cor. Jur. 199.

We conclude that the evidence fully supports the findings, and the judgments should therefore be, and they are hereby, affirmed.

We concur: KNIGHT, J.; CASHIN, J.

83 Cal. App. 1

ANDERSON et al. v. NELSON et al.*
(Civ. 4680.)

District Court of Appeal, Second District, Division 2, California. May 9, 1927.

Hearing Denied by Supreme Court July 7, 1927.

1. Executors and administrators $\S$ 129(3)—Rights of personal representative to recover property for estate are coextensive with those of deceased (Code Civ. Proc. $\S$ 1582).

In suit by personal representative under Code Civ. Proc. $\S$ 1582, to recover property of estate, personal representative's rights are coextensive with rights which could have been asserted by deceased.

2. Deeds $\S$ 196(2)—Conveyance without consideration to son from father aged, infirm, and enfeebled in mind, who placed confidence in son, is presumed fraudulent.

Though age and physical condition alone are insufficient to set aside conveyance, fraud will be presumed on deed from father to son, where father was aged, infirm, and enfeebled in mind, and placed confidence in son, and conveyance was without consideration.

3. Deeds $\S$ 196(2, 3)—Son has burden to prove conveyance without consideration from aged and mentally enfeebled father was not procured by fraud or undue influence.

Where aged, infirm father, enfeebled in mind, makes conveyance to son without consideration, son has burden to show transaction was free from fraud or undue influence.

4. Fraudulent conveyances $\S$ 172(3)—Court will give relief from deed procured through fraud, though given for improper purpose, where parties are not in pari delicto.

Where parties are not in pari delicto, and deed, though made for improper purpose, was procured through undue influence, abuse of confidence, fraud, or violation of fiduciary relationship, court will grant relief.

5. Fraudulent conveyances $\S$ 172(3)—Aged father's conveyance to son, procured through fraud, could be set aside by personal representative, though given to avoid lien of judgment in anticipated litigation against father (Code Civ. Proc. $\S$ 1582).

Personal representative of father's estate could recover as against son, under Code Civ. Proc. $\S$ 1582, property which deceased conveyed without consideration and under son's undue influence, though purpose of conveyance was to prevent lien under possible judgment in anticipated litigation against father; father and son not being in pari delicto.

6. Executors and administrators $\S$ 129(3)—Complaint of personal representative, alleging decedent's son had procured aged father's property to avoid possible judgment lien, under promise of reconveyance on settlement of litigation, held to state cause of action (Code Civ. Proc. $\S$ 1582, 1589).

Complaint of personal representative, under Code Civ. Proc. $\S$ 1582, alleging son had procured from aged and enfeebled father conveyance without consideration, on representation

that such transaction would prevent judgment in threatened litigation from becoming lien, and on promise to reconvey, and further alleging death of father without reconveyance, held to state cause of action; section 1589 being applicable to conveyances fraudulent as against creditors.

7. Executors and administrators $\S$ 129(3)—Demand for reconveyance need not be alleged in suit to recover property conveyed by decedent under undue influence.

In action by personal representative to recover property conveyed by decedent on ground that undue influence was exercised, it is unnecessary to allege demand for reconveyance.

8. Trusts $\S$ 35(4)—Son, holding father's property under conveyance until threatened litigation should be settled, was "trustee" required to make reconveyance on father's death (Civ. Code, $\S$ 2224).

Son, who took conveyance of father's property without consideration, under agreement to reconvey if threatened litigation against father should be settled, avoided, or dismissed, held "trustee" under Civ. Code, $\S$ 2224, required to make reconveyance on father's death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trustee.]

9. Executors and administrators $\S$ 129(3)—Complaint to recover property conveyed by deceased was not rendered demurrable by allegation that property was needed to pay debts.

In action by personal representative to recover property conveyed by deceased under exercise of undue influence, allegation that property was necessary to pay debts, though surplusage, did not render complaint demurrable.

Appeal from Superior Court, Los Angeles County; Erwin W. Owen, Judge.

Suit by Ruth Anderson, as administratrix of the estate of Richard C. Nelson, deceased, and another against Roy N. Nelson and another. Judgment for defendants pursuant to an order sustaining a demurrer to the complaint, and plaintiffs appeal. Reversed.

George G. Bechtel and Tanner, Odell & Taft, all of Santa Monica, for appellants.

Robert M. Clarke and Henry L. Knopp, both of Los Angeles, for respondents.

CRAIG, Acting P. J. This is an appeal from a judgment entered pursuant to an order sustaining a demurrer to the complaint; the plaintiffs having declined to amend.

Concise stated, the material allegations of the questioned pleading, assuming them, for the purposes of the demurrer, to be true, were substantially as follows: The defendant Roy M. Nelson was the son of Richard C. Nelson, who in his lifetime, and especially on or about March 15, 1922, was the owner of certain real and personal property. He was 65 years of age, and was suffering from kidney complaint and paralysis which partially disabled him, and rendered him bedfast and so en-

feebled in mind that he was not competent to transact business. At that time he was informed that one Martha L. Hixon threatened to institute an action against him for damages upon the ground that he had failed to fulfill a promise of marriage. Although Nelson contended that he had not promised to marry Martha L. Hixon, and that she had no cause of action against him, such threats made him nervous, distressed and fearful, and increased his disability to transact business. Prior thereto Nelson had married and was then living with the plaintiff Jennie Pierce Nelson, his wife.

The plaintiffs then alleged that said defendant Roy M. Nelson learning of the threatened litigation, and knowing of his father's feeble health, and designing and intending to deprive the plaintiff Jennie Pierce Nelson of any interest in said property should his father not survive such illness, represented to his father that the best method of defeating the threatened suit for damages would be for the latter to convey to the defendant all of said property, in order that Martha L. Hixon should not obtain a judgment lien against it, and that the anticipated litigation could then easily be settled. It was alleged that said defendant promised and agreed that, as soon as any such litigation was settled, avoided, or dismissed, he would reconvey the property, should his father demand a reconveyance; that the father, though declaring that Martha L. Hixon had no legal, equitable, or just claim against him, was influenced and persuaded by his son's representations and promises, and, without intending to defeat or avoid any just claim of any creditor, or one having a just claim against him, and relying upon such promise to reconvey, did in March, April, and May, 1922, convey all of his property to the defendant Roy M. Nelson without consideration and without the consent of the plaintiff Jennie Pierce Nelson; that on or about June 30, 1922, Richard C. Nelson died intestate without having received a reconveyance, though owing various creditors. It was further alleged that the plaintiff Ruth Anderson was the duly appointed, qualified, and acting administratrix of the estate of said deceased, that demand had been made by her for a reconveyance and surrender of the property so acquired by the defendant son, and that it was necessary that the property be recovered and reduced to the possession of the administratrix in order to pay debts of the decedent and to provide a suitable widow's allowance.

The defendants demurred specially to the complaint, and argued in their briefs before us that the complaint did not contain facts sufficient to constitute a cause of action and was uncertain, unintelligible, and ambiguous. Their contention is that by their pleading the plaintiffs attempted to combine two causes of action in one, but that it was not

sufficient to bring the case within the provisions of section 1582 of the Code of Civil Procedure, which provides for the recovery of property and for an action upon contract by an administrator, or of section 1589, which directs the prosecution of an action by an administrator for the recovery of property fraudulently conveyed by one since deceased for the purpose of defeating the rights of creditors.

The section first mentioned reads as follows:

"Sec. 1582. Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

[1] It is at once apparent from the language of this section that the administratrix stands in the shoes of, and, for the purposes of such litigation, possesses the same but no greater rights than, the intestate. *Bath v. Valdez*, 70 Cal. 350, 11 P. 724. Any conveyance by Richard C. Nelson, if valid as to him, is equally binding upon his estate. *Peck v. Brummagim*, 31 Cal. 440, 89 Am. Dec. 195; *Cunningham v. Ashley*, 45 Cal. 485; *Jones v. Tallant*, 90 Cal. 386, 27 P. 305. If, therefore, Nelson could not have maintained this suit, his administratrix would not be entitled to recover upon a like state of facts, and of course the converse is also true.

It appears from the allegations of the complaint that the decedent in his lifetime knew of the threatened litigation, and that, relying upon the advice of his son that it was "the best method of defeating the threatened litigation," and to prevent a judgment lien against his property, conveyed all of his assets to Roy M. Nelson, upon the promise of the latter to reconvey them when the storm subsided.

[2, 3] The complaint alleged that Nelson was 65 years of age and was infirm, enfeebled in mind, and not capable of transacting business, and that he relied upon his son's advice in such matters. As a general rule age, physical condition, and suffering of pain furnish no basis for setting aside a conveyance if the vendor exercised a free and untrammelled mind. *Carty v. Connolly*, 91 Cal. 15, 27 P. 599.

On the other hand, fraud will be presumed in the making of a deed by father to son, where it appears that, in addition to the existence of the relation between them, the father was aged, infirm, and enfeebled in mind, and placed confidence in the son, and that the conveyance was without consideration. Under such circumstances the burden is on the grantee to show absence of fraud or undue influence in the transaction. *Fowler v. En-*

riquez, 56 Cal. App. 107, 204 P. 854; Nobles v. Hutton, 7 Cal. App. 14, 93 P. 289, and cases there cited. We think upon this theory the complaint before us would unquestionably be sufficient to state a cause of action if it were not for further allegations contained in it showing that the purpose of the transfer was to injure another. Where such is the case,

equity will refuse a remedy to the grantor or those claiming under him. *Allstead v. Laumeister*, 16 Cal. App. 59, 116 P. 296. Nor will equity retreat from its position in thus upholding the maxim, *in pari delicto melior est conditio passidentis et defendantis*, and other equitable principles equally applicable, because the claim of the person which is sought to be avoided was in fact without foundation. *Carson v. Beliles*, 121 Ky. 294, 89 S. W. 208, 1 L. R. A. (N. S.) 1007; *Kihlken v. Kihlken*, 59 Ohio St. 106, 51 N. E. 969.

[4] A number of authorities are cited in the decision last mentioned sustaining it, but in none of them did it appear that the grantor and the grantee occupied a close confidential relation, or that the former was taken undue advantage of by the latter. Where the parties are not in *in pari delicto*, and the deed, though made for an improper purpose, was unfairly procured through the undue influence of the grantee, the violation of a fiduciary relationship, abuse of confidence, oppression, or fraud, the court will grant relief. *Donnelly v. Rees*, 141 Cal. 56, 74 P. 433; *Pride v. Andrew*, 51 Ohio St. 405, 38 N. E. 84; *Harper v. Harper*, 85 Ky. 161, 3 S. W. 5, 7 Am. St. Rep. 583; *Rozell v. Vansyckle*, 11 Wash. 79, 39 P. 270; *Hollivay v. Hollivay*, 77 Mo. 392; *Ingersoll v. Weld*, 103 App. Div. 554, 93 N. Y. S. 291; *Barnes v. Brown*, 32 Mich. 146. Many of these cases proceed upon the theory stated in the one last cited, that "relief will not be denied to the party least in fault against one who has led her into the act by a violation of confidence. They are not in equal wrong."

[5, 6] Applying these well-recognized principles to the allegations in the appellants' complaint, we have no hesitation in concluding that a cause of action is stated, even though Richard C. Nelson allowed himself to become a party to a transaction tainted with fraud. While the facts do not show him to have been of unsound mind so as to have been legally incapacitated, it does appear that he was clearly not in *in pari delicto* with the defendant. The situation is strikingly similar to that presented in *Rozell v. Vansyckle*, supra. His act, though intentionally dishonest and induced by the representations and promises of the defendant Roy M. Nelson, in whom the deceased reposed great trust, the relationship of the parties, the advanced age of the father, the representations and promises made by the son, the confidence placed in the latter's advice, especially in business matters—

all of these considerations make it apparent that the father and son were related in the transaction as an inferior to a superior, though both were in *delicto*. Richard C. Nelson during his lifetime might have secured a reconveyance, and therefore we hold that, under section 1582 of the Code of Civil Procedure, the administratrix of his estate may do so.

[7-8] The special grounds of demurrer require but brief comment. It was unnecessary to allege a demand upon the defendant by the decedent for the reconveyance. Roy C. Nelson received the property as a trustee (Civ. Code, § 2224), and holds it in that capacity, and the event upon which he was to reconvey, to wit, the arrival of the time when the threatened litigation should be settled, avoided, or dismissed, occurred when Richard C. Nelson passed away. The allegation in the complaint that it is necessary that the property be recovered by the administratrix to pay the debts of the deceased may be regarded as surplusage. It should have been stricken out on motion, but its presence does not render the complaint demurrable on any ground interposed.

The judgment is reversed.

We concur: JOHNSON, Justice pro tem.; THOMPSON, J.

82 Cal. App. 793
RATHBUN et al. v. SECURITY MFG. CO.
(Civ. 4838.)

District Court of Appeal, Second District, Division 1, California. May 9, 1927.

1. Evidence $\S$ 441(11)—Evidence of contemporaneous, unexecuted oral agreement to extend time of payment on note held inadmissible in buyer's action for nondelivery of motor valves (Civ. Code, § 1698).

In action for nondelivery of motor valves for which plaintiffs had given note, which remained unpaid, testimony as to contemporaneous oral agreement by which defendant was to extend time for payment held inadmissible under Civ. Code, § 1698, as unexecuted oral agreement altering written contract.

2. Evidence $\S$ 441(1)—Payment under written contract may not be extended by unexecuted oral agreement.

Time of payment as fixed by written contract may not be suspended or extended by subsequent unexecuted oral agreement.

3. Estoppel $\S$ 78(1)—Seller was not estopped to claim nonpayment of note by alleged contemporaneous oral agreement extending due date.

In buyer's suit for nondelivery, seller was not estopped to claim nonpayment of buyer's note when due by fact of alleged contemporaneous oral agreement extending time for payment.

4. Contracts $\Rightarrow$ 278(1)—Party in default cannot compel other's performance of contract.

Party who is himself in default under contract cannot compel other contracting party to perform.

Appeal from Superior Court, Los Angeles County, Ruben S. Schmidt, Judge pro tem.

Action by W. N. Rathbun and W. H. Huyler, copartners under the firm name and style of the Motor Valve Manufacturing Company, against the Security Manufacturing Company, in which the defendant sought to recover affirmatively. Judgment that plaintiffs and defendant take nothing, and plaintiffs appeal. Affirmed.

Geo. S. Hupp and Ben F. Gray, both of Los Angeles, for appellants.

Clark, Law & Clay and Clark & Law, all of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Action is brought to recover \$34,800 as damages for nondelivery of certain motor valves which it is alleged defendant contracted to manufacture and deliver to plaintiffs and which plaintiffs had in turn contracted to sell and deliver to their customers. Defendant alleges that it did manufacture all of said valves that had been ordered, and offered to deliver the same, and that plaintiffs failed and refused to pay a promissory note of \$300 given under the terms of the contract, and asks judgment for said amount, with attorney's fees, together with judgment in the sum of \$1,792.12 for valves manufactured. The trial court adjudged that plaintiffs and defendant take nothing. Plaintiffs appeal from the judgment.

Under date of April 16, 1921, plaintiffs and defendant entered into a written contract whereby, in consideration of plaintiffs' order for 5,000 motor valves, plaintiffs' check for \$200 and plaintiffs' 30-day note for \$300, in payment of special dies required for the production of the work, defendant agreed to manufacture, at certain prices, such motor valves as plaintiffs might order from time to time during the period of one year. Defendant agreed to deliver the goods within 30 days after receipt of order from plaintiffs, with the exception of new specifications. Plaintiffs agreed to inaugurate and maintain an active sales campaign for the sale of the motor valves, and, after the initial order was completed, to purchase not less than 2,000 per month for six months, and 3,000 per month thereafter. A promissory note in the usual form, due 30 days from the date of the contract, for the sum of \$300, was delivered by plaintiffs to defendant. This note has never been paid. There is no provision in the writ-

ten contract requiring completion of the dies before the payment of the note, or at any other definite time. Testimony was introduced and received in reference to conversations between the plaintiffs and defendant, to the effect that the dies would not be completed within 30 days from the date of the contract, and that defendant would take care of the note until the dies were completed. On defendant's motion, all testimony as to the contemporaneous oral agreement was stricken.

[1-3] It is asserted by appellants that the trial court erred in granting the motion to strike, for the reason that this testimony was introduced, not for the purpose of varying the terms of a written contract, but simply to explain and excuse nonperformance, and that respondent is estopped to take advantage of the nonpayment of the note when due. This assertion is without merit. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise. Civ. Code, § 1698. There is no evidence of an executed oral agreement in the case at bar. In *Rottman v. Hevener*, 54 Cal. App. 474, it is said at page 479, 202 P. 329, 331:

"* * * It is the established rule in this state that the time of payment as fixed by the written contract may not be suspended or extended by a subsequent unexecuted oral agreement. *Henehan v. Hart*, 127 Cal. 656, 60 P. 426; *Harloe v. Lambie*, 132 Cal. 133, 64 P. 88. See, also, *Foster v. Furlong*, 8 N. D. 282, 78 N. W. 986."

Neither can the doctrine of estoppel in pais be invoked under the circumstances of this case to excuse the nonpayment of a promissory note due on a certain date. *Rottman v. Hevener*, supra; *Lindemann v. Coryell*, 59 Cal. App. 788, 212 P. 47.

In conclusion, it may be remarked that there is sufficient testimony in the record to support the finding of the court that defendant manufactured approximately 5,000 valves, but that defendant refused to deliver said valves to plaintiffs until the note mentioned in the agreement was paid, and so notified the plaintiffs, and that said note was never paid.

[4] It is elementary that one party cannot compel another to perform while he himself is in default under the contract. *Wood, Curtis & Co. v. Seurich*, 5 Cal. App. 252, 90 P. 38; *San Francisco Commercial Agency v. Widemann*, 19 Cal. App. 209, 124 P. 1056; *Karales v. Los Angeles Creamery Co.*, 36 Cal. App. 171, 171 P. 821.

For the reasons stated, it is ordered that the judgment be affirmed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 18

CHOWCHILLA NAT. BANK v. NILMEIER.
(Civ. 3153.)

District Court of Appeal, Third District, California. May 10, 1927.

1. Husband and wife $\hookrightarrow$ 129(5)—Wife held not estopped from claiming cows mortgaged by husband because of signing former mortgage and joint affidavit that mortgagor had title.

In action to replevin cows mortgaged by husband, wife was not estopped from claiming ownership therein because of having signed former mortgage jointly with her husband and by making joint affidavit that mortgagor owned absolute title to cows, affidavit being at most an assertion or admission of joint ownership of the property.

2. Estoppel $\hookrightarrow$ 107, 110—Estoppel, to be relied on, must be pleaded.

Where the cause of action or defense depends upon estoppel, it must be pleaded.

3. Husband and wife $\hookrightarrow$ 129(5)—Wife's statements as to ownership of cows mortgaged relied on as estoppel must have been intended to induce subsequent mortgagee to act.

Statement in affidavit of wife jointly with her husband that mortgagor owned absolute title to cows to estop her from claiming ownership must have been intended to induce subsequent mortgagee to act thereon or have led it to believe that she so intended.

4. Husband and wife $\hookrightarrow$ 129(5)—Unless wife's conduct in signing former mortgage and affidavit influenced subsequent mortgagee to make loan on cows, no estoppel arose.

Where husband and wife joined in chattel mortgage on wife's cows and thereafter husband borrowed money from bank and gave chattel mortgage on cows previously mortgaged, unless wife's conduct in signing mortgage to first mortgagee jointly and by making joint affidavit that mortgagor owned the absolute title to mortgaged property influenced subsequent mortgagee in making loan and accepting mortgage, no estoppel against her claim of absolute ownership of cows arose.

5. Appeal and error $\hookrightarrow$ 854(2)—If case was correctly decided, statements or reasons for decisions even if erroneous will be disregarded.

If case was correctly decided, statements by trial judge or reasons given for his decision, even if erroneous, will be disregarded.

6. Chattel mortgages $\hookrightarrow$ 173(5)—In absence of evidence as to amount of damages for wrongful detention of milking cows, nominal sum only may be allowed.

In mortgagee's action in replevin to recover possession of cows, where defendant by cross-complaint claimed recovery of animals and damages for their detention, while after judgment for recovery of animals by defendant damage resulting from detention of milking cows will be presumed, in absence of evidence of amount thereof only nominal damages can be allowed.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action in replevin by the Chowchilla National Bank against Katie Nilmeier. From a judgment for defendant, plaintiff appeals. Modified, and, as modified, affirmed.

Barcroft & Barcroft, of Madera, for appellant.

J. M. Emmert and Walter C. Maloy, both of Madera, for respondent.

SHIELDS, Justice pro tem. This is an action in replevin to recover possession of eight cows and three heifers, the increase of these cows, which plaintiff claims were mortgaged to it as hereinafter stated. It appears to be undisputed that the cows in question were purchased by the defendant, Katie Nilmeier, with her separate funds during the lifetime of her husband, C. H. Nilmeier, while they were living together as husband and wife, and that the animals became the separate property of Katie Nilmeier. On January 30, 1924, and in the circumstances above stated, C. H. Nilmeier and Katie Nilmeier joined in a chattel mortgage of these cows to the Bank of Italy to secure the payment of a promissory note of that date. Attached to this mortgage was the usual affidavit of ownership and good faith. This affidavit begins, "Said mortgagor being duly sworn, individually, disposes and says," etc., and continues in the singular throughout, including the statement that "said mortgagor owns the absolute title" to said mortgaged property. This affidavit is signed by both C. H. Nilmeier and Katie Nilmeier. On April 14, 1924, C. H. Nilmeier borrowed a sum of money from the plaintiff bank and as security for its payment gave a chattel mortgage on, among other things, the eight cows, previously mortgaged as above stated, the mortgage to the Bank of Italy being thereafter released. Katie Nilmeier did not sign nor join in this latter mortgage.

C. H. Nilmeier died on July 1, 1925, while in default upon such later note and mortgage. Plaintiff made demand upon Katie Nilmeier for the sum due on the note and mortgage of her husband, and upon her statement that she would not make such payment, and that she owned the cows as her separate property, this action was begun. At the trial judgment was given defendant upon her cross-complaint for the recovery of the animals or their value assessed at \$675 and for \$100 damages for the detention of the animals by the plaintiff.

Plaintiff's appeal from this judgment presents very few questions for decision.

Practically the only matter to have been determined at the trial, as counsel agreed at the time, was as to who owned the mortgaged cows. This fact was determined against the plaintiff by the trial court, and, as this finding is well supported by the evidence, it should end the matter.

[1, 2] But appellant contends that by signing the mortgage to the Bank of Italy, jointly with her husband, and by making the affidavit jointly with him, that the "said mortgagor owns the absolute title" to the mortgaged property, Katie Nilmeier is now estopped to deny that her husband owned the cows, or to deny that he was authorized to later mortgage them to plaintiff. This contention is unwarranted. In the first place, the issue of estoppel is not raised by the pleadings. Where the cause of action or defense of a party depends upon estoppel he must plead it. 10 Cal. Jur. 653. The facts set up in paragraph 5 of plaintiff's answer to defendant's cross-complaint are not sufficient to raise this issue. But disregarding this omission in the pleadings and taking the evidence broadly as it is disclosed by the record, no facts creating an estoppel are shown.

The only fact that occurred before the loaning of the money by the plaintiff and its acceptance of C. H. Nilmeier's mortgage of the cattle to secure it was the joining of defendant with C. H. Nilmeier in the affidavit to the chattel mortgage to the Bank of Italy. This affidavit was a part of a transaction between plaintiff and her husband and the Bank of Italy. The statement in the affidavit that "said mortgagor owns the absolute title" to the cows was made to the Bank of Italy and was for the purposes of that loan. The affidavit does not say that C. H. Nilmeier owned the property. If we invoke the rule that the singular includes the plural and hold that where two persons sign an affidavit, as in this case, the word "mortgagor" must be read "mortgagors," if the public are to deduce any conclusion from it, it must be held at most to be an assertion or admission of joint ownership. There is nothing to show or even tending to show that when Katie Nilmeier joined in making this affidavit she intended that the plaintiff should act upon any statement in it, nor was there anything in it that should have led plaintiffs to believe that she so intended.

[3, 4] Such an element is an essential quantity in any estoppel. 10 Cal. Jur. p. 627, § 14. The alleged failure of Katie Nilmeier to assert title to the cows following their attempted mortgage to plaintiff, or to move to have the mortgage set aside, occurred after the date of the mortgage, as did the alleged statement of Katie Nilmeier to the assessor; as a consequence these circumstances could not have influenced the plaintiff in making the loan and accepting the mortgage, and it could not have relied upon them to its injury. Unless conduct is so influenced, no estoppel arises. 10 Cal. Jur. p. 627.

[5] Another contention of appellant is that during the trial the court stated to counsel for plaintiff that the burden was upon plaintiff to show that the title to the cows, the mortgaged property, was in C. H. Nilmeier,

the mortgagor. Aside from the apparently obvious correctness of this statement, it presents no question for review. Thereafter and in due course the court decided the case. The question here is as to the correctness of that decision. If it was correctly decided, mere statements by the trial judge or reasons given for the decision, even if they were erroneous, will be disregarded. 2 Cal. Jur. p. 809; 24 Cal. Jur. p. 924; 33 C. J. p. 1104, § 59.

[6] The judgment in this case included \$100 as damages for the detention of the cows, from the period when they were taken until the trial of the action. This seems to have been unwarranted. No evidence of any kind seems to have been offered as to the damage suffered. All that appears is that eight cows, two of them milking, were taken from defendant on the 10th day of July, 1925, and kept until the 10th day of November following. That damage resulted from such detention will be presumed, but in the absence of any evidence of its amount only a nominal sum may properly be allowed. *Parke v. Frank*, 75 Cal. 364, 17 P. 427; *Johnson v. Levy*, 3 Cal. App. 591, 86 P. 810; 17 C. J. p. 720, § 59.

The judgment is modified by striking therefrom the sum of \$100 allowed as damages, and as so modified the judgment is affirmed, the appellant to recover cost of appeal.

We concur: FINCH, P. J.; PLUMMER, J.

83 Cal. App. 12
PEOPLE v. GIACOBBI. (Cr. 1351.)

District Court of Appeal, First District, Division 2, California. May 10, 1927.

1. Criminal law ☞ 159(5)—Finding of identity of one convicted of assault with deadly weapon held conclusive on appeal, in view of evidence.

Finding of jury that one convicted of assault with a deadly weapon was sufficiently identified as the one making the assault held binding on appeal, in view of positive identification by two officers, notwithstanding defense of alibi.

2. Assault and battery ☞ 67—Possession by apparent vagrant of club and loaded pistol held sufficient to warrant arrest of his companion (Pen. Code, § 647, subd. 6, and § 836, subds. 1, 5).

Possession by one who was an apparent vagrant as defined by Pen. Code, § 647, subd. 6, of a club and loaded pistol held sufficient to warrant arrest of his companion, also a vagrant, under section 836, subds. 1 and 5.

3. Assault and battery ☞ 67—One resisting arrest held not justified in shooting at officer, regardless of legality of arrest, where there was no reason to fear physical injury.

Where there was no reason for one resisting an arrest to believe that the officer intended to injure him physically, held that he was not justified in shooting at the officer, whether or

not such officer was warranted in making the arrest.

4. Criminal law $\Rightarrow$ 775(3)—Instruction that alibi defense should raise reasonable doubt to authorize acquittal held not to reduce prosecution's burden of showing accused's presence.

In trial for assault with deadly weapon, an instruction that the accused was not required to prove an alibi beyond a reasonable doubt, but if the evidence on that point raised a reasonable doubt of his presence, it would justify an acquittal, *held* not to have the effect of reducing the prosecution's burden of proving the presence of the accused beyond a reasonable doubt.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Angelo Giacobbi was convicted of assault with a deadly weapon, and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KOFORD, P. J. Defendant appeals from an order denying a new trial and from a judgment of conviction of the crime of assault with a deadly weapon. The defense at the trial was an alibi, but upon this appeal it is contended that the evidence shows justification or self-defense.

The evidence showed the following facts: Two police officers of San Francisco, after 11 o'clock at nighttime, noticed the defendant and a companion named Hale standing together at the corner of Montgomery and Broadway streets. As the officers approached the two men separated, the defendant stepping back a few paces from the curb to the building line. The officers came to Hale first, announced themselves as police officers and asked him where he lived. He did not answer. One of the officers, Gallatin, then searched him and found a large club under the waistband of his trousers. Subsequently Hale was taken to police headquarters and a further search disclosed a pistol and a piece of wire arranged with a slip knot upon his person. Upon a plea of guilty he was sent to San Quentin for violating the Firearms Act (Stats. 1923, c. 339). After Officer Gallatin took from Hale the club he put Hale in charge of Officer Lillis and approached the defendant. As he did so defendant drew a pistol and commanded Gallatin to put up his hands. The officer, instead of doing so, reached for his own pistol, whereupon defendant fired three shots at him, which did not take effect, and then turned and ran. By that time Gallatin had drawn his pistol and started to fire, but the defendant escaped. Gallatin stated that he thought one of his bullets struck, as he saw the fugitive throw up his arm.

[1] Subsequently the two officers identified the defendant in a "line up" at police headquarters, and this prosecution followed. Defendant had peculiar scars upon his chest which the city physician testified in his opinion marked the entrance and exit of a bullet. Other witnesses and the defendant testified contrary. The jury found the defendant guilty despite his defense of alibi. The determination by the jury of this issue is binding upon this appeal, in view of the positive identification of the defendant by the two officers.

[2, 3] The appellant urges on this appeal that the evidence shows justification or self-defense. This defense was not put forward at the trial either by evidence or instructions requested. The evidence shows the appellant drew and pointed his pistol in anticipation of what he thought the officer approaching him intended to do. The officers had the right to question these men under the circumstances. The two men apparently were vagrants as defined in the Penal Code, § 647, subd. 6. Hale, as it turned out, was in the act of committing a felony when questioned, not only by the possession of the club, but of the loaded pistol found afterwards. These circumstances furnished sufficient cause to arrest his companion, under subdivision 1 or 5 of Penal Code, § 836. But, even assuming that the defendant was justified in believing he was about to be arrested and that the officer was not warranted in making an arrest, the defendant's conduct in either drawing, pointing, or discharging his pistol at the officer was unjustified, there being no reason for him to believe the officer intended to injure him physically. *People v. Dallen*, 21 Cal. App. 770, 775, 132 P. 1064; 5 Cor. Jur. 750, § 237.

[4] The court committed no error in instructing the jury on the subject of alibi as follows:

"All the evidence should be carefully considered by you, and if the evidence on this subject, considered with all other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit him. The accused is not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of evidence. It is sufficient to justify an acquittal if the evidence on that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed. And you will understand also, that the attempt of the accused to prove an alibi does not shift the burden of proof from the prosecution, but that the prosecution is bound to prove his presence beyond a reasonable doubt."

In claiming that it is not necessary that the defense of alibi should be sufficient to raise a reasonable doubt, appellant does not suggest any less onerous degree of proof necessary, but, as we understand his contention, it is that this instruction had the effect of reducing in some way the burden of proof resting

upon the prosecution of proving the presence of the accused beyond a reasonable doubt. We see no merit in this contention, and, furthermore, it will be noticed that the last sentence in the instruction expressly states that the attempt to prove an alibi does not shift the burden of proof from the prosecution.

The judgment and order appealed from are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

82 Cal. App. 675

FORD v. COTTON. (Civ. 4525.)*

District Court of Appeal, Second District, Division 2, California. May 3, 1927.

Hearing Denied by Supreme Court June 30, 1927.

1. Brokers ⇨62—Owner, refusing to close sale, could not deprive broker of commission because he did not own acreage he told purchaser he had.

Where owner gave agent authority to sell land for \$170,000, and owner represented to purchaser that he had enough land to produce \$170,000 or more at price purchaser offered per acre, and, after agreeing to sell, owner refused to close sale, he could not deprive broker of commission on ground that engineer's description showed less acreage, and therefore that purchaser had not agreed to pay owner's price of \$170,000.

2. Brokers ⇨88(14)—Finding that broker brought owner into touch with qualified purchaser held sufficient, in action by broker for commission.

Court's finding that broker, acting under brokerage agreement, brought owner into immediate touch with ready and willing purchaser, able to buy at owner's price and on terms acceptable to owner, held sufficient in action by broker for commission.

3. Trial ⇨404(3)—Finding in suit for broker's commission that suitable terms were agreed on between owner and purchaser was finding of ultimate fact.

In suit by broker for commission on real estate under contract authorizing broker to sell property at certain price on terms of \$25,000 cash and balance to be suitably arranged, court's finding to effect that terms of sale were agreed on between owner and purchaser, and were suitable, was finding of an ultimate fact.

4. Trial ⇨404(3)—Court, finding ultimate fact in plaintiff's favor, in effect concluded that contradictory probative declarations relied on by defendant were untrue.

Where court found ultimate fact in favor of plaintiff, it in effect found and concluded that contradictory probative declarations relied on by defendant were untrue.

5. Brokers ⇨63(1)—Broker held entitled to commission, where he produced purchaser ready, willing, and able to purchase on seller's terms, and seller refused to close sale.

Broker held entitled to commission under contract with owner, where he produced pur-

chaser who was ready, willing, and able, and who verbally agreed, to purchase on terms proposed by seller, and offered to enter into binding written contract, and owner refused to close sale.

Appeal from Superior Court, Los Angeles County; Thos. O. Toland, Judge.

Action by L. M. Ford against H. H. Cotton for broker's commission on sale of real property. From a judgment for plaintiff, defendant appeals. Affirmed.

W. G. Van Pelt and Loren O. Crenshaw, both of Los Angeles (Victor E. Shaw and Hewlings Mumper, both of Los Angeles, of counsel), for appellant.

Goudge, Robinson & Hughes, of Los Angeles, for respondent.

JOHNSON, Justice pro tem. This is an action, tried without a jury, to recover brokerage claimed by plaintiff under a contract with defendant reading as follows:

"Los Angeles, California, April 3, 1922.

"Mr. L. M. Ford, 1023 Chapman Bldg., Los Angeles, Calif.—Dear Sir: In the event of your being able to negotiate a sale of 73 acres of land, more or less, belonging to H. H. Cotton, et al., located immediately north of Wilshire boulevard, beginning at a point on Wilshire boulevard and Preuss road, running in an easterly direction to a point on Wilshire boulevard to the beginning of the property sold to Barman and others, being a part of subdivision of a portion of Rancho Rodeo de Las Aguas, in the city of Beverly Hills, for the sum of one hundred seventy thousand (\$170,000.00) dollars, on terms of \$25,000.00 cash and the balance to be suitably arranged, I hereby agree to pay you the sum of 5 per cent. commission on the sale price of \$170,000.00, payable out of the first payment. Subject to any arrangement Ford may have had with C. C. C. Tatum.

"Yours very truly, H. H. Cotton."

Plaintiff had agreed that C. C. C. Tatum should have one-third of the commission, to be paid directly by the defendant to Tatum, and this is the arrangement to which the contract alludes. Judgment was rendered in favor of plaintiff for \$5,666.66, being two-thirds of the agreed brokerage, and from that judgment defendant prosecutes this appeal.

Before he obtained the brokerage contract, plaintiff had presented the property to a real estate operator named Allen Ratteree, and after the brokerage agreement was signed, plaintiff on the same day brought defendant and Ratteree together at the latter's office, in order that they might conduct their own negotiations. No written agreement of sale was ever made; but plaintiff relies upon his production of a purchaser whom he brought directly to defendant, and who in personal negotiations came to an oral agreement with defendant which, notwithstanding conflicting evidence, the court has found was

made on the day of that meeting, and on the following day repudiated by defendant. All parties agree that, as a result of that meeting at Ratteree's office, instructions were given to have a written contract prepared and submitted as soon as possible by Ratteree's attorney, F. Walton Brown, who was present at the conference and made notes of the details to be incorporated in a formal agreement. Before such agreement could be submitted, however, defendant gave notice next day that he had sold to other parties, and hence could proceed no further with Ratteree. Thereafter defendant denied plaintiff's right to any commission, and in consequence this action was instituted.

The attack of appellant is upon certain of the court's findings, which in general are based on evidence given on behalf of the plaintiff. The court found that plaintiff procured a purchaser at the price and on the terms and conditions stated in the brokerage agreement. It found also that the broker brought defendant and Ratteree together, and that Ratteree thereupon offered to defendant to purchase at a price and on the terms and conditions specified in defendant's agreement with plaintiff, and that it was agreed between defendant and Ratteree that the balance of the purchase price over the cash payment of \$25,000 should be paid in five equal annual installments, payable respectively in one, two, three, four, and five years from the time of the cash payment, with interest at 7 per cent. per annum, payable semiannually. The court found further that the arrangement made was "suitable," within the meaning of the brokerage contract, and that defendant agreed to enter into a formal written agreement of sale, to be prepared by Ratteree's attorney in accordance with the terms of the understanding reached, but that, before such written agreement was completed, defendant refused to deal further with Ratteree upon any terms or conditions.

It is contended that there is no evidence to support a finding that there was any offer or agreement on Ratteree's part to buy at the price or on the terms and conditions named in the brokerage contract, but that, on the contrary, the price and terms discussed varied from the price, terms, and conditions originally prescribed, and that the conference was concluded without reaching any definite arrangement, though with an understanding that discussion might be resumed when the parties had before them the draft to be prepared by Ratteree's attorney. In other words, the defendant insists that the negotiations never went far enough to assume a concrete form. It is, of course, true that such was the testimony of defendant and his witness Tatum, who appears to have been interested in the syndicate which bought the property from defendant; but the findings show that the court gave credence to the testimony

of plaintiff and his witnesses. The sole question is, then, whether or not there is evidence justifying the finding that the minds of the negotiators met upon a sale at the price and on the terms and conditions stated in the agreement between plaintiff and defendant, with "suitable" arrangement as to deferred payments.

There were present, at the conference at Ratteree's office, not only the plaintiff, the defendant, and Ratteree, but also Ratteree's attorney, F. Walton Brown, Thomas A. Hazelton, one of Ratteree's salesmen, and C. C. C. Tatum, all of whom, except defendant and Tatum, were called as witnesses for plaintiff. The brokerage agreement described a tract of land said to contain 73 acres, more or less, and the price named was \$170,000, \$25,000 payable in cash and the balance as might be agreed. Ratteree was proposing to buy for purposes of subdivision and sale in lots; and according to the testimony of plaintiff and his witnesses the discussion at the meeting in reference to price turned upon the question of the clear acreage left after excluding land subject to rights of way or dedicated for streets, reference being made to a map or blueprint produced at the time and now annexed to the transcript as part of the record on this appeal. The 73 acres, more or less, belonging to the defendant Cotton, are represented in the brokerage contract as comprising a tract "immediately north of Wilshire boulevard, beginning at a point on Wilshire boulevard and Preuss road," from which point the first call runs easterly to the Barman property. This language would imply that the tract lay to the north of the northerly property line of Wilshire boulevard, with the point of beginning at the intersection of such northerly property line with the easterly property line of Preuss road, and that the land traversed by Wilshire boulevard and Preuss road was excluded in computing the acreage. The tract had not been actually surveyed, and, when the defendant and Ratteree met, Ratteree testified that he stated to the defendant that he was willing to pay \$170,000 if the tract itself had approximately 70 acres, but that he would not pay for land dedicated for streets or subject to rights of way.

Accordingly he proposed to take the property at its net acreage, and pay \$2,250 an acre for the easterly portion, marked off on the map before them, and comprising about two-thirds of the tract, and \$2,500 an acre for the residue. Ratteree testified, further, that defendant said the price would perhaps run \$1,500 or \$2,000 over \$170,000, because of a somewhat greater acreage than was being reckoned upon, and that in fact the total price would come to \$171,500, or \$172,000. Ratteree also said that, in response to that statement of defendant, he himself answered: "All right, if you have got that amount of acreage in there, that is

satisfactory to me." Mr. Brown corroborated Ratteree, stating that defendant declared that on the basis proposed by Ratteree there would be something over 73 acres, and that the total price would therefore be a little over \$171,000; and that Ratteree thereupon expressed willingness to pay that price. Further corroboration is found in evidence given by plaintiff in his direct examination, where he testified as follows:

"The subject of price was discussed at the conference. The price mentioned was \$170,000 at first, and Mr. Ratteree said it was all right. Mr. Cotton said, 'Well, if that is what it figures out;' he said, 'No; it figures a little bit more, doesn't it?' We added up the acreage that was shown on the map and multiplied them out, and it came to \$171,250. We had some little argument about it, and I was prepared, if it came to a showdown, to give them that out of my commission to let the deal go through. Mr. Ratteree said, 'Well, I am buying this by the acre, and if there is two or three more acres there it don't make any difference,' he said, 'if it is there.'"

Again, upon cross-examination, plaintiff reiterated this testimony, saying:

"We figured the price at \$170,000, based upon Mr. Cotton's representation that there were so many acres there. When we got to Mr. Ratteree's office and had the map before us, we took down the number of acres in each individual block to the point where the line was drawn. I added that up in a little book; * * * figured it out to what was supposed to be $\frac{1}{1000}$ of an inch, according to the survey there made, and it came to \$170,200. They said, 'How about the prices?' Mr. Cotton says, 'Don't it go a little more than that?' And I figured it definitely at \$171,250. There was \$1,250 difference. Mr. Ratteree said, 'A few more acres, more or less, don't make any difference to me. If the land is there, I will pay for it.'"

It is thus manifest that the court based its finding upon evidence before it, which in substance showed that the defendant represented that he had approximately 73 acres net, or at any rate sufficient land to produce at the rate designated something in excess of \$170,000.

As to terms and conditions, there is evidence that the parties agreed upon a cash payment of \$25,000, to be made on delivery of deed, and deferred payments in equal annual interest-bearing installments, as found by the court. While the court has not made a further finding in reference to deferred payments, the evidence on behalf of plaintiff is to the effect that an agreement was reached that the deferred payments were to be evidenced by Ratteree's promissory notes secured by a deed of trust, which was to contain certain provisions for release of lots of the contemplated subdivision upon payment of certain fixed amounts. The record contains evidence also that Ratteree offered to pay a deposit on the spot, and to deposit the balance of the cash payment in escrow, with

instructions to pay the amount to defendant when title should pass, but that defendant stated that that matter could wait until the contract was signed. According to Ratteree, defendant said in reference to the formal contract, "You gentlemen go and draw up your papers and get them ready by tomorrow, if you can," and promised to close then or the following day, as soon as the papers could be gotten ready, and in the meantime to send Mr. Brown an exact legal description of the property. Brown states also that, as defendant was leaving the conference, he remarked:

"Well, we have made a deal—submit your contract to me as soon as it is drawn up and close it up."

Before the parties separated, instructions had been given to Brown to prepare a formal agreement embodying the terms arrived at in his presence, and Brown testified that he had his notes taken during the conference, and that on the following day there was sent to his office a description of the property by courses and distances, which defendant had promised to procure from his engineer. Brown started to draw the formal agreement, but had not finished it when he learned that defendant had disabled himself from the performance of any agreement with Ratteree.

[1] The description of the engineer places the point of commencement at the intersection of the center line of Preuss road (60 feet wide) and Wilshire boulevard (100 feet wide), and gives the area of the tract as 73.2733 acres, less portions of Preuss road and Wilshire boulevard, amounting to 3.5355 acres dedicated to Los Angeles county for road purposes. Using these figures in connection with the map in evidence, appellant argues that the price at the rate offered by Ratteree would fall below \$170,000, and that consequently plaintiff's purchaser did not agree to buy at defendant's price. There is no evidence, however, that there had been any actual survey by the engineer, or that the tract did not in fact contain approximately 73 acres net; and it must be remembered that at the conference, according to testimony relied upon by the court, defendant was representing himself as owner of enough land to produce \$170,000 or somewhat more, and that Ratteree expressed his willingness to pay that gross amount, or even \$1,500 or \$2,000 more, for the net quantity of land which defendant declared he would be able to convey.

Under the circumstances, it may not be said that the alleged discrepancy in net acreage resulted in failure of the broker to produce a purchaser at the price fixed for the tract of approximately 73 acres. If the net acreage was as represented by defendant, he could have had at least \$170,000 from Ratteree; and defendant's refusal to close the

sale with Ratteree cannot deprive the broker of his commission upon the ground, here urged, that the purchaser had not agreed to pay defendant's price of \$170,000. In *Cohen v. Farley*, 28 Misc. Rep. 168, 58 N. Y. S. 1102, the broker was held entitled to his commission, where the owner of the lot, desiring to sell, gave the broker a card describing the lot as 23 feet wide, and the broker in good faith found a person who, in reliance upon the statement on the card, was able, ready, and willing to purchase at the price demanded, but who withdrew when it was afterwards discovered that the lot was only 22 feet and 7 inches wide. See, also, *Schweid v. Storandt*, 157 App. Div. 855, 143 N. Y. S. 161, affirmed 217 N. Y. 637, 112 N. E. 1075, and *Sokolski v. Bleistift* (Sup.) 129 N. Y. S. 26.

[2] While the court did not make a specific finding as to each one of the details agreed to be embodied in the contract which Ratteree's attorney was to prepare, yet there is the essential finding that plaintiff, acting under his brokerage agreement, brought defendant into immediate touch with a ready and willing purchaser, able to buy at defendant's price and on terms acceptable to defendant, and did thus procure for defendant a bona fide purchaser at the price and on the terms and conditions prescribed in the brokerage contract, and that the arrangement made was "suitable" within the contemplation of the contract. These findings, under the record before us, are sufficient to support the judgment.

[3, 4] The defendant in his answer averred that the only terms and conditions on which he and Ratteree had agreed were as to the initial payment of \$25,000, and that the terms as to the balance of the payments were never suitably arranged between himself and Ratteree. Upon conflicting evidence the court finds specifically, however, that:

"It is not true that the only terms and conditions relative to said sale upon which the minds of the defendant and said Allen Ratteree met

was upon the initial payment; it is not true that the terms as to the balance of the payments were never suitably arranged between plaintiff and said Allen Ratteree."

In view of the language of the brokerage contract and the issues tendered by plaintiff's answer, the finding to the effect that the terms were agreed upon and were suitable is to be treated as a finding of an ultimate fact. Since the court found the ultimate fact in favor of plaintiff, it in effect found and concluded that contradictory probative declarations relied on by the defendant were untrue. *Tower v. Wilson*, 45 Cal. App. 123, 134, 188 P. 87.

[5] The law governing a broker's right to his commission, where he brings buyer and seller together and leaves them to make their own engagement, has been frequently expounded by our courts, and is thus stated in the late case of *Twogood v. Monnette*, 191 Cal. 103, 107, 215 P. 542, 543:

"It is also established law in this state that a written contract between the seller and the purchaser is not essential to the recovery of the broker's commission, if he has produced to the seller a purchaser who is ready, willing, and able to purchase upon the terms proposed by the seller, and who has agreed to those terms and is willing and offers to enter into a binding written contract. The broker has performed his duty and has earned his commission, regardless of whether a written contract is actually entered into, or whether the sale is ever consummated by the delivery of the property and the payment of the purchase price. *Gunn v. Bank of California*, 99 Cal. 349, 33 P. 1105; *Merwin v. Shaffner*, 31 Cal. App. 374, 160 P. 684."

The same rule has been applied still more recently in *Contant v. Wallace*, 62 Cal. App. 768, 217 P. 1081; *Umphray v. Hufschmidt*, 73 Cal. App. 140, 238 P. 749; *Frank Meline Co. v. Kleinberger* (Cal. App.) 246 P. 136, and *Ball v. Glantz* (Cal. App.) 248 P. 258.

The judgment is affirmed.

We concur: CRAIG, J.; THOMPSON, J.

201 Cal. 219

P. A. SMITH CO. v. MULLER. (S. F. 11413.)

Supreme Court of California. May 16, 1927.

1. Evidence ⇨428—Evidence that written contract for purchase of glass was merely sham, to enable plaintiff to secure shipments from manufacturers, held admissible (Civ. Code, § 1698).

In action for purchase price of glass alleged to have been sold by written contract, evidence to effect that writings constituting contract were sham, and were executed only for purpose of enabling plaintiff to secure shipments of glass from manufacturers, pursuant to oral understanding between parties that plaintiff would furnish bids on each contract secured by defendant for construction of buildings, held admissible, within Civ. Code, § 1698, on theory that it did not vary terms of written instrument, but established that such contract had no force.

2. Evidence ⇨428—Evidence that parties never intended writing to constitute contract, but that another parol contract was entered into, is not objectionable.

Evidence that parties never intended writing to constitute contract, but that in lieu thereof another parol contract was entered into between them, is not objectionable, under the parol evidence rule, since it does not change a written contract by parol, but serves to establish that such contract had no force.

3. Principal and agent ⇨137(1)—Defense that writing was not intended as contract held not to require proof of authority to orally contract of plaintiff's agent, authorized to execute writing.

In action on written contract for purchase price of plate glass, plaintiff's contention that defendant's special defense that writings were not intended to constitute a contract, but that in lieu thereof another oral contract was entered into, was not supported by evidence, because of failure to show plaintiff's agent had authority to enter into oral agreement, held without merit, in that to accept contention would be to sanction a fraud, because perpetrated through an agent.

In Bank.

Appeal from Superior Court, Alameda County; H. L. Preston, Judge.

Action by the P. A. Smith Company against F. A. Muller. Judgment for defendant, and plaintiff appeals. Affirmed.

F. L. Hatch, Jackson Hatch, and Harry G. McKannay, all of San Francisco, for appellant.

Harrison S. Robinson, Harry L. Price, and R. W. Macdonald, all of Oakland, for respondent.

WASTE, C. J. Plaintiff brought an action against the defendant for the purchase price of plate glass alleged to have been sold to defendant, but which defendant refused to accept. The trial court found that certain writings signed by the parties, and on which

the plaintiff relied, were not intended to be contracts, but were signed, and duplicates thereof exchanged, pursuant to an oral understanding and agreement that the writings should not, and did not, constitute a contract between the parties, and that they were not delivered as a contract. Judgment was therefore entered for the defendant, and plaintiff has appealed.

The plaintiff corporation is engaged in the selling and furnishing of glass and plate glass. The defendant is engaged in the building business. Plaintiff's causes of action were based upon writings, similar in form, one of which reads as follows:

"P. A. Smith Co., Glass.

"Oakland, Cal., April 27, 1923.

"No. 97.

"Mr. F. A. Muller: We will perform the labor and furnish the glass necessary to glaze the building at W.-sie 23rd Ave. bet. E. 14th & E. 12th St., owner Mr. McElhinney, architect, East Bay Planners, in accordance with plans & Specif- we will furnish and set plate for the sum of 65 off list; net cash. Disclaiming all liability for delay occasioned by strikes, labor troubles, or other causes beyond our control. This bid does not include the cleaning of glass or replacing glass broken by others.

"Exceptions: If any cement corners, they will be extra at 1.00 per lin. ft.

"P. A. Smith Co., per S. H. Sorrell.

"Accepted: F. A. Muller.

"This quotation subject to ——— days acceptance from date."

The defendant denied that any contract for the purchase of glass was, in fact, entered into. He further pleaded, as a special defense, and the court found, that in the spring of 1923 it was common knowledge among those engaged in the building business, and was represented by the plaintiff to the defendant, that there was a shortage of plate glass available for building purposes, and that on account of the shortage plaintiff would not be able to get a sufficient supply of glass to do an active business in Alameda county, unless it were able to show a considerable number of accepted orders. Plaintiff orally proposed to defendant that, whenever defendant had the prospect of securing a building contract, plaintiff would make out a bid for the furnishing of the plate glass therefor at current list prices less a discount of 65 per cent.; that, in order to enable plaintiff to secure glass from the manufacturers, the defendant should thereupon sign an acceptance of the bid; that the writing should not in fact constitute an accepted bid, but, in case the defendant became the builder on the job referred to in the bid, and had the letting of the subcontract for glass or plate glass, plaintiff would make a competitive bid therefor, the defendant to award the subcontract to the lowest bidder. Pursuant to such oral understanding be-

tween the parties, a number of purported bids were offered by plaintiff, and signed as accepted by the defendant; but the buildings with reference to which the bids were made were never built, or the defendant was not awarded the contract for their construction. On April 12, and again on April 27, 1923, in anticipation of the defendant being a successful bidder on contracts about to be awarded, the plaintiff tendered purported bids to the defendant for performing the labor and furnishing the glass required for two buildings. The procedure theretofore orally agreed upon by the parties was carried out, but in neither instance was the plaintiff the lowest bidder, and the contract for glass on each job was awarded to another. Based on these findings, the trial court concluded that no contracts for the sale and purchase of glass had, in fact, been entered into between the parties.

[1, 2] The appellant objected to the introduction of any evidence in the court below in support of the special defense, and is here contending that the action of the court was in violation of section 1698 of the Civil Code, which provides that a contract in writing can only be altered by a contract in writing or by an executed oral agreement, and not otherwise. The objection was overruled, and the evidence received by the trial court, upon the theory that such evidence was admissible, not to vary the terms of a written instrument, but in support of the contention of the defendant that the writings sued upon were sham, and executed for the purpose of influencing third persons, and that the oral agreement set out in the special defense was the only contract entered into between the parties. It is well settled by the decisions in many jurisdictions that evidence that parties never intended a writing to constitute a contract, but that in lieu thereof another contract was entered into between them, is not objectionable under the parol evidence rule. Such evidence does not change a written contract by parol, but serves to establish that such contract had no force, efficacy, or effect. *Grierson v. Mason*, 60 N. Y. 394; *Woodard v. Walker*, 192 Mich. 188, 158 N. W. 846; *Humphrey v. Timken Carriage Co.*, 12 Okl. 413, 75 P. 528; *Oak Ridge Co. v. Toole*, 82 N. J. Eq. 541, 88 A. 827; *Birely & Sons v. Dodson* (a case much like the case at bar) 107 Md. 229, 68 A. 488; *Robinson v. Nessel*, 86 Ill. App. 212; *Deierling v. Wabash R. Co.*, 163 Mo. App. 292, 146 S. W. 814. "The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract. The authorities supporting these views are numerous. * * * [Citing cases.]" *Burke v. Dulaney*, 153 U. S. 228, 14 S. Ct. 816, 38

L. Ed. 698. In *Coffman v. Malone*, 98 Neb. 819, 154 N. W. 726, L. R. A. 1917B, 258, the court held parol evidence to be admissible to show the parties to the action had mutually agreed that the purported written contract which the plaintiff was seeking to enforce was never to be performed, but was a mere sham, executed for the purpose of influencing the conduct of a third person.

Other decisions which support the rule followed by the trial court in this case are collected and referred to in the concurring opinion to *Coffman v. Malone*, supra, and in the note to that case found in L. R. A. 1917B, page 263. The principle seems to be so well established that we deem further citation unnecessary. The decisions relied on by the appellant (*Graham v. Savage*, 110 Minn. 510, 126 N. W. 394, 136 Am. St. Rep. 527, 19 Ann. Cas. 1022; *Hendrickson v. Evans*, 25 Pa. 441; *Grand Isle v. Kinney*, 70 Vt. 381, 41 A. 130) do not overcome the weight of authority of the cases above referred to. The effect of *Graham v. Savage* on the point we are here considering appears to have been nullified by a subsequent decision in the same state. *Summit Mercantile Co. v. Daigle*, 146 Minn. 218, 178 N. W. 588. *Hendrickson v. Evans*, decided in 1855, has but little significance, for the courts in Pennsylvania hold it to be "settled beyond all dispute," in that state, "that where at the execution of a writing a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, parol evidence is admissible, though it may vary and materially change the terms of the contract." *Croyle v. Cambria Land & Imp. Co.*, 233 Pa. 310, 82 A. 360. See, also, the cases collected in the note to 20 A. L. R. 483. In the recent case, *Kinnear & Gager Mfg. Co. v. Miner*, 88 Vt. 324, 92 A. 459, the Chief Justice and one of the associate justices vigorously dissent from the minority rule announced in *Grand Isle v. Kinney*, supra, and advocate the application of the rule that parol evidence should be admissible to show that a writing never had any force as a valid contract.

[3] Appellant contends the special defense interposed by the respondent is not supported by the evidence. Its argument is that the writings upon which it relies were executed in its behalf by an agent who had authority to make such a contract for it, but it is not shown that such agent had authority to enter into the oral agreement upon which the respondent relies. We are not impressed with the argument. To accept the contention would be to sanction a fraud in the interest of the appellant, because the principal perpetrated it through an agent. *Humphrey v. Timken Carriage Co.*, supra.

The conclusion we have reached, that the trial court was correct in holding that the

writings relied on by the appellant did not amount to contracts entitling it to recover on either count, renders it unnecessary to consider the contention of the respondent that the appellant did not make a legal offer of performance, for the reason that such offer was not followed by segregation and storage of the glass called for. For the same reason, we are not required to pass upon the contention of the appellant that the findings do not support respondent's position.

The judgment is affirmed.

We concur: PRESTON, J.; LANGDON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

201 Cal. 169

HOGEBERG et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(S. F. 12006.)

Supreme Court of California. April 29, 1927.

1. Master and servant ⇨419—Industrial Accident Commission cannot increase award by amended finding after original award becomes final, without new facts or change in condition (Workmen's Compensation Act, §§ 11c, 20d).

Industrial Accident Commission has no power to increase original award by amended findings, if original findings and award have become final, without new facts or change in condition of applicant to support it, notwithstanding continuing jurisdiction, under Workmen's Compensation Act §§ 11c, 20d (St. 1917, p. 831).

2. Master and servant ⇨416—Commission's order giving notice of intention to amend finding and award held not final adjudication of right to permanent disability compensation.

Order of Industrial Accident Commission, giving notice of intention to amend findings and award based on 50 per cent. loss of earning power, was not final adjudication of claimant's right to permanent disability compensation, where such amendment was never made.

3. Master and servant ⇨416—Referee's order, not approved by Industrial Accident Commission, held not final adjudication of right to permanent disability compensation (Workmen's Compensation, Insurance and Safety Act, § 4).

Order by referee, not approved or confirmed by Industrial Accident Commission, was not final adjudication of claimant's right to permanent disability compensation, not being order of commission, in view of Workmen's Compensation, Insurance and Safety Act, § 4 (St. 1913, p. 280).

4. Master and servant ⇨416—Denial of application for permanent disability compensation on ground commission was without jurisdiction held not bar to second proceeding of same character.

Industrial Accident Commission's order, denying claimant's application for compensa-

tion for permanent disability on ground that it was without jurisdiction to entertain it, held not bar to second proceeding of same character.

5. Master and servant ⇨401—Workmen's petition for back compensation and award based on present condition held not insufficient as petition for permanent disability.

Petition of injured workman asking for back compensation and also for award "finding petitioner's rights based on his present condition" held not insufficient as petition for permanent disability.

In Bank.

Proceeding under the Workmen's Compensation Act by Nickolaus Meiers, opposed by Amiel Hogeberg, employer, and the New Amsterdam Casualty Company, insurer. The Industrial Accident Commission by supplemental order awarded permanent disability compensation, and the employer and insurer bring certiorari. Award affirmed.

Barry J. Colding, Theodore Hale, and H. C. Kelsey, all of San Francisco, for petitioners.

Warren H. Pillsbury and G. C. Faulkner, both of San Francisco, for respondents.

CURTIS, J. The facts upon which this proceeding is based are stated in the opinion of Mr. Justice Tyler, Presiding Justice of the District Court of Appeal, First Appellate District, Division 1. We adopt that opinion, in part, as follows:

"Certiorari to review a supplemental award made by the Industrial Accident Commission under which an injured employee was given a permanent disability compensation allowance for 88 weeks, amounting to the sum of \$1,833.04.

"Petitioner New Amsterdam Casualty Company is the insurance carrier of its copetitioner Hogeberg. Respondent Nickolaus Meiers was employed by Hogeberg as a hodcarrier and on June 27, 1922, he injured his left knee through slipping and falling upon a concrete floor. Meiers was compensated thereafter by the insurance carrier and given medical treatment, but being dissatisfied therewith he filed in the office of the commission an application for adjustment of claim by him against petitioners herein arising out of the accident. Petitioners filed an answer, and thereafter said matter came on for hearing, and evidence was taken by a referee appointed by the commission. On the 14th day of April, 1923, the commission filed its findings and award in favor of Meiers and against petitioners. It found that the injury complained of proximately caused temporary total disability, continuing from the date thereof to and including the 20th day of November, 1922, for which compensation had been paid for in full at the rate of \$20.83 per week, beginning with the eighth day after said injury. It found in addition thereto that the injury also proximately caused temporary partial disability, beginning with the 21st day of

November, 1922, continuing indefinitely, entitling the employee to \$10.41 per week, based upon a 50 per cent. loss of earning power, and that the amount accrued to April 4, 1923, a period of 19½ weeks, was \$200.76. In accordance with these findings an award was made in favor of the applicant and against the defendant New Amsterdam Casualty Company for the sum of \$200.76, and the further sum of \$10.41 per week, beginning with the 5th day of April, 1923, until the termination of the disability or the further order of the commission. It was further ordered that the defendant company furnish to the applicant suitable surgical and hospital treatment necessary for the cure of the condition from which he was suffering as a result of the injury, and that during any period of disability occasioned by such treatment that defendant pay to the employee the sum of \$20.83 per week. The insurance carrier complied with this award. It placed the applicant in a hospital, where he was operated upon, and thereafter it compensated him in accordance with the terms of the orders.

"Despite the award so made in his favor the applicant became dissatisfied and on April 23, 1923, he filed an application for a rehearing. Petitioners filed an answer thereto and at the same time they, too, filed an application for a rehearing and a request for termination of liability. Thereafter, on the 20th day of June, 1923, the commission made its order denying applicant's petition for a rehearing. It also denied defendants' petition for rehearing and made a finding of fact that the medical and surgical treatment furnished by defendants under the commission's findings and award of April 14th disclosed no condition that should have caused disability to the applicant, and that, therefore, temporary partial disability due to injury did not extend beyond April 5, 1923. In the same order, however, the commission made a finding that the applicant was 'temporarily totally disabled by reason of the above-mentioned treatment beginning April 25, 1923, indefinitely,' and the commission gave notice of its intention to amend the findings and award accordingly, unless good cause to the contrary be shown in writing within ten days from the date of this order. The order proposed in this notice of intention to amend the findings and award it seems was never made.

"On the 2d day of July, 1923, petitioners herein filed their petition for an order terminating their liability for compensation. In this petition it is set forth that the applicant should have been able to return to work on or about May 23, 1923, as he had fully recovered from the results of the surgical treatment given him on April 25, 1923. This petition was supported by reports of attending surgeons. Thereafter, on July 9, 1923, the applicant filed a petition for a rehearing. On the 28th day of July, following, the commission made its order denying petition for rehearing. On August 20th of the same year the applicant filed a petition for an increase of compensation, and following this petition hearings were had before a referee, and thereafter, on September 7, 1923, such referee made an order terminating indemnity. This order concludes with the referee's signature and the statement that it will be approved by the commission after 5 days, notice of approval to be mailed to the parties. This confirmation, so far as the record shows,

was never made, and no petition for a rehearing therefrom was filed by the applicant.

"A few days following this order of the referee a protest was sent to the commission by the attorney for the applicant, criticizing this order of the referee, and requesting that the commission go into the matter personally. Pursuant to this request the matter was sent to Dr. Leonard Ely for special examination. This physician and one Dr. Chamberlain made an examination of the applicant's injury. Dr. Ely filed his report on October 12, 1923, in which he stated that in his opinion the applicant's then disability was not referable to the accident, but rather to an infectious arthritis attributable entirely to systematic or local disease. Nothing further appears in the record concerning the confirmation of the order of the referee. The following year, and on the 30th day of June, 1924, the applicant filed a petition for a modification of the award made on the 14th day of April, 1923. This petition was accompanied by a report of the applicant's attending physician. In this petition the applicant represented that his disability had become established to such a degree and such a character that the same had become a permanent injury.

"Following the filing of this petition, which prayed for a permanent disability rating to applicant, a hearing was held before a referee of the commission, at which hearing the applicant produced evidence of his condition. Thereafter, on August 12, 1924, the commission made its order denying the petition for further compensation. The commission found that applicant's claim for additional relief had been previously determined adversely to him and had become res adjudicata, and that the commission was without jurisdiction to entertain the petition. An order was accordingly made that the applicant take nothing further by reason of his petition. On the 26th day of September, following, and more than 20 days after the making of the last order referred to, applicant filed a petition for a rehearing. To this petition defendants filed an answer, in which they set forth a history of the proceedings had before the commission and claimed that such proceedings clearly showed that the entire matter was res adjudicata and that the commission had no jurisdiction to render any further award. The answer set forth that the petition for rehearing merely presented evidence which had been previously fully and carefully considered and determined by the commission; that no new evidence was presented by the petition; and that its decision of August 12, 1924, was final upon the subject. On the 24th day of November, 1924, the commission denied the applicant's petition for a rehearing.

"The following year, and on the 6th day of January, 1925, applicant again filed a petition 'for further order and allowance for further surgical operation.' In this petition it was claimed that the original allowance of half compensation had never been terminated, but was still in force and effect. A finding and award was asked for covering the alleged claim and also that petitioner's rights be based upon his present condition. Accompanying this petition was a report of certain physicians. Petitioners herein filed their answer to this application, in which they again reviewed the history of the proceedings had before the com-

mission and claimed that no showing was made by the medical reports that would justify the commission in reopening the case under section 20(d) of the act (St. 1917, p. 850) and that the matter had been fully and finally determined and was res adjudicata.

"Following the filing of this petition and the answer thereto, the commission set the cause for further hearing, and the testimony of the physicians who had filed the reports accompanying applicant's petition was received and considered. The commission then referred applicant to a medical referee for further examination and for this purpose the commission appointed a physician to examine applicant.

"Thereafter, on July 15, 1925, the commission made its 'supplemental findings and award,' by which it determined the applicant to be suffering from a 'permanent disability' proximately caused by the original injury, and allowed a 22 per cent. permanent disability rating thereon. The commission made a further finding that the disability of the applicant 'determined, became permanent and reached a stage at which the extent of permanent disability could first be definitely ascertained within six months, and such permanent disability, therefore, constituted a new and further disability under the provisions of section 11(c) of the Workmen's Compensation Act, and this application was therefore filed in time.'

"Within 20 days after the making of this order and award petitioners herein filed their application for a rehearing. Accompanying this petition was filed a memorandum which again reviewed the various previous petitions and orders of the commission thereon and where it was again pointed out and claimed that the whole matter had become res adjudicata and the commission was therefore without jurisdiction to grant the relief given. On the 10th day of August, 1925, the commission made its order denying a rehearing whereupon the present proceeding was instituted.

"It is here claimed in support of the relief prayed for that the commission acted without and in excess of its powers and that the evidence does not justify the findings of fact. In support of these grounds petitioners rely upon the evidence, the various orders, decisions, and awards made herein prior to the filing of the petition of January 6, 1925, and upon the reports and other medical data on file before the commission.

"Petitioners insist that the order denying the petition for further compensation made by the commission on the 12th day of August, 1924, and the order denying rehearing made on November 24th, following, not having been appealed from in the manner prescribed by the act, are final and conclusive against all claims of the applicant for matters occurring prior to the date of said orders. They further contend that, while under section 20(d) of the act the commission has continuing jurisdiction for 245 weeks from the date of the injury and has the right to review, grant or re-grant, diminish, increase, or terminate compensation, such right is dependent solely upon the grounds 'that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated.'

"It is claimed that in the applicant's petition of January 7, 1925, filed long after the previous order of November 24, 1924, had become final,

and in the subsequent hearings and the medical evidence submitted, there is no evidence to indicate that applicant's disability has either recurred, increased, diminished, or terminated. Petitioners, therefore, contend that there is no evidence whatever to support the supplemental findings of the commission to the effect that the applicant was suffering from a permanent disability or that his condition is in any way different to what it was prior to November 24, 1924, the date of the last final order of the commission.

[1] "There can be no question that the commission has no power to increase the original award by amended findings after its original findings and award have become final without new facts or a change in the condition of the applicant to support it. In *Georgia Casualty Co. v. Ind. Acc. Com.*, 177 Cal. 289, 170 P. 625, it appeared that the commission attempted to make a second award not based upon any new facts since its original one, but predicated solely upon a reconsideration of the facts upon which its former award was made, and it was held that the continuing jurisdiction given to the commission to rescind, amend, or alter its own orders, decisions, and awards, is limited under the terms of the act for the sole purpose of making such change as may be required by the occurrence of new facts arising after the date of the original decision; and where the commission, after a denial of an application for a rehearing, makes a second award based solely upon a reconsideration of the facts upon which an award was made, and without any evidence having been presented as a basis for the second award, such action is in excess of the jurisdiction of the commission. See, also, *Northern Redwood Lumber Co. v. Ind. Acc. Com.*, 44 Cal. App. 61, 185 P. 991.

"* * * The same question involved in the *Georgia Casualty Case* has recently been considered and passed upon by this court since the amendment. In *Benton v. Ind. Acc. Com.* (Cal. App.) 240 P. 1021, it is held in conformity with the decisions above cited that the continuing jurisdiction given to the commission under sections 11 (c) and 20 (d) of the act to take cognizance of applications for additional compensation within 245 weeks after the date of injury upon the ground that the original injury has caused new and further disability does not authorize the commission to entertain supplementary applications for the identical complaint where relief has once been denied. The determination of that issue is final in the same manner as the original decision where there has been no change in the disability or injury.

"It is not here claimed that there has been any such change and the evidence shows that on the hearing had upon the last application of January 7, 1925, no statement or even suggestion was made that petitioner's condition had recurred or increased, or that he had a new and further disability, nor that any change had taken place in his condition, and it is conceded that the only question before us is whether the commission has, by reason of any intermediate adjudication, precluded itself from allowing the applicant compensation for his alleged permanent disability by the order here complained of.

"It would be a matter of supererogation to again review the many petitions filed with the commission and the orders made in refer-

ence thereto. That there is a confusion in the record there is no question. It does definitely appear therefrom, however, that on June 30, 1924, nearly a year following a prior order, the applicant filed a petition for a permanent disability rating, which petition was accompanied by a report of his physician. It is conceded that the applicant had the right so to do and was entitled to the remedy sought provided he was able to show a change in his condition to justify the commission in reopening his case. The applicant was given a hearing and an opportunity to present all his evidence. After the close of this hearing the commission on August 12, 1924, made its order denying the petition for further compensation, and found that the evidence introduced in support thereof involved matters which had theretofore been decided adversely to the applicant and which had become res adjudicata, and ordered that the applicant take nothing further from the petition or the claim asserted by him. Applicant had 20 days within which to file a petition for a rehearing. He did not do so until September 26th, following, but it was nevertheless considered and denied. It is claimed that this order did not decide whether or not the applicant was suffering from any permanent disability, but only determined that the commission was without jurisdiction to go into the question upon its merits for want of jurisdiction. * * *

While the commission granted a full hearing upon the petition filed June 30, 1924, and heard and received evidence upon its merits on behalf of all the parties thereto, it is apparent from the record before us that the order of August 12, 1924, and the order of November 24, 1924, denying a rehearing of the same, were not based upon the evidence adduced at said hearing, but were made upon the belief and finding on the part of the commission that it had previously decided the issues then before it adversely to the applicant. This is made apparent beyond any question by reference to said orders. The order of August 12, 1924, after certain recitals, contains the following as the sole finding of facts:

"The petition for additional relief filed herein on the 30th day of June, 1924, and the evidence introduced in support thereof, involved matters which have been heretofore decided adversely to the applicant, and which now have become res adjudicata, and this commission is therefore without jurisdiction to entertain said petition or grant the relief prayed for."

Upon this finding the commission made its order as follows:

"In accordance with the foregoing findings, it is hereby ordered that applicant take nothing further by reason of the aforesaid petition or the claim herein asserted."

The order of November 24, 1924, denying a petition for a rehearing, simply recites that:

"Good cause appearing therefor, It is ordered that applicant's petition for rehearing filed herein on the 27th day of September, 1924, be, and the same is hereby, denied."

This was not a hearing upon its merits. When, therefore, the petition on January 6, 1925, came before said commission for hearing, it examined the record of the proceedings of this matter and determined that the claim of applicant for permanent disability had never been finally adjudicated by said commission and that, as said application had been made within 245 weeks from the date of the injury, the commission still had jurisdiction of said matter. It thereupon proceeded to hear said application upon its merits and after said hearing and on July 15, 1925, made its supplemental findings and award. As before noted, a petition for a rehearing thereof was denied August 10, 1925. As we view the case as it now stands, there are presented two questions upon the correct answers to which rests the validity of said award of July 15, 1925. The first of these questions is as to the correctness of the finding or conclusion of the commission that the order before it was not res adjudicata, and the second is as to whether the commission was bound by its order of August 12, 1924, in which it declared that it had previously adjudicated the claim of applicant for permanent injury.

[2, 3] As to the first of these questions, the respondents claim that by two separate orders of the commission it had decided that applicant had suffered no permanent injury. One of these is the order of date June 20, 1923, and the other was the order of September 7, 1923. In the first place it will be observed from the above recital of the facts herein that the commission, on April 14, 1923, found that the injury "caused temporary partial disability, beginning with the 21st day of November, 1922, continuing indefinitely, entitling the employee to \$10.41 per week, based upon a 50 per cent. loss of earning power." An award based upon and in accordance with said finding was made by the commission. Each party to these proceedings applied for a rehearing, and on June 20, 1923, the commission denied said applications. Said order was in the following words:

"It further appearing from the reports above mentioned that the medical and surgical treatment furnished by said defendant under the commission's order of April 14, 1923, disclosed no condition that could have caused disability to said applicant, and that, therefore, temporary partial disability due to injury did not extend beyond April 5, 1923, and it further appearing that said applicant was temporarily totally disabled by reason of the above-mentioned treatment beginning April 25, 1923, indefinitely: Now, therefore, it is ordered that the petitions for rehearing by both applicant and defendant be and they are hereby denied.

"Notice is hereby given that, unless good cause to the contrary be shown in writing within 10 days from the date of this order, this commission will amend the findings and award heretofore entered in accordance with the findings set out above."

No further action was taken by the commission under this order and said findings and award of April 14, 1923, were never amended or modified in any manner whatever. Just why the commission failed to cause amended findings and award to be made and filed does not appear from the record, but it is perfectly clear that, as the findings and award of April 14, 1923, were left intact, the order of June 20, 1923, can have but slight, if any, bearing in the determination of the rights of the applicant. We are fully convinced that it was not a final adjudication of applicant's claim to either temporary or permanent disability. The other order relied upon by said respondents as a final determination by the commission of applicant's claim for disability is the order of September 7, 1923. This order was not made by the commission or by any members thereof, but by a referee of said commission. Following the signature of the referee to the document were the following words:

"Notice: The foregoing order will be approved by the Industrial Commission after 5 days. Notice of approval will be mailed to parties."

This "notice" was unsigned and the record fails to disclose that any further action was taken in pursuance thereof or under said order of the referee. There is an entire absence in the record of any evidence of any order of the commission approving or confirming the referee's order of September 7, 1923. By section 4 of the Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 280) an order made by a referee shall be deemed an order of the commission only when approved and confirmed by the commission. It must be clearly apparent, therefore, that this order of September 7, 1923, was not in any sense a final adjudication of any right of applicant, nor was it any order of the commission whatever. There is, therefore, nothing in the record to support or justify the finding and order of the commission of date August 12, 1924, holding that "the petition for additional relief filed herein on the 30th day of June, 1924, and the evidence introduced in support thereof, involved matters which have been heretofore decided adversely to the applicant and which now have become res adjudicata." Accordingly, it was the duty of the commission, upon the filing of applicant's petition of June 30, 1924, to proceed and hold a hearing thereon on its merits. This it refused to do for the reason, as set forth in said order of August 12, 1924, that "this commission is therefore without jurisdiction to entertain said petition or grant the relief prayed for."

[4] This brings us to our second question and that is the binding effect of this order of August 12, 1924, upon the future acts of the commission. Applicant filed a petition for a rehearing, which was denied. The order thereupon became final. Did this final order

of the commission denying applicant's petition of June 30, 1924, upon the ground that it was without jurisdiction to entertain the same, preclude it from thereafter entertaining a subsequent petition for the same relief based upon the same state of facts set forth in said prior petition? In other words, is the dismissal of a proceeding for want of jurisdiction to hear the same a bar to a second proceeding of the same character?

This question has frequently arisen in cases pending before the courts of this state and we see no reason why the same rule prevailing in the courts is not applicable to proceedings before the Industrial Accident Commission. In 15 California Jurisprudence, p. 129, the rule is stated as follows:

"Where a proceeding is dismissed for want of jurisdiction, the judgment or order is not a bar or estoppel in another court or proceeding wherein jurisdiction is obtained."

In *Slaker v. McCormick-Saeltzer Co.*, 179 Cal. 387, 389, 177 P. 155, 156, this court, in considering this same question, held as follows:

"But to operate as a bar or estoppel, the judgment in a former action must have been on the merits. 15 R. C. L. 955; 23 Cyc. 1131; *Gray v. Dougherty*, 25 Cal. 266; *Hughes v. United States*, 4 Wall. 232, 18 L. Ed. 303; *Swift v. McPherson*, 232 U. S. 51, 34 S. Ct. 239, 58 L. Ed. 499. See, also, *Rose v. U. S. Notes*. To determine the character and scope of an adjudication, the entire record of the prior action is to be examined. *Watson v. Lawson*, 166 Cal. 235, 241, 135 P. 961; *Smith v. Auld*, 31 Kan. 262, 266, 1 P. 626. Looking merely to the judgment in the foreclosure suit, it is very plain that the court did not therein undertake to pass upon the merits of the controversy between *Slaker* and the *McCormick-Saeltzer Company*. What it did was to decline to determine that controversy, for the reason that it was without jurisdiction, in that action, so to do. Whether the holding that it had no jurisdiction was sound or erroneous is not a question for consideration here. The essential point is that there was no adjudication of the merits. Having reached the conclusion that it lacked jurisdiction, the court might more appropriately, perhaps, have ordered a dismissal as to the *McCormick-Saeltzer Company*, instead of adjudging that the plaintiff 'have and recover nothing of or from' said defendant. But the mere form of words found in this part of the judgment is not controlling (*Dixon v. Sinclear*, 4 Vt. 354, 24 Am. Dec. 610), since, upon a reading of the entire decree, it is apparent that the court had no thought of deciding the question now in dispute (see *Smith v. Auld*, supra). In effect, the former judgment amounted to a dismissal as to the *McCormick-Saeltzer Company*."

In the more recent case of *Heine Piano Co. v. Bloomer*, 183 Cal. 398, 404, 191 P. 900, 903, this court again said:

"In *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 50 P. 277, it was held that, where a suit was dismissed for want of jurisdiction or

was disposed of on any ground not going to the merits of the action, the judgment rendered was not a bar to another suit. This rule finds support in 7 Encyclopedia of Evidence, 811: 'If it appears that a suit has been dismissed for want of jurisdiction, the judgment of dismissal will be no bar to another action brought in a court having jurisdiction of the subject-matter.' See, also, *Reynolds v. Lincoln*, 71 Cal. 183, 9 P. 176, 12 P. 449; 23 Cyc. 1150; *Laguna Drainage District v. Charles Martin Co.*, 5 Cal. App. 166, 172, 89 P. 993; *Shively v. Eureka Tellurium, etc., Co.*, 5 Cal. App. 236, 243, 89 P. 1073. As already shown, the order of April 3d stated that the plaintiff's motion to vacate the satisfaction of judgment was denied by reason of want of jurisdiction. Inasmuch as this order—and not the order of April 5th—represented the court's ruling on the motion to vacate, we think it clear that the question whether the plaintiff is entitled to have the satisfaction of judgment in action 76831 vacated is not *res judicata*."

From these authorities it would appear that the order of August 12, 1924, dismissing applicant's petition upon the ground that the commission had no jurisdiction was not a bar to the proceeding instituted by applicant on January 6, 1925. The commission, therefore, was authorized to hear said petition upon its merits. By this petition applicant sought an award for permanent disability. In effect he claimed in this petition that he was then suffering from a permanent disability as a result of the injury received by him on June 27, 1922. The only final order made by the commission relative to his right to receive compensation for this injury was the order of April 14, 1923, awarding him compensation for temporary injury to continue until terminated. We have already seen that no legal order of the commission had ever been made terminating this compensation. Applicant was therefore authorized to show under his last petition any change in his condition subsequent to April 14, 1923, and if the evidence introduced upon the hearing of said petition showed that his disability from said injury had since said last-named date become permanent, he was entitled to an award accordingly. The commission found from the evidence produced at said hearing that he was then suffering a permanent disability as a result of said injury and made the award which petitioners seek to set aside by these proceedings. It is not seriously contended that the evidence before the commission was not sufficient to support the findings upon which said award was based if the commission was authorized to receive evidence of applicant's con-

dition prior to the several orders which we have considered above. In other words, if the commission was authorized to disregard the orders of June 20th and September 7, 1923, and August 12, 1924, and receive evidence, as it did, regarding applicant's condition at all times since the date of its order of April 14, 1923, then respondents, as we understand their position, do not seriously contend that such evidence was insufficient to sustain the findings and award of July 15, 1925. As we have already shown, the commission was within its legal rights in disregarding these three orders. In our opinion the evidence, irrespective of any contention which might be made to the contrary, was sufficient to sustain said findings and award.

[5] In the course of these proceedings the respondents have contended that the petition of January 6, 1925, was not one for permanent disability, but was for back compensation on a partial disability basis claimed to be due applicant under a prior order of the commission and for a surgical operation. It is true that said petition asks for such compensation and for such an operation. It further sets forth that applicant is still disabled and unable to work and asks that the commission enter its findings and award "finding petitioner's rights based upon his present condition." The petition was filed over three years after the date of the receipt of the injury. It might be assumed that any disability from which the applicant was then suffering as a result of said injury was permanent, or, at least, that applicant claimed it to be permanent. The petition of January 6, 1925, appears to have been considered by the commission, at least, as one for permanent disability compensation. The hearing thereon was conducted with a view of ascertaining the condition of applicant at the date of the filing of said petition, the only purpose of which was to fix the compensation to which applicant was entitled, based upon the condition in which he might then be found. Under these circumstances we are not prepared to hold that the petition was insufficient as a petition for permanent disability.

For the reasons hereinbefore stated, the petition to review said amended findings and award of July 15, 1925, is denied, and said award is hereby affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.

201 Cal. 217

SMITH v. SMITH. (L. A. 9691.)

Supreme Court of California. May 16, 1927.

Appeal and error $\S$ 479(1)—**Supreme Court would order superior court not to enforce order granting temporary alimony pending appeal therefrom, where appeal undertaking was filed.**

The Supreme Court would order the superior court to refrain from enforcing by contempt proceedings or otherwise an order against a divorced husband granting temporary alimony and counsel fees, pending appeal therefrom, where the husband filed undertaking on appeal to stay execution.

In Bank.

Action by Martha A. Smith against Llewellyn J. Smith. From an order granting temporary alimony and counsel fees, the defendant appealed. On application for writ of supersedeas to stay the enforcement of the order by contempt proceedings pending determination of his appeal therefrom. Writ granted.

W. W. Kaye, and Ralph E. Wallace, both of Los Angeles, for appellant.

Hewitt, Ford & Crump, of Los Angeles, for respondent.

LANGDON, J. This matter comes before us upon a petition for a writ of supersedeas.

Plaintiff was awarded a decree of divorce from the defendant in 1918, by the terms of which defendant was ordered to pay plaintiff \$10 a week for the care and maintenance of herself and her minor child until said child reached the age of 18 years. On August 4, 1926, the child reached the age of 18 years. Within a few days plaintiff made a motion in the superior court to modify said final decree of divorce, which motion was granted, and defendant was ordered to pay \$150 a month to plaintiff. This order was modified later so as to require the payment by defendant of \$100 a month for three years and then \$50 a month for three years. From this order defendant has appealed and has stayed the execution thereof by filing an undertaking on appeal. Pending the appeal plaintiff moved for an order granting her \$100 a month temporary alimony and \$250 attorney's fees and \$50 for the cost of printing incident to the defense of the maintenance order upon appeal. This motion was granted, and from this order defendant also appealed, filing an undertaking upon appeal to stay execution.

The petition for the writ of supersedeas alleges that, notwithstanding the appeal from the order for temporary allowance to the wife and the undertaking on file staying its execution, the trial court is attempting to enforce such order by contempt proceedings. In opposition to the petition for the writ respondent urges that defendant is not entitled

to a stay of execution upon the second order of the trial court while he is prosecuting his appeal from the first order, because to permit execution to be stayed upon the second order would leave plaintiff without means to defend the first appeal. This argument has been considered by this court in similar controversies, as will appear from the decisions of the cases herein cited. The defendant's right to stay execution of an order such as we are considering here, pending the determination of the appeal involving the main issue, has been settled in this state since the elaborate consideration given to the subject in the case of *Sharon v. Sharon*, 67 Cal. 199, 7 P. 456, 635, 8 P. 709. *McAneny v. Sup. Court*, 150 Cal. 6, 87 P. 1020, is to the same effect, as are the text and authorities noted in 1 Cal. Jur. 952, § 8.

It is ordered that the superior court of the state of California, in and for the county of Los Angeles, desist and refrain from enforcing or attempting to enforce the order of said court made on the 8th day of November, 1926, requiring the defendant to pay to the plaintiff the sum of \$50 per month for the care and maintenance of plaintiff and \$50 per month for the care, maintenance, and support of the minor child of plaintiff and defendant, as temporary alimony, and also requiring the said defendant to pay to the plaintiff the sum of \$250 for attorney's fees and \$50 for costs on appeal, and that all proceedings of the said superior court on said order be and the same are hereby stayed until the further order of this court.

We concur: WASTE, C. J., RICHARDS, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

201 Cal. 225

BRUSSEAU v. HILL et al. (S. F. 11463.)

Supreme Court of California. May 17, 1927.

1. Deeds $\S$ 3—**Instrument described as "gift of deed" held to transfer present interest; "deed;" "deed of gift."**

Statement in instrument that it is "gift of deed" held equivalent of statement that it is "deed of gift," which alone suffices to constitute it a transfer of present interest in property, if otherwise sufficient; "deed" in its usual and ordinary signification meaning a written instrument conveying title to real property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deed.]

2. Evidence $\S$ 450(3)—**Purported "gift of deed," containing later expression "after my death," held ambiguous as to when title was to be transferred, so as to authorize explanatory evidence (Civ. Code § 1647; Code Civ. Proc. § 1860).**

Instrument stating that it was "gift of deed" held ambiguous as to whether it was limited to purported transfer to take effect after maker's

death by later expression "after my death," or imported present transfer of title to property, possession of which was to await grantor's death, so as to authorize admission of evidence of circumstances under which instrument was made, under Civ. Code § 1647, and Code Civ. Proc. § 1860.

3. Deeds ⇨206—Findings for plaintiff in quiet-title suit held supported by evidence and sufficient to support judgment that deed conveyed present title.

Trial court's findings for plaintiff in action to quiet title held supported by evidence, objected to only on erroneous theory that deed was unambiguous, and sufficient to support judgment that maker intended to convey present title to plaintiff.

4. Appeal and error ⇨1010(1)—Trial court's findings, supported by evidence, held conclusive against contention that claim of title through deed of gift was negated by attempt to procure probate.

Trial court's findings, supported by evidence and supporting judgment that maker of instrument intended to convey present title to plaintiff, held conclusive against defendants' claim that plaintiff's claim of title through deed of gift was negated by his abortive attempt to procure probate of instrument on theory that it was testamentary.

5. Deeds ⇨38(1)—Description of property in general terms, as "all in my possession," is sufficient to uphold transfer, when identified by extraneous evidence.

Property described in general terms, such as "all in my possession," is susceptible of identification by extraneous evidence, and sufficient, when so identified, to uphold attempted transfer.

6. Deeds ⇨38(1)—Instrument stating "This is my gift of deed all is in my possession," held sufficiently to describe property, in view of extraneous evidence.

Instrument stating, "This is my gift of deed all is in my possession" held to sufficiently describe property, in view of extraneous evidence, in action to quiet title, that realty described in complaint was only property grantor owned in city wherein instrument was executed, and that it was property intended to be conveyed.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by George W. Brusseau against Albert E. Hill, administrator of the estate of Charles Kruse, deceased, and others. Judgment for plaintiff, and defendant Hill appeals. Affirmed.

Edward R. Eliassen and Walter H. Eliassen, both of Oakland (Markell C. Baer, of Oakland, of counsel), for appellant.

W. A. Sloane, of San Diego, and Paul E. Sloane, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action to quiet title to a tract of land in

the city of Oakland. The complaint is in the usual brief form of pleading in such actions. The answer consists in equally brief denials of the plaintiff's ownership and averments to the effect that the title to the premises in question was in Charles Kruse, deceased, at the time of his death, and that the right of possession thereto is in his estate, of which the defendant is the administrator. The findings of fact of the trial court reveal specifically the source and foundation of the plaintiff's title to the property, and upon the basis thereof finds that all of the allegations of the plaintiff's complaint are true and that he is the present owner and entitled to the possession of the premises in dispute. The specific findings of the court rest upon uncontradicted evidence as to the transaction and the circumstances surrounding the same, through which the plaintiff acquired whatever rights he asserts in the property. These findings are in substance as follows: That on and before the 4th day of March, 1923, Charles Kruse was the owner and in possession of the premises, specifically describing the same. That on said March 4, 1923, he executed and delivered to the plaintiff, George W. Brusseau, an instrument in writing in words and figures as follows:

"Oakland, March 1st.

"This is my gift of deed all is in my possession to Mr. G. W. Brusseau after my death.

"Chas. Kruse."

That at the same time and accompanying the delivery of said instrument Charles Kruse delivered to the plaintiff the key to the house on said premises theretofore occupied by Charles Kruse as his residence, and declared to the plaintiff, "They are for you," and directed him to take care of said paper and that he "would never need them again." He also stated that he never expected to return from the hospital to which he was then preparing to go, and hence directed plaintiff to take possession and control of said premises, which the latter immediately proceeded to do. That Kruse was then suffering from an illness which proved to be fatal and from which he shortly thereafter died at said hospital. That while an inmate thereof and a day or two before his death he confirmed his previous statements to the plaintiff in conversations, in which he stated that he had transferred his said property and effects to the plaintiff in part at least in payment of a considerable indebtedness which he owed plaintiff for labor and services which the latter had rendered during previous years, and that plaintiff need not worry about his pay, as "I have given you all my property, for you have been kind to me." The trial court found from the evidence before it that such indebtedness in

fact existed and formed of itself a sufficient consideration for such transfer. The court further found that Charles Kruse at the time of the execution and delivery of such instrument was of the age of about 65 years, that he had an imperfect knowledge and use of the English language, that he lived alone, was unmarried, had no family nor any relations in the United States, and that such relations as he had elsewhere he was not on friendly terms with; while on the other hand, the plaintiff had been his friend, companion, and associate for many years and was particularly solicitous for his comfort and welfare during his last illness. As conclusions of law from the foregoing facts the trial court found:

"That the written instrument executed and delivered by Chas. Kruse to said plaintiff, G. W. Brusseau, on the 4th day of March, 1923, was written and signed by said Chas. Kruse on the date it bears date, with the intention to give and convey to said G. W. Brusseau, an immediate estate in fee of all his property, subject only to a subsequent contingent life estate in him, the said Chas. Kruse."

As a result of the foregoing conclusion the court found the plaintiff to be the owner in fee simple of the property in question, and that neither the estate of Kruse nor the defendant as the administrator of said estate had any interest therein. Judgment was entered accordingly in plaintiff's favor, and from such judgment the defendant prosecutes this appeal.

[1, 2] The first point urged by the appellant is that the instrument upon which the plaintiff relies as the foundation of his claim of ownership of the premises in question shows upon its face that it is not a deed for the reason that it lacks certain elements required by law to constitute it a deed. These are: (a) It was not a transfer of a present interest in property; (b) It contains no operative words of conveyance; (c) It contains no description of the property intended to be affected thereby." The question as to whether or not the instrument under review is to be held operative or inoperative as a transfer of a present interest in property is one which, in our opinion, cannot be resolved from the face of the instrument itself. It states upon its face that it is a "gift of deed," which is to our minds the equivalent of stating that it is "a deed of gift." Such words, if they stood alone in such an instrument, would suffice to constitute it, if otherwise sufficient, a transfer of a present interest in property. This much would be implied from the use of the term "deed," which in its usual and ordinary signification is understood to mean a written instrument conveying title to real property. *Hellman v. Howard*, 44 Cal. 100; 9 Cal. Jur. p. 94, § 2. The ambiguity in the instrument in question does not arise from

the use of the foregoing phrase, which in itself would be sufficiently certain as to its intent, but rather out of the use of the expression "after my deat" in the same instrument. The word "deat" as used therein is conceded to mean "death" by the parties hereto, and the question which the use of the phrase in which it occurs presents is as to what the maker of the instrument intended it to mean; that is to say, whether the instrument wherein the earlier expression "gift of deed" occurs was to be by said later expression limited to a purported transfer to take effect as such after the maker's death, in which case it would amount to no more than an attempted but abortive testamentary disposition of his properties, or whether the instrument, when considered as a whole, was to import a present transfer of title to the property affected thereby, the possession of which by the grantee was to await the death of the grantor. We are of the opinion that the instrument is ambiguous in the foregoing regard, and, that being so, it was the function and duty of the trial court to permit such ambiguity to be explained away if possible by proof of the circumstances under which the instrument was made. Civ. Code, § 1647; Code Civ. Proc. § 1860. The trial court was therefore not in error in the admission of that particular portion of the evidence in the case upon which its specific findings above referred to were predicated.

[3, 4] The reporter's transcript herein discloses that the objections of the defendant to the admission of such evidence went to its general admissibility based upon his theory that the instrument in question was unambiguous and could not therefore be aided as to its interpretation thereby, but that no objections were made to any specific portions of such evidence upon any other ground and no claim of error is now urged to the admission of such evidence in detail if the same was admissible at all under the aforesaid general objection. We therefore conclude that the findings of the trial court were supported by the evidence properly admissible upon the trial of the case, and that they in turn support the judgment in so far as it decided therein that the maker of the instrument in question intended to convey and did convey a present title to whatever of his properties the conveyance shall be found adequate to transfer. This disposes of certain other of the appellant's contentions, such as, for example, his contention that the plaintiff's claim of title to said property through such conveyance must be held to have been negated by his abortive attempt to procure the probate of said instrument on the theory that it was testamentary in character. The trial court, with such evidence before it, must have concluded that the plaintiff's effort in that direction did not operate

to estop him from claiming under the instrument as a present transfer of title. The findings of the trial court are conclusive upon that phase of the case. They are also conclusive upon the claim of the appellant that the instrument in question was testamentary in character.

[5, 6] The only remaining contention of the appellant is that the instrument under review is void for the reason that it contains no adequate description of the property intended to be affected thereby. The language of the instrument in that regard is: "This is my gift of deed all is in my possession to Mr. G. W. Brusseau." According to the modern current of authority both in this and other jurisdictions, descriptions of property similar in general terms to that embraced in the foregoing language of the instrument under review have been held susceptible of identification by extraneous evidence, and when so identified sufficient to uphold the attempted transfer. In the case of *Lick v. O'Donnell*, 3 Cal. 59, 58 Am. Dec. 383, a conveyance of "one-half of my lot" was upheld upon proof that the grantor owned but one lot in San Francisco, and the instrument was held to convey title to an undivided one-half of such lot. In the case of *Pettigrew v. Dobbelaar*, 63 Cal. 396, the description was "all lands [of grantor] * * * wherever the same may be situated," and the instrument, though executed in Illinois, was held to cover and convey land owned by the grantor in California. In the case of *Staples v. May*, 3 Cal. Unrep. Cas. 250, 23 P. 710, the description was "all the lands, * * * and personal property * * * belonging to the said party * * * in Santa Clara county," and it was held that extraneous proof might be offered to locate the lands conveyed within said county. In 9 Cal. Juris. p. 306, these and certain other cases are reviewed as upholding the view that "descriptions of land, general in character, such as 'all land and real estate' of the grantor 'wherever the same may be situated,' or 'the land owned by the grantor' in a certain county, or all the grantor's 'right, title and interest' in a certain city, etc., are good and pass the grantor's interest in all his real property coming within the description." In *Ruling Case Law*, vol. 8, p. 1076, the rule is thus stated:

"Usually general descriptions, such as 'all the estate both real and personal of the grantor,' 'all my land' in a certain town, county or state, 'and my land wherever situated,' 'all my right, title and interest in and to my father's estate at law,' and the like, are held good. And a deed is not void merely because it conveys all one's property in general terms."

The evidence in the instant case fully showed that the piece of real estate described in the complaint herein was the only

property which Charles Kruse owned in the city of Oakland, and also fully identified it as the property intended to be covered by the instrument in question. We are therefore of the opinion that said instrument was thus shown to be sufficient in the matter of description to convey to the plaintiff title to the said property.

No other questions being presented for our consideration upon this appeal, the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

82 Cal. App. 764

BOTTOMS v. SUPERIOR COURT IN AND FOR MADERA COUNTY et al. ★
(Civ. 3316.)

Hearing Denied by Supreme Court July 5, 1927.

District Court of Appeal, Third District, California. May 6, 1927.

1. Continuance ⇨20(2)—Act permitting extension of time on application to parties whose attorneys are attending session of Legislature held mandatory (Code Civ. Proc. § 1054).

Code Civ. Proc. § 1054, providing for extension of time where attorney for party seeking extension is actually engaged in attendance on session of Legislature, held mandatory, not matter of discretion.

2. Continuance ⇨20(2)—Statute permitting extension of time on application for parties whose attorneys are attending legislative session applies in eminent domain proceedings (Code Civ. Proc. §§ 1054, 1237-1264).

Code Civ. Proc. § 1054, permitting extension of time in proceedings until after final adjournment of Legislature where attorney of record of party applying for extension is engaged in attendance at legislative session, applies in special eminent domain proceedings, under sections 1237-1263, especially sections 1244, 1262, notwithstanding requirement of section 1264 that such actions shall be quickly heard and determined.

3. Continuance ⇨20(2)—That legislator became party's attorney of record after beginning of legislative session did not impair client's right to have time for answer extended until after adjournment (Code Civ. Proc. § 1054).

Where sole attorney of record of defendant in eminent domain proceedings was member of Legislature attending session, court was required, under Code Civ. Proc. § 1054, on application, to extend time for answer until 30 days after Legislature's adjournment, notwithstanding member became attorney of record after beginning of legislative session.

4. Certiorari ⇨5(1)—Order vacating order which extended time to file answer held reviewable by certiorari (Code Civ. Proc. §§ 963, 1054).

Order of court vacating order extending time to answer under Code Civ. Proc. § 1054,

was reviewable by certiorari; section 963 not being applicable.

Application by Prentice H. Bottoms for certiorari to be directed to the Superior Court of Madera County and Stanley Murray, judge thereof, to review an order of the Superior Court vacating an order extending time to file answer in an action wherein the Southern California Edison Company was plaintiff and the petitioner defendant, and on motion of the Southern California Edison Company to intervene. Motion denied, and vacating order annulled.

Hearing denied by the Supreme Court, on the ground, and for the sole reason, that the question therein has become moot.

Robert L. McWilliams, of San Francisco, for petitioner.

Edward F. Treadwell, of San Francisco, for respondents.

HART, J. This is an application for a writ of certiorari. From the petition for the writ it appears that an action was commenced in the respondent court on the 30th of December, 1926, by the Southern California Edison Company, against the petitioner and others for the purpose of condemning certain water rights of the latter; that Hon. Raymond W. Williamson, an attorney at law in the city of San Francisco, was retained by petitioner to appear in and defend said action for petitioner; that said Williamson, at the general election held throughout the state on the 5th day of November, 1926, was duly elected as a member of the assembly of the Legislature of the state of California, to be convened and which did convene at the city of Sacramento in its regular biennial session on the first Monday after the 1st day of January, 1927; that, on March 14, 1927, while the Legislature was in session, and said Williamson was then in attendance at said session and then actually engaged in the performance of his duties as a member thereof and still was the regularly retained attorney for the petitioner in the action above named, the latter applied to the respondent court for an extension of time within which to file his answer in said action and to take any other proceeding which might be necessary therein; that said application was in writing and supported by the affidavit of the petitioner; that, on said 14th day of March, after a consideration of the application, the court made an order finding that said Williamson was then a member of the Legislature and in attendance thereon and actually engaged in performing his duties as such, and extending the time within which the petitioner might file an answer in the action or take any other steps which the exigencies of the case might require on the part of petitioner, until the Legislature adjourned sine die and for 30 days thereafter. Code Civ. Proc. § 1054. It further appears from the petition for the writ that, on the 28th day of March, 1927, and while the Legislature

was yet in session and the petitioner still actually engaged in the performance of his duties as a member thereof, the respondent court, on motion of the plaintiff in said action, made an order vacating and setting aside the order extending petitioner's time to answer the complaint, etc., in said action until the final adjournment of the Legislature and for 30 days after such adjournment.

The affidavit filed by the petitioner in support of his application for an extension of the time to take any steps or proceeding with reference to the complaint in said action, as above explained, until after the adjournment of the Legislature sine die, stated that said Williamson "is, and ever since the filing of the complaint herein (the action above named) has been, the only attorney for the defendant, Prentice H. Bottoms (petitioner herein), in said above action"; that said Williamson, on the 2d day of February, 1927, as attorney for petitioner, filed in said action a motion to strike out parts of the complaint filed therein, and also a demurrer, upon both general and special grounds, to said complaint; that thereafter, and in the month of February, 1927, said Williamson argued said motion and said demurrer, and thereafter filed points and authorities in support of the motion and the demurrer; that on the 26th day of February, 1927, respondent made orders denying the motion to strike out parts of the complaint and overruling said demurrer, and gave defendant (petitioner) ten days in which to answer said complaint; that plaintiff in said action, on the 26th day of February, 1927, served said Williamson with notice of the action of respondent court on said motion and said demurrer; that thereafter the said court allowed petitioner ten days' additional time in which to answer said complaint or prepare a bill of exceptions to the orders denying the motion to strike and overruling the demurrer. The affidavit proceeds with a statement of the fact that the Legislature was then in session and the further fact that Williamson was a member thereof, representing the Twenty-Sixth assembly district in San Francisco, and then actually performing his duties as assemblyman; that the answer necessary to be prepared and filed in said action will involve "many intricate questions of law and fact," and will require, in its preparation, the undivided attention of said Williamson "for a considerable time," and that the time so required "cannot be given thereto by said * * * Williamson while he is attending to and giving necessary attention to his duties as said assemblyman." The affidavit further stated that petitioner had related the facts of said cause to said Williamson, "and affiant has been by said Williamson advised that he has a good and meritorious defense to said action on the merits," and that affiant "verily" so believes.

The plaintiff made no countershowning by affidavit or otherwise, except in so far as any arguments which might have been made in

resistance to the application may be so considered.

The submission here is on the petition for the writ and the return by the respondents, certifying the record and all the pertinent proceedings in the action out of which the present controversy arises. As hereinabove intimated, the petitioner claims the right to an extension of the time in which to answer the complaint or to take further proceedings until 30 days after the final adjournment of the Legislature by virtue of the provisions of section 1054 of the Code of Civil Procedure, and this because, as is made to appear by the record before us, he is the only attorney he has employed or at any time retained or employed since the filing of the complaint in condemnation in the action referred to and is and has been, ever since said action was instituted, a duly elected and acting member of the Legislature of the state of California. That section reads as follows:

"When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertakings to be filed, or the justifications of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this Code, unless otherwise expressly provided, may be extended, upon good cause shown, by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days, without the consent of the adverse party; except that when it appears to the judge to whom said application is made, that the attorney of record for the party applying for said extension is actually engaged in attendance upon a session of the Legislature of this state, as a member thereof; in which case it shall be the duty of said judge to extend said time until said session of the Legislature adjourns, and thirty days thereafter."

[1] The petitioner contends: That the above section, in so far as it applies to attorneys at law that are members of the Legislature and are in attendance upon its sessions, is clearly mandatory, and therefore, where it is made to appear that in a particular action that the only attorney a party thereto has retained and employed to represent him in the litigation involved in said action is a duly elected, qualified, and acting member of the Legislature, and, while the action is still pending, is in attendance at the session thereof and actually engaged in the performance of his duties as such, there is but one course which is open to the court before which such action is pending, and that is to grant an application, if one be made, for a postponement of further proceedings therein for the period of time prescribed in said section. We agree to that view of the section, and that, under the provision thereof, it is not a matter of discretion with the court, where the facts support such application, or where in a particular case considerations do

not exist or are not satisfactorily shown which would justify a denial of the application as to whether it will order a postponement of further proceedings in the action until after the expiration of the full time so prescribed, but that it is the mandatory duty of the court to grant such postponement. It follows that points 1, 2, 5, and 6 urged here by the respondents have no application to the instant case. These points, stating them in the order in which they are presented in the briefs of respondents, are: 1 and 2. That section 1054 (Code Civ. Proc.) has no application to a case where the time (for answering after a demurrer is overruled) is not fixed by law, but rests in the discretion of the court, citing *Vestal v. Young*, 147 Cal. 715, 82 P. 381, and other cases. 5. "This statutory provision should be strictly construed." 6. That the superior court has jurisdiction to set aside an order made by it. The other points advanced by respondents are: (1) That the provision of section 1054 of the Code of Civil Procedure as to members of the Legislature does not apply to a special proceeding such as an eminent domain proceeding, citing section 1264 of the Code of Civil Procedure; *Santa Rosa v. Fountain Water Co.*, 138 Cal. 581, 71 P. 1123, 1136; *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 P. 646, 23 Am. St. Rep. 451, and *Kubach Co. v. McGuire*, 199 Cal. 215, 248 P. 676; (2) "That section 1054 regarding members of the Legislature has no application to a case where the member became attorney of record after the beginning of the legislative session," citing *People v. Goldenson*, 76 Cal. 328, 342, 19 P. 161, and *Stockley v. Goodwin*, 78 Ill. 127. (3) That "the setting aside of the order is at most error and not necessarily even reversible error, and error cannot be corrected by a writ of review," citing *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372, 36 N. E. 88. These propositions will be considered in the order in which they are thus stated.

1. The purpose of the provision of section 1054 of the Code of Civil Procedure is obvious. It will readily be conceded that there is no activity connected with and essential to the preservation and maintenance of the social fabric of greater importance than that of the functioning of the legislative department of a state. In exercising and administering that branch of the sovereign powers of a state that is appropriated to it by the people, in a government such as ours, in which the sovereign powers are divided into and assigned to three different, distinct, and independent departments, the Legislature is required to deal with the most sacred of human rights—rights which directly affect the life, the liberty and the property of the citizen. The members of that body, therefore, must give constant and uninterrupted attention to their duties as such while it is in session lest there be either advertently or inadvertently bad legislation put over or good laws re-

pealed, the effect of which would necessarily be to work, for the time, irreparable damage to the state. But these propositions are well understood and their soundness will be conceded, since it cannot possibly be doubted that the members of the Legislature, particularly such members as may belong to the legal profession and engaged actively in the practice thereof, should be relieved by the law from concerning themselves with extraneous matters or interests not pertaining to their legislative duties while they are in attendance on sessions of the Legislature and actually prosecuting their duties as such. On the other hand, the suggestion may be ventured, significant in the present connection, that a practicing lawyer deals with a science involving the most abstruse learning, in its remedial and procedural as well as its substantive branch, and in conserving or preserving, or protecting or defending the rights of his clients when such rights are questioned in the judicial tribunals, the demand for his undivided attention to those causes is as necessary or imperative as is the demand upon him for like attention while he is engaged in performing the duties of a member of the Legislature. It must be plainly apparent to every person of common intelligence that in any attempt upon his part to attend to his duties as a legislator and at the same time attend to his professional engagements, he could give neither to the people whom he represents, nor to his clients, while the legislative body of which he is a member is in session, the capable service which he owes to both and which they have the right to expect from him. These considerations plainly disclose the motives of and also exhibit the wisdom displayed by the Legislature in inserting in section 1054 of the Code of Civil Procedure the provision the effect of which is to relieve lawyers serving as members of that body from attending to certain of their professional duties during its session, so that they may not be diverted from the proper performance of the solemn duties they owe to the people as legislators, and, at the same time, that the cause of their clients pending in the courts contemporaneously with the sessions of the Legislature may be given the benefit of the scientific attention and supervision which they require and which only a lawyer learned in the principles of the law can properly give to legal problems.

[2] These considerations are suggested as one of the answers to the proposition of counsel for the respondents that the provision of section 1054 of the Code of Civil Procedure regarding lawyers that are members of the Legislature does not apply to proceedings authorized and prescribed by sections 1237 to 1263, inclusive, of the same Code for invoking and applying in any appropriate case the right of eminent domain. But section 1054, considered in connection with certain other sections, clearly shows that it was intended

to apply in any case, whether the proceeding involved is technically an action at law or a suit in equity or a "special proceeding," where "pleadings" are essential to the institution and maintenance thereof. Obviously, a proceeding in eminent domain could acquire no standing in a court where the grounds upon which it was sought to exercise that right were not stated in some formal manner. Section 1244 of the Code of Civil Procedure, though, clearly settles that matter. That section specifically points out what the "complaint" in a proceeding in eminent domain shall contain to state a cause of action in such cases. And section 1262 of said Code, which relates to eminent domain proceedings, declares that, "except as otherwise provided in this title, the rules of pleading and practice in civil actions now in force in this state are applicable to the proceedings mentioned in this title, and constitute the rules of pleading and practice therein." Lastly, in this immediate connection, it may be observed that no logical argument can be advanced supporting the proposition that the reason for the rule declared in section 1054 regarding attorneys that are members of the Legislature is less pertinent or applicable to proceedings or actions looking to the exercise of the right, under the doctrine of eminent domain, to take private property for a public use, than to any of the common or usual actions at law or suits in equity.

There is absolutely nothing in the language of section 1264 of the Code of Civil Procedure (cited by respondents) which lends support to the position of counsel for respondents that section 1054 has no application to actions or proceedings in eminent domain. That section merely provides that in all actions brought to enforce the right of eminent domain, the same shall, by any court in which they are instituted, be given preference over all other civil actions therein, in the matter of setting such actions for hearing or trial, and in hearing the same, "to the end that all such actions shall be quickly heard and determined." Of course, it is eminently proper that the Legislature should require that actions in such cases, which involve the proposition of taking private property for a public use against the consent of the owner, should be brought to trial and determined with a greater degree of alacrity than is the case in the common run of civil actions, for the obvious reason that, so long as such actions are pending and undisposed of, the owner of the property sought thus to be condemned or taken from its owner is himself practically deprived of the right to use or utilize it. What section 1264 really means is, not that the defendant in such case shall be forced to such haste in the preparation of his defense as would preclude him from making full and proper preparation therefor, both as to his pleading and proof, or that he shall be deprived of the right to take any step in its preparation

which under the law is common in its application to all actions or any proceeding in courts which call for the determination of an ultimate issue, but that, after issue has been joined therein, such action shall be brought to trial with such promptitude as will facilitate the earliest final disposition thereof consistent with a due regard to all the rights of all the parties thereto, and to that end it shall in the matter of setting the same for trial and in the trial thereof, be given preference over any other civil action pending at the same time.

The cases cited by the respondents on the point now under review are the following: *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 P. 646, 23 Am. St. Rep. 451; *Santa Rosa v. Fountain Water Co.*, 138 Cal. 579, 71 P. 1123, 1136; *Kubach Co. v. McGuire*, 199 Cal. 215, 248 P. 676. These cases are not in point. The first named case was one for the foreclosure of a mechanic's lien on a public schoolhouse. The respondent (board of education) rested its case upon the proposition that public buildings were not subject to the liens of materialmen and mechanics for material used therein and labor bestowed thereon. The appellant argued that public buildings were "included both in the word 'property,' used in the Constitution, and in the phrase 'any building,' used in the section of the Code, allowing such liens on privately owned buildings." The Supreme Court, referring to appellant's contention, said:

"But this ignores the rule of statutory construction, that the state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it."

Santa Rosa v. Fountain involved an action to condemn for a public use certain property. A motion for a change of the place of trial from Sonoma county to the city and county of San Francisco was made and denied, and an appeal from the order denying the motion taken. The ground of the motion was that the residence of the defendant being in the city of San Francisco, section 395 of the Code of Civil Procedure entitled it as of right to a change of the place of the trial to that city and county, said section providing that in certain actions, the place of trial shall be in the county "in which the defendants, or some of them, reside." The Supreme Court, holding that the denial of the motion was proper, said that section 1243 of the Code of Civil Procedure establishing the territorial jurisdiction in eminent domain actions laid down the only and exclusive rule as to the venue of such actions, and that section 395, therefore, had no application thereto.

The case of *Kubach Co. v. McGuire*, etc., involved the question whether the authorization by a vote of the voters of the city of Los Angeles for a bond issue to secure money to

finance the erection of a new city hall of 28 stories, or 400 feet in height, in that city, was in conflict with a provision of the city charter of that municipality prohibiting the erection of a building within the zone within which the towering structure was proposed to be constructed exceeding 150 feet in height. In holding the proposal was in no way offensive to the charter provision referred to, the court, through Mr. Justice Shenk, speaking of said charter, among other things, said:

"Under the Constitution, the charter of the city is not only the organic law of the city, but it is also a law of the state within the constitutional limitations. Ex parte Sparks, 120 Cal. 395, 399, 52 P. 715; *Dalton v. Leland*, 22 Cal. App. 481, 487, 135 P. 54; *Stern v. City Council of Berkeley*, 25 Cal. App. 685, 688, 145 P. 167. Being an enactment in the exercise of the lawmaking power of the state, it is subject to the recognized rules of statutory construction. In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication. *Marin Municipal Water Dist. v. Chenu*, 188 Cal. 734, 207 P. 251; *Balthasar v. Pac. Elec. Ry. Co.*, 187 Cal. 302, 202 P. 37, 19 A. L. R. 452; *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 P. 646, 23 Am. St. Rep. 451; *Wittaker v. County of Tuolumne*, 96 Cal. 100, 30 P. 1016."

It is readily to be noted that the principles discussed in the above cases and as applied therein afford no support to the position of the respondents here. We will not take the trouble of explaining wherein, according to our view, the doctrines of those cases have no relevancy to the point we are discussing further than to say that, while the right of eminent domain is an attribute of sovereignty and solely under the control of the state, and while, furthermore, those persons upon whom the state has deemed it proper to confer the exercise of that power for certain designated purposes, when exercising the power, are, at least theoretically, agents of the state, the people through their Constitution, in view of the fact that, to invoke that power, there must be a judicial adjudication of the question of use, necessity, and compensation, have clothed the Legislature with a broad discretion in determining the procedure to be followed in such cases. In exercising this power, the Legislature has, as we have seen, provided that "except as otherwise provided in this title [title dealing with the right of eminent domain], the rules of pleading and practice in civil actions now in force in this state are applicable to the proceedings mentioned in this title, and constitute the rules of pleading and practice therein." This provision is broad enough to include, as applicable to cases of this character, the provisions of section 1054, and there is not, under the title relative to "eminent domain," any provision establishing a different rule

from that established by the section just named. Obviously, the case here is not of that class of cases involving the state or any of its mandatories to which the administration of certain of the state sovereign powers is committed and as to which, to bring them within the ordinary rules regulating the reciprocal obligations and duties owing from one to another, there must be definitely expressed authority therefor by the state itself. In other words, the case here does not fall within the rule that the state or its agencies in such matters are not "bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication." *Kubach Co. v. McGuire*, supra.

[3] 2. The contention that section 1054, relating to attorneys that are members of the Legislature, "has no application to a case where the member became attorney of record after the beginning of the legislative session," involves the point next to be considered. Counsel for respondents cite *People v. Golden-son*, 76 Cal. 328, 342, 19 P. 161, and *Stockley v. Goodwin*, 78 Ill. 127, as supporting this contention. Those cases appear to support the respondents' position upon that proposition, although we are frank to say that we can perceive no logical reason for holding, as an abstract proposition, that section 1054 should not apply to a case where the attorney is employed after the session of the Legislature of which he is a member has commenced, as well as to the case where he has been employed before the legislative session has begun. Particularly should this be held to be the rule in this state, in which our legislative sessions are divided into two periods, since, to follow the rule laid down in the cases named, might, in many conceivable instances, preclude an attorney at law from accepting employment in cases about to be transmuted into actions in the courts pending the recess period of the Legislature, or, more important still, might prevent an attorney regularly employed for many years as the legal adviser of an individual, whose general business he is thoroughly familiar with, from attending to the preliminaries of an action brought in the courts while the Legislature is in session against such client and forcing the latter to employ an attorney not at all familiar with the legal phases of his business affairs. Moreover, it is known as a matter of common notoriety that in the last two or three decades the tendency with members of the legal profession has been, so that now it is pretty generally the course adopted by lawyers, to specialize in their practice in particular branches of the law, as, for instance, many devoting themselves in the practice exclusively to corporation law, others to what may be termed "water law," and so on through the various ramifications or branches of the vast body of the science of jurisprudence. The law

relating to water rights, when invoked in the courts, always develops intricate legal problems, and actions at law or suits in equity arising thereunder demand, for their proper presentation in the courts, legal ability of the highest order—lawyers not only profoundly learned in the general principles of the law, but who have made a special study of that branch thereof and have had years of experience in applying its principles to concrete cases. These observations are advanced to show that a litigant should be entitled to call to his aid in a case which not only involves legal problems but property rights of transcendent importance, the lawyer or lawyers in whom he prefers to confide the care of undertakings of such tremendous moment to him. It is to be conceded, however, that cases may arise in which section 1054, in so far as it relates to lawyers that are members of the Legislature, should not be given application. If it be shown that the party to the action claiming the benefit of that provision of said section has other attorneys of record in the case capable of managing it in court, or that some attorney, a member of the Legislature, had been employed for no other purpose than to secure to a party the benefit of the provision in question from sinister or improper motives, then, in either such cases, particularly in the last suggested, a continuance should not be granted. In this case, so far as the record advises us, the defendant at no time before or at the time the action was commenced had any other attorney to represent him in the action out of which this proceeding grows than said Williamson. On the contrary, the uncontradicted affidavit of the defendant declares that Raymond D. Williamson is the only attorney that he has had in said action since the commencement thereof. While the language of the affidavit, in this particular, may not be as direct or explicit as it should be and is always desirable in a showing such as should be made on a motion for a postponement of the trial of a cause or other like motion, it is certain that from the affidavit it cannot be assumed or inferred that he had at any time at and after the time the action was begun any other attorney. So far as this record shows, Williamson might be and have been before the commencement of the action defendant's regularly retained attorney. The complaint in the action, as shown, was filed on the 30th day of December, 1926. On February 2, 1927, the Legislature being in recess, Williamson filed a demurrer to the complaint and a motion to strike out certain parts thereof, and later in that month argued the demurrer and motion, the same being, as seen, overruled and denied. The return (the orders of respondent on the demurrer and the motion) shows that Raymond D. Williamson was the only attorney who appeared for defendant at the hearing of those proceedings. There was, so far as the record here discloses,

no attempt to show that the act of the defendant in retaining and employing Williamson as his attorney to represent him in the action was not prompted by good faith or not because defendant did not prefer him as such attorney over other attorneys. Our conclusion upon this branch of this discussion is that the record before us does not support the point here considered.

[4] 3. The remedy herein sought is proper. There is no appeal from an order granting or refusing to grant, or, as here, setting aside an order granting a continuance of the trial of a case. Section 963, Code Civ. Proc. Such an order would be reviewable on an appeal from the judgment, but the circumstances of this case obviously require a more speedy remedy than would thus be afforded. The case of *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372, 36 N. E. 88, does not hold otherwise. It merely holds that it was error to deny a motion for a continuance of the trial of a certain case, upon the showing made, on the ground that the appellant's attorney was, at the time the motion was made, a member of and in actual attendance upon a session of the Legislature. So it was error for the court in this case to grant the motion to set aside its order continuing the trial of the action until after the Legislature adjourned sine die and for 30 days thereafter; but it does not follow that such error is reviewable only by appeal. No jurisdictional writ was ever issued except upon some alleged error of an inferior tribunal exercising judicial functions. In the Illinois case named the main question was whether, in a suit to enjoin the defendant from committing acts of trespass upon the plaintiff's property, injunction would lie where the several acts of trespass were committed by the same person. The court held that for the trespasses committed the plaintiff had available to him an adequate remedy at law, in that the wrongs complained of were committed by one and the same person, that it was not, therefore, a question of a multiplicity of suits, and that the loss suffered by plaintiff in such case "would be susceptible of compensation in damages."

The Southern California Edison Company, alleging that it is "the real party in interest" in the action from which the present proceeding arises, submitted, at the hearing of the proceeding before this court, a motion to be allowed to intervene herein. The ground upon which the right of intervention is based is that the petitioner herein, on applying for the writ of review issued herein, did not disclose to this court that the said action involved a special proceeding or not the ordinary action at law or suit in equity. The assumption was and is that the provision of section 1054 of the Code of Civil Procedure regarding attorneys that are members of the Legislature has no application to an action or

proceeding in eminent domain, and that had this court been apprised or aware of the nature of the action this writ would not have been granted and issued. The conclusion at which we have arrived, as announced above, relative to the question of the applicability of said provision of section 1054 to a proceeding or action in eminent domain deprives the proposed intervention on the ground stated of all force, assuming, without deciding, that it would in any event have exercised controlling influence in the decision on this writ.

The motion of the Southern California Edison Company for permission to intervene herein is denied, and the order is annulled.

We concur: FINCH, P. J.; PLUMMER, J.

82 Cal. App. 685

HAMMOND LUMBER CO. v. CRAVENS. (Civ. 4313.)

District Court of Appeal, Second District, Division 2. California. May 3, 1927.

1. **Compromise and settlement** ⚡23(3)—Evidence held to show forbearance to prosecute lien suit under agreement in consideration of promise to pay money by way of compromise.

In action for money, evidence held to show oral agreement by plaintiff not to further prosecute pending action to foreclose lien, and to dismiss action in consideration of defendant's promise to pay money by way of compromise and performance by plaintiff of agreement.

2. **Contracts** ⚡53—Actuality of consideration, rather than quantum, is essential for contract in action at law.

In action at law, it is the actuality of consideration, rather than its quantum that supplies the essential ingredient of a contract.

3. **Compromise and settlement** ⚡6(3)—Oral agreement to forbear prosecution of lien suit and dismiss action fully performed held sufficient consideration for promise to pay money (Civ. Code, § 1605).

Under Civ. Code, § 1605, oral agreement by plaintiff to forbear prosecution of lien suit and to dismiss suit fully performed of which defendant received benefit, together with detriment suffered by plaintiff through forbearance of prosecution, was sufficient consideration for defendant's promise to pay money therefor.

4. **Compromise and settlement** ⚡2, 20(1)—Enforcement of oral agreement to pay money for forbearance of further prosecution of lien suit did not require novation or dismissal of suit.

In action against defendant purchasing property subject to plaintiff's lien and promising to pay money to plaintiff in consideration of oral agreement to forbear prosecution of lien suit and to dismiss suit on receipt of agreed

amount, it was not necessary to prove novation releasing original debtors and accepting defendant in their stead or that suit should be dismissed.

5. **Compromise and settlement** ⚡15(2)—Defendant orally promising to satisfy lien for forbearance to prosecute lien suit could not repudiate liability after court lost jurisdiction and defendant dismissed suit (Code Civ. Proc. § 581a).

Where defendant purchasing property subject to lien continued oral promises to settle amount of lien in consideration of plaintiff's forbearing to further prosecute suit, until court had lost jurisdiction and lien was extinguished by dismissal on motion of defendant under Code Civ. Proc. § 581a, defendant could not repudiate liability under agreement.

6. **Compromise and settlement** ⚡20(1)—Direction by plaintiff's business agent to attorney of record to forbear prosecution of lien suit on defendant's agreeing to pay money showed sufficient control of suit to defendant's advantage.

In action to recover money orally promised by defendant in consideration of plaintiff's forbearing to further prosecute lien suit, direction to plaintiff's attorney of record to refrain from further prosecution, made by authorized business agent of plaintiff, showed actual control of suit to advantage of defendant.

7. **Frauds, statute of** ⚡33(3)—Oral promise by defendant purchasing property subject to lien to satisfy lien on forbearance of further prosecution of lien suit held enforceable; "original undertaking" (Civ. Code, § 1624, subd. 2, § 2794, subd. 3).

Where defendant purchased property subject to lien and entered into possession, oral promise to satisfy lien in consideration of plaintiff's forbearing to further prosecute lien suit was not conditional or collateral promise to answer for debt of another, but an original undertaking based on beneficial consideration moving directly to defendant from plaintiff, excluded from operation of Civ. Code, § 1624, subd. 2, requiring promises to answer for debt of another to be in writing, and on performance by plaintiff promise was enforceable under Civ. Code, § 2794, subd. 3.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Original Undertaking.]

8. **Frauds, statute of** ⚡33(3)—Oral promise to compromise lien suit on forbearance of further prosecution became original contract on acceptance, and was admissible in suit to enforce promise.

In action based on uncompleted agreement for compromise of lien suit, oral promises by defendant to satisfy lien on forbearance by plaintiff of further prosecution of suit became original contract between parties on acceptance by plaintiff, and was admissible in evidence without being committed to writing as prescribed by Civ. Code, § 1624.

9. **Compromise and settlement** ⚡2—Agreement to compromise controversy is valid.

An agreement to compromise is valid because it is for the settlement of a controversy.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by the Hammond Lumber Company against A. H. Cravens. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodwin & Morgrage, of Los Angeles, for appellant.

R. L. Horton, of Los Angeles, for respondent.

JOHNSON, Justice pro tem. This is an appeal from a judgment in favor of plaintiff for the sum of \$600 and interest, found by the court to be owing to plaintiff under verbal promises of defendant to pay said sum in consideration of plaintiff's agreement to refrain from further prosecution of a pending action to foreclose a lien for materials supplied for, and used in, buildings constructed on land acquired by defendant after the lien attached, and to dismiss the action on receipt of the agreed amount. The appellant states that the appeal involves only the correctness of rulings of the trial court admitting oral testimony of the alleged promise by defendant to pay the antecedent debt of another, and of the court's order denying defendant's motion for a new trial.

During a period when the Title Insurance & Trust Company and J. T. Lyons were owners, or reputed owners, of the property subject to the lien, certain lumber used in the construction of buildings thereon was furnished by plaintiff, of the purchase price of which there remained unpaid a balance of \$737.49. On July 18, 1916, plaintiff had instituted, and caused summons to issue in, an action to enforce plaintiff's claim of lien against the property for the unpaid balance. Defendant was not a party to that action, but at a time in 1916, after the action had been begun and before service of summons on any of the defendants therein, Cravens, the defendant here, entered into a contract of purchase of the property, with part of the purchase price payable in futuro, and thereupon took possession. He stated in one part of his testimony that he knew of the lien on the property, in another part that he first learned that the lien had not been taken care of, and was a cloud on the title, when he asked for a deed in the year 1918. Owing to some expectation of a settlement of the lien suit, summons was not served on any of the defendants until July 8, 1918, at which time it was served on the defendant Lyons, the only defendant ever served in that action. There was never any appearance in the action by Lyons or any other defendant. After the service on Lyons, no return of summons

was made until July 29, 1920, more than three years after its issuance and after service of notice of motion by Cravens to dismiss the action under section 581a, Code of Civil Procedure. The motion to dismiss was granted August 12, 1920, and this present action, based on previous verbal promises of Cravens to compromise and settle plaintiff's claim for \$600, was then begun. The complaint contains three counts, each pleading a separate promise by defendant at as many different times, the first in September, 1918, the second in January, 1919, and the third in June, 1920. The defendant denied all such promises, but the court found them all to have been made as alleged in the complaint and awarded judgment against defendant accordingly.

The defendant contends that there was a lack of consideration for any of the promises, and that in any event they were promises to answer for the debt of another and invalid under subdivision 2 of section 1624 of the Civil Code because not in writing, and that the court erred in admitting oral evidence of any such promises. These contentions have, however, no justification in the record.

The court finds that each of defendant's promises was made in consideration of plaintiff's agreement not to prosecute the lien suit or take any further proceedings therein, and that this agreement was kept on plaintiff's part. These findings are fully supported by the evidence. According to testimony given on behalf of plaintiff, the defendant called on plaintiff's agent, C. S. Anderson, about September 1, 1918, and, exhibiting the copy of the summons served on Lyons, said that he had heard of the case from Lyons. Upon the representation that he desired to avoid the expense of litigation he offered to pay \$600 in full settlement, promising to make such payment if the Hammond Lumber Company would refrain from prosecuting the action, and proposing that the case should stand without either further service of process or further prosecution. Anderson stated that this arrangement would be agreeable, and that they would accommodate Cravens. Accordingly, the prosecution of the case was allowed to linger. A few months later, as Anderson testified, he asked Cravens, in January, 1919, to make payment as had been previously agreed, whereupon Cravens said that he was short of money owing to the fact that he had in storage beans that he could not sell; but he agreed to pay in January, 1920, and also to sign a letter to be prepared by Anderson. Though such a letter was submitted to Cravens, it was, nevertheless, not signed. Again, at the time of Anderson's call in January, 1919, Anderson testified that he promised Cravens that the action would not be prosecuted. Payment not having been made, Anderson, accompanied by A. W. Greiner, a corroborating witness in the case, called on Cravens at a date fixed by the lat-

ter as about July 26, 1920; and, according to both Anderson and Greiner, Cravens said on that occasion that his beans were still unsold but that he expected to dispose of them shortly, and promised that as soon as he could sell, he would pay the \$600. Anderson said in his testimony that at that time he made mention of the fact that the lien suit had been pending a long time and that something should have been done earlier, to which Cravens replied that Anderson had agreed to wait; and in this statement Anderson acquiesced, saying, "Well; we will wait." On that occasion Anderson presented also a letter, bearing date July 26, 1920, for Cravens' signature; and Cravens then said that he did not want to sign the letter, but that he would take care of the \$600.

[1-3] It appears from the testimony recited that defendant, knowing of the lien suit and desiring to avoid the expense incident to litigation looking to a foreclosure sale, asked to have the action lie dormant and further service, or return, of process withheld, and in consideration of the promise of delay, followed by actual delay, in prosecution of the suit, and of the grace of additional time allowed to satisfy the claim of lien, he agreed to pay \$600 by way of compromise. There was both an agreement to forbear further prosecution of the suit and an actual forbearance. In actions at law it is the actuality of a consideration, rather than its quantum, that supplies the essential ingredient of a contract; and the promise of delay, duly and fully performed, of which defendant received the benefit, together with the detriment suffered by plaintiff through the delay, was a sufficient consideration for defendant's promise to pay. Civ. Code, § 1605.

[4, 5] It was not necessary that there should be a novation, through release of the original debtors and acceptance of defendant in their stead, or that the foreclosure suit should be dismissed by plaintiff. Defendant wanted his property cleared of the lien; and, after lulling plaintiff into a sense of security by oft-repeated promises until the court had lost jurisdiction, and the lien was extinguished by a dismissal of the action on motion of the defendant himself as owner of the property in suit, defendant is in no position to repudiate his liability.

[6] A further point made on behalf of defendant is that Anderson, because not the attorney of record in the lien suit, could not control the action. Anderson was, however, an authorized business agent of plaintiff, and plaintiff, or its authorized agent, had power to, and did, direct the attorney of record to refrain from further prosecution. In that way there was actual control of the suit to the advantage of defendant.

[7] Defendant's objections that his promises of payment are unenforceable because not in writing, and that oral testimony concern-

ing them was inadmissible, are also untenable. None of the promises was a conditional or collateral promise to answer for the debt of another. Each was a promise made directly to promote and subserve an interest of defendant himself, and became an original undertaking on his own part, based upon a beneficial consideration moving directly to himself from plaintiff. Hence these promises are excluded from the operation of section 1624 of the Civil Code and are made provable by oral evidence, and enforceable, under subdivision 3 of section 2794 of the Civil Code. *Fuller v. Towne*, 184 Cal. 89, 96, 193 P. 88; *Leslie v. Conway*, 59 Cal. 442, 444; *Fairchild v. Cartwright*, 39 Cal. App. 118, 121, 178 P. 333; *Doe v. Allen*, 1 Cal. App. 560, 564, 82 P. 568.

The case of *Brightman v. Hicks*, 108 Mass. 246, on which defendant relies, is not applicable here. In that case the defendant was not in possession of the property subject to the lien, nor was there a consideration moving to him so as to make his promise an original rather than a collateral undertaking. The present case has more resemblance to the ancient case of *Williams v. Leper*, 3 Burr. 1886 (97 Eng. Rep. 1152), where a landlord having a lien on an insolvent tenant's goods for rent was about to distrain, but was induced to refrain by an agent of the tenant's assignee for the benefit of the creditors, who promised verbally to pay the rent. The promise was held enforceable as an original obligation.

[8, 9] It may be said further that the oral evidence of each of defendant Cravens' promises was admissible not only for the reasons given, but also because of the fact that this action is founded upon an uncompleted agreement for the compromise of the lien suit. Plaintiff accepted Cravens' verbal offer to pay \$600 in full settlement of plaintiff's claim of lien against Cravens' property; and each offer when accepted became an original bargain between plaintiff and Cravens, controlled by the principles applicable to contracts in general. Cravens' promises were therefore provable as the basis of the several contracts here sued upon in separate counts. An agreement to compromise is valid because it is for the settlement of a controversy; and, so far as section 1624, Civil Code, is concerned, the terms of each of the agreements between the parties, treated as an original contract of compromise, were such as to be valid without being committed to writing.

It follows from what has been said that no error was committed in allowing the oral evidence to which defendant takes exception, and that the evidence justifies the findings of the court.

The judgment is affirmed.

We concur: CRAIG, J.; THOMPSON, J.

MILLER v. GREGORY, Judge of Superior Court et al. (Civ. 3315.)

District Court of Appeal, Third District, California. April 30, 1927.

1. Prohibition ⚡17—Prohibition did not lie on application of stranger to record below to interfere with order in supplemental proceedings (Code Civ. Proc. §§ 386, 720).

Writ of prohibition did not lie to restrain proceedings under order entered in supplemental proceedings directing clerk to pay out moneys which had been tendered him by debtor in another action, notwithstanding claim that petitioner had made reimbursement for money so tendered, where petitioner was stranger to record below and clerk had not sought interpleader under Code Civ. Proc. § 386, or claimed adverse interest under section 720.

2. Execution ⚡397—On assertion of adverse claim in supplemental proceedings, court has no jurisdiction except to impound property and authorize actions to adjudicate rights therein (Code Civ. Proc. § 720).

Where, in supplemental proceedings, person alleged to have judgment debtor's property claims adverse interest or denies debt, under Code Civ. Proc. § 720, court's jurisdiction is limited to authorizing institution of actions to determine right to money or property and to provide for its retention or impounding until final adjudication.

Application by C. W. Miller for writ of prohibition prayed to be directed to H. D. Gregory, Judge of the Superior Court in and for the County of Butte, and C. F. Belding, Clerk, to restrain proceedings under an order directing the clerk to pay over a certain sum in his possession to C. J. Luckehe, pursuant to supplemental proceedings, in an action wherein C. J. Luckehe was plaintiff and J. P. Gordon and C. E. Pfister defendants. Writ denied.

Seth Millington, of Gridley, for petitioner.

Raymond A. Leonard, of Oroville, for respondents.

PLUMMER, J. This matter comes before us upon a petition of C. W. Miller asking that a writ of prohibition be issued from this court directed to Hon. H. D. Gregory, as judge of the superior court of the state of California, in and for the county of Butte, and C. F. Belding, clerk of said court, restraining and prohibiting further proceedings under an order of said court, directing the said C. F. Belding to pay over and deliver the sum of \$819.75 to one C. J. Luckehe, now in possession of and under the control of said C. F. Belding, pursuant to supplemental proceedings had in the case of C. J. Luckehe against J. P. Gordon and C. E. Pfister, pending in said court.

It appears from the papers on file in this action and the stipulations of counsel entered into in open court upon the hearing hereof

that in a certain action prosecuted in said superior court, wherein J. P. Gordon and C. E. Pfister were plaintiffs against C. J. Luckehe, one W. H. Carlin, who then and there appeared as attorney for the plaintiffs, did in open court make and tender the sum of \$819.75 to the defendant in satisfaction of the controversy then in issue between the parties, which tender was refused by C. J. Luckehe, the defendant in the action then pending; that the action referred to was being prosecuted and the tender was made in open court on or about the 6th day of October, 1926; that the said W. H. Carlin made the tender by his own personal check then and there delivered by him to the respondent C. F. Belding, the clerk of said court; that thereafter, and on or about the 20th day of October, 1926, the said W. H. Carlin was reimbursed for the money tendered by him, as aforesaid, and left in the custody of the respondent Belding.

The petition alleges that the reimbursement to the said Carlin for the money tendered by him in the action referred to and left in the care and custody of the respondent Belding was made by the petitioner, C. W. Miller, herein out of funds of which he, the said Miller, was the owner.

It further appears from the pleadings and papers on file herein and the stipulations of counsel that in the action of Gordon and Pfister v. Luckehe judgment was rendered and entered for the defendant for his costs. The action was prosecuted on account of a certain lease, or contract of sale, for a certain tractor, of which the defendant had possession, and for the recovery of which the plaintiffs were prosecuting the action referred to, and the tender made and refused was of the amount upon the lease contract, or contract of sale, admitted to be due by the plaintiffs on the purchase price of the tractors in question.

It further appears from the papers on file that in a certain other action begun and prosecuted by C. J. Luckehe, as plaintiff, against J. P. Gordon and C. E. Pfister, as defendants, the plaintiff obtained judgment against said defendants in the sum of \$2,711.71, as principal, \$54.57 as costs, and attorney's fees in the sum of \$350; that thereafter an execution was issued on the judgment just referred to, placed in the hands of the sheriff of the county of Butte, and by him returned as unsatisfied on the 16th day of February, 1927. Thereafter, upon the petition of the said C. J. Luckehe, supplemental proceedings were taken and had in said last-mentioned cause for the examination of the said C. F. Belding as to the \$819.75 in his possession, deposited and left with him as herein above stated, upon the conclusion of which examination had before the said Hon. H. D. Gregory, as judge of the superior court of said county, an order was made directing the said C. F. Belding to turn over to the plaintiff C. J. Luckehe the said \$819.75 in part

satisfaction of the judgment obtained by the said C. J. Luckehe against the defendants J. P. Gordon and C. E. Pfister, as herein stated.

Prior to the making of this order and prior to the issuance of the execution, as above stated, a writ of attachment had been issued in the case of Luckehe against Gordon and Pfister, and garnishee process therein served upon said C. F. Belding, purporting to garnishee in his hands all moneys and credits belonging to the said J. P. Gordon and C. E. Pfister, to which process the respondent Belding made no answer. It further appears that immediately following the trial of the action of Luckehe against Gordon and Pfister, the said W. H. Carlin died and since said date said Gordon and Pfister have been represented by other counsel.

In so far as the record presented to this court shows the transaction which took place during the trial of the first action herein referred to, when the offer or tender was made, we are furnished with the following:

"Mr. Carlin: What does the record show that deposit was with the bank, do you know?"

"Mr. Gordon: \$759.

"Mr. Carlin: Draw two checks, Mr. Clerk, one to Mr. Leonard for his costs, and to the clerk of the court here for the other sum; and I will ask you further questions about the money. Mr. Myers, will you kindly go over to the Bank of Italy here and get the money?"

"The Court: Are they your checks?"

"Mr. Carlin: Yes.

"The Court: Well, that will be all right. If you say so, we know the money is there.

"Mr. Leonard: Make the check payable to the clerk of the court.

"Mr. Carlin: You can make it out to suit yourself.

"The Court: Is there anything further in the case of Gordon and Pfister v. Luckehe?"

"Mr. Leonard: No."

After mentioning another case then pending, the following occurred:

"Mr. Leonard: If your honor please, how much is the amount of that larger check?"

"Mr. Gordon: \$759 and some odd cents.

"Mr. Carlin: That is including the interest up to November?"

"Mr. Gordon: Yes.

"Mr. Leonard: We will stipulate, Mr. Carlin, that you may fix that up at noon.

"Mr. Carlin: No; I will give him a check to cover it."

Upon the hearing of the order to show cause in this proceeding, it was stipulated that the foregoing is a true and correct copy of the proceedings had and as to what took place at the time of the tender of the sum of \$819.75, involved in this proceeding.

[1] The petition for a writ of prohibition herein is entirely silent as to what took place upon the hearing had upon the supplementary proceedings in the case of Luckehe v. Gordon and Pfister, wherein the respondent C. F. Belding was examined as to the \$819.75 placed in his possession, as aforesaid, and still

in his possession. Whether the respondent Belding represented to the court that the money in his possession was other than money belonging to Gordon and Pfister, or whether any third person laid claim thereto, the record furnishes us no information. In the petition filed as the basis of this action, it is set forth that C. W. Miller furnished the money to reimburse W. H. Carlin for the tender made by him and the money which his check represented in the tender made in open court and by the said Carlin delivered to the clerk, as aforesaid. Whether this claim is well founded, or whether the transaction was such that the tender made by Carlin and the reimbursement to Carlin made by Miller constituted a loan of the money to Gordon and Pfister are questions which we cannot determine in this proceeding, and which are entirely outside of any matters affecting the right of the plaintiff to a writ of prohibition herein. It does not appear that the petitioner, C. W. Miller, appeared at the supplementary proceedings had in the case of Lucke v. Gordon and Pfister, upon which respondent Belding was examined concerning said matters, and as we have said, the record is absolutely silent as to what defense, response, or answer, if any, was made by the said Belding, preceding the making of the order for the turning over of the said moneys to C. J. Lucke by the respondent H. D. Gregory, as judge of said superior court.

No intervention in the action of Lucke v. Gordon and Pfister was asked for by the said C. W. Miller, nor does it appear that the said C. F. Belding has sought in any manner to take advantage of the provisions of section 386 of the Code of Civil Procedure, by way of interpleader or bringing action against the respective parties requiring them to come into court and litigate their right and title to the money in his hands. So far as the record before us is concerned, the petitioner C. W. Miller, is an entire stranger to all the proceedings in the case of Lucke v. Gordon and Pfister. It does not appear that his rights are being litigated. It does not appear that the respondent C. F. Belding is asking that the claims of other parties to the money be first determined before the money is paid over by him to any one. Under the authorities which we will hereafter cite, if the clerk had made it appear to the trial court during the examination had upon supplemental proceedings that the money in his hands was subject to conflicting claims, then, under the provisions of section 720 of the Code of Civil Procedure, the trial court would have had no jurisdiction to order the money paid over, but would have been limited in its power to authorizing a suit wherein all persons claiming the money may be made parties and complete adjudication had as to all conflicting claims. This is not a petition by the respondent C. F. Belding, as clerk of said court, to prohibit the execution of the order, and so long as the

clerk makes no objection to following the order of the court, takes no appeal therefrom, nor seeks by any other proceeding to stop the execution thereof, in order that a judgment may be entered determining the title to the money in question and so relieve him from responsibility it does not lie within the power of this court to issue a writ of prohibition restraining the action of the trial court or preventing further proceedings upon the petition of an entire stranger to the action, where no showing was made in the trial court, so far as the record informs us, that the petitioner had any right whatever to the moneys deposited with the clerk. It may be here stated that, so far as disclosed to us upon the papers and files herein, the petitioner's rights are not determined, because he was not a party to the proceeding in the court below, and therefore any action of the clerk in turning over the money would not relieve the clerk from responsibility to the petitioner, nor would the proceedings, as disclosed to us, estop the petitioner from bringing an action against the respondent C. F. Belding to establish his ownership and right to the moneys involved.

[2] In the case of Deering v. Richardson-Kimball Co., 109 Cal. 73, 41 P. 801, the procedure necessary to invoke the power of this court is laid down, in so far as the respondent Belding and the petitioner, Miller, herein are concerned. In that case: one Lothian was a third party claiming an interest in the moneys held by the Los Angeles National Bank by virtue of garnishee process and became a party to the action by intervention. The bank was brought into the action by supplementary proceedings. An examination of the cashier of the bank was had and an order made directing the bank to turn over a certain sum of money to be applied in payment of a judgment held by the plaintiff against the defendant, Richardson-Kimball Company. Both Lothian, as intervener, and the bank, as a party to the supplementary proceedings, appealed. The action of the trial court was reversed and the cause remanded for further proceedings according to section 720 of the Code of Civil Procedure, providing for an action to determine the rights of the respective parties to the moneys involved. The following cases show that the trial court has no jurisdiction under section 720 of the Code of Civil Procedure to make any order for the turning over of the money where the title thereto is disputed, where the party examined denies the indebtedness or sets up the fact that there are other parties making claim thereto. In such cases, the jurisdiction of the trial court is limited to authorizing the institution of actions to determine the right to the money or property, and providing for its retention by the party examined, or its impounding until the final adjudication of the rights of the respective parties to the fund. *Parker v. Page & Hill*, 38

Cal. 522; *Hartman v. Olvera*, 51 Cal. 501; *Lewis v. Chamberlain & Morse*, 108 Cal. 525, 41 P. 413; *Deering v. Richardson-Kimball Co.*, 109 Cal. 73, 41 P. 801.

During all the time since the delivery of the check by W. H. Carlin, the attorney in the case of Gordon and Pfister v. Lucke, the petitioner herein, if the owner of said money, has had the right to institute an action against all persons and against the respondent C. F. Belding to recover possession thereof. So far as the record shows, he still possesses that right. He has not been made a party to any proceeding in the trial court and has not sought to intervene in any proceeding, and it is simply axiomatic to state that his rights are not determined in actions to which he is not a party, all of which clearly establishes that this court has before it nothing upon which it can issue an order prohibiting further proceedings in an action or actions to which the petitioner is not a party, nor to which the record discloses that he has made any attempt to become a party.

The respondents herein appeared in this proceeding first by demurrer and then by answer, but as the demurrer was submitted together with an argument upon the merits, we have concluded to decide the cause upon the merits, rather than upon the respondent's demurrer to the petition herein, which, nevertheless, appears to be well taken. For the reasons herein stated the writ prayed for is denied.

We concur: FINCH, P. J.; HART, J.

82 Cal. App. 648

VENTURA REFINING CO. v. ROSEBERG OIL CORPORATION. (Civ. 4470.)

District Court of Appeal, Second District, Division 2, California. May 2, 1927.

1. Sales $\hookrightarrow$ 371—Seller need not resell property on buyer's breach to sue for damages based on difference between contract price and market value (Civ. Code §§ 3049, 3311, 3353).

In action to recover difference between contract price and market value for breach of buyer's contract to purchase oil, it was not necessary, under Civ. Code §§ 3049, 3311, 3353, for seller to sell oil at best price obtainable at nearest market before he could sue for damages.

2. Sales $\hookrightarrow$ 384(2)—Market value in determining damages for breach of contract to purchase oil was determinable as of reasonable time after termination of contract.

In action to recover damages for buyer's breach of contract to purchase oil, based on difference between market value and contract price, market value was to be determined as of a reasonable time after contract was to have been completed.

3. Sales $\hookrightarrow$ 383—Finding of market value in determining damages for breach of contract, without specifying date of breach or of completion of contract, held justified, in absence of proof of established market during such period.

In action to recover damages for buyer's breach of contract to purchase oil, finding as to price seller could have obtained for oil at place nearest point of delivery, without specifying certain date, held justified, whether date for determining market value was date of breach or completion of contract, where evidence showed that there was no regular established market during such period.

4. Sales $\hookrightarrow$ 384(2)—Buyer, requesting time for performance, cannot complain of granting of request, when sued for difference between contract price and market value after termination of contract.

In action to recover damages for buyer's breach of contract to purchase oil, based on difference between contract price and market value after termination of contract, buyer cannot complain of granting of further time for performance of contract made at his request.

5. Sales $\hookrightarrow$ 89—Seller need not accept new offer on buyer's breach of original contract.

Where buyer breached contract to purchase oil by failure to supply shipping advices, seller was under no obligation to accept new offer changing terms of original contract.

6. Sales $\hookrightarrow$ 152—Buyer's failure to furnish shipping instructions for 9 months constituted breach of contract to purchase oil in monthly installments for one year.

Under contract for sale of oil to be delivered in monthly installments for one year in accordance with buyer's shipping instructions, buyer's failure and refusal for 9 or 10 months to supply shipping advices constituted breach of contract.

7. Sales $\hookrightarrow$ 379—Allegation that defendant "bought" oil held not fatal variance from contract under which defendant "agreed to buy" oil.

Petition by seller for buyer's breach of contract to purchase oil, alleging agreement whereby plaintiff sold and defendant "bought" oil, held not material variance from contract whereby defendant "agreed to buy" oil.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by the Ventura Refining Company against the Roseberg Oil Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Black, Hammack & Black, of Los Angeles, for appellant.

Robert M. Clarke, of Los Angeles, and Charles W. Slack, of San Francisco, for respondent.

THOMPSON, J. The difficulties to be adjusted by this action arise out of the failure on the part of the defendant and appellant to accept and pay for the major portion of

the oil agreed to be purchased by it in the following contract:

"Los Angeles, Cal., January 10, 1921. Ventura Refining Company, Title Insurance Building, Los Angeles, Cal.: Please enter order for account of the undersigned of the following commodities: Five tank cars each month 38-40 gravity special gas oil. The price hereby agreed to be paid therefor is at the rate of 9½ cents per gallon for said special gas oil and at the rate of — per — for said — f. o. b. Fillmore, Cal. It is agreed that payment shall be made by the undersigned, in United States gold coin, to Ventura Refining Company at its office in the city of Los Angeles, for all of said commodities loaded during each calendar month, to apply on account of said order at said point of Fillmore, Cal., on or before the 10th day of the next succeeding calendar month. In case of default in the making of such payments, or if the financial condition of the undersigned shall, in the opinion of Ventura Refining Company, have become impaired to an extent not foreseen, or existing, at the date of the acceptance of this order, then it is agreed that the whole amount in payment for all loadings actually made under this order, not yet paid for, shall become due and payable immediately upon demand in writing and further loadings to apply on this order shall be suspended pending such payment, or this order may be canceled forthwith at the option of Ventura Refining Company, without notice to the undersigned. It is agreed that all deliveries hereunder are contingent on conditions beyond the control of Ventura Refining Company, but said company will use its best efforts to make the following loadings: Fairly even monthly quantities between date and January 10, 1922. T. E. N. — S. R. R. It is agreed that said price of 9½ cents per gallon for said special gas oil is based upon the present published market price of 30 gravity California crude oil at the well and said price is to be advanced or lowered ½ cent per gallon for each advance or decline of 5 cents per barrel in the published market price of 30 gravity California crude oil at the well at time of delivery. S. R. Roseberg. Very truly yours, Roseberg Oil Company, by S. R. Roseberg. No order is binding until the same shall have been accepted by a duly authorized officer of Ventura Refining Company. Shipping address as directed. Address for invoices: 923 Santa Fé Ave., L. A., Cal. Rate of delivery, 5 cars each month; size of cars, 10,000 gallon. Credit approved: Roland Young. T. E. Nichols, Jr., Credit Department Salesman. Order accepted: Order approved: Ventura Refining Co., F. C. Deinse, Vice President; T. W. Okey, Sales Manager."

Under this agreement the plaintiff shipped 10 tank cars aggregating 101,639 gallons, the last of which was shipped on April 4, 1921. On May 13, 1921, a 25-cent per barrel decline in the price of crude oil reduced the contract price to 8¼ cents per gallon of the special gas oil, and on August 3 another decline reduced the price to 8⅞ cents per gallon. Subsequent to April 4, 1921, the defendant failed to give any further shipping instructions, although orally requested to do so once a month or oftener and many times in writing,

and although, according to plaintiff's witness, "shipping instructions were many times promised" by defendant, "but were deferred and were not forthcoming." Negotiations for delivery and acceptance by defendant continued until after the time for complete performance, and even as late as January 17, 1922, the defendant indicated by letter that efforts were being made for acceptance of the oil. This letter was in response to plaintiff's communication of January 17, 1922, demanding that the oil be taken to relieve the storage capacity. Finally, on March 11, 1922, the defendant wrote plaintiff as follows:

"Los Angeles, Cal., March 11, 1922. Mr. S. P. Van Deinse, General Manager, Ventura Oil Refining Co., Los Angeles, Cal.—Dear Sir: In order that we may settle the differences arising under the order that I signed January 10, 1921, to take 5 cars of oil per month for a period of one year at the prices named in the order, I having thus far accepted 8 cars, I would suggest and will therefore offer that I take the remaining number of cars, namely, 52, of the character of oil mentioned in that order and at the prices named in that order; the cars that I offer to take to be shipped at the minimum rate of 6 per month, commencing immediately, the terms of payment, price and quality to be as provided in the order I gave you on January 10, 1921. I hope you can see your way clear to accept this offer as an adjustment of the entire situation, as we always have been, and always ought to be the best of friends, doing business and as man to man. Yours very truly, Roseberg Oil Corp., by S. R. Roseberg, President."

On March 23, 1922, plaintiff commenced this action to recover the difference between the contract price of the special gas oil and its market value in the market nearest to the place where defendant should have accepted the oil. Judgment was recovered in the sum of \$26,274.60, together with interest from March 23, 1922, at 7 per cent. per annum in the sum of \$1,783.77. Defendant prosecutes this appeal from the judgment thus entered.

On the trial it developed that the plaintiff made sales of the oil in considerable quantities at 3½ cents and 3¼ cents per gallon between January 24, 1922, and March 14, 1922, but was unable to resell the amount held for defendant. A witness testified that the market value on January 10, 1922, was from 3 to 3½ cents per gallon f. o. b. Fillmore. There was testimony that there was not an established or regular market value for this special oil between April, 1921, and March, 1922.

[1] Appellant's principal position may be briefly stated as follows: Assuming a breach of the agreement; that such breach occurred on or about March, 1921, and that it was the duty of plaintiff to sell the oil contracted for within a reasonable time thereafter, or at least to sell the deliveries due each month

within a reasonable time after failure to take the monthly delivery. To support this argument, counsel contends that by reason of the contract being executory it was necessary for plaintiff to sell the oil at the best price obtainable in the nearest market and sue for the difference between the price received and the contract price; that without such resale plaintiff is not entitled to recover damages. We cannot assent to this doctrine, nor do the cases cited by appellant support it. Those authorities are of two classes, the first holding that the seller of personal property is not entitled to recover the selling price in actions on the contract, where title has not vested in the purchaser, but is confined to his action for damages, and the second holding that he has the right to sell under the provisions of sections 3311, 3049, and 3353, of the Civil Code, but that when he attempts to exercise the right he must do it within a reasonable time and that the sale must be for the market value. In some of the cases the expression is used that the seller not only has the right, but it is his duty to sell; but such expressions were not necessary to the decisions and cannot be accepted as authoritative in the face of direct precedent to the contrary, and despite the express language of the sections of the Civil Code to the contrary, and in direct violation of the logic of such situations. Reversing the order thus stated, what difference can it make to the purchaser whether the seller conducts a sale at the market value, or keeps the goods himself and credits the damages with the market value, the seller himself becoming in effect and in logic the purchaser? It would be the superlative refinement of legal sophistry to hold to such a distinction. Again, section 3311 of the Civil Code says:

"The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: 1. If the property has been resold, pursuant to section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or, 2. If the property has not been resold in the manner prescribed by section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it."

Section 3049 of the Civil Code simply provides for a seller's lien dependent on possession, giving to him the right of sale as though the property were pledged to satisfy the lien. It is apparent, therefore, that section 3311 expressly contemplates that a resale by the seller is not a necessary prerequisite to the maintenance of an action for damages in which the difference between the

contract price and the market value is the measure of the detriment. It has been so held. See *Cuthill v. Peabody*, 19 Cal. App. 304, 125 P. 926; *Lillie v. Weyl-Zuckerman & Co.*, 45 Cal. App. 607, 188 P. 619; *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 P. 177; and *Oldershaw v. Kingsbaker Bros. Co.*, 53 Cal. App. 667, 200 P. 729.

[2, 3] In one sense our conclusion upon this branch of the first question obviates the necessity of an extended discussion of that portion, which is, that the breach of the contract, if one in fact existed, occurred in March, 1921. There is some confusion in the specific date, due, no doubt, to the fact that, as the appellant's brief shows, the defendant was under the belief that it accepted only 6 or perhaps 8 carloads of oil, the last of which was in March, 1921, while the record justifies the conclusion and the court in effect found that ten cars were in fact shipped, the last of which was as stated above, on April 4, 1921. The question, however, is not affected. In substance it is that the market value within a reasonable time after the first failure to give shipping instructions, instead of the market value within a reasonable time after the arrival of the date for the complete performance, should be the unit used in determining the deduction from the contract price. The court did not find the market value as of a certain date, but did find that—

"The price which plaintiff could, by reasonable diligence, have obtained for the same at the place nearest to where the defendant should have received the said oil from the plaintiff, was the sum of 3¼ cents per gallon."

[4] Under the testimony which we have already recited, this finding would be justified, though the date were considered as immediately following April 4, 1921, or following January 10, 1922. It was shown that there was no regular established market during this entire period, and although the witness testified to the price on January 10, 1922, resort was had to other sales made in January, February and March of 1922 to fix the market value. Be that as it may, however, there can be no doubt but that negotiations were pending during this entire period looking to the acceptance by the defendant of the oil. It cannot be questioned under these circumstances that plaintiff assented by its acts and its statements to an extension of time within which defendant might accept; and not until after January 17, 1922, did plaintiff terminate the negotiations. It does not rest with defendant to complain on this score when it sought and was granted further time within which to supply shipping instructions. We find apt language in the case of *Roberts v. Benjamin*, 124 U. S. 64, 8 S. Ct. 393, 31 L. Ed. 334, to fit the situation here:

"It is contended by the defendants that the referee erred in taking the \$34 per ton, the market value of the iron on November 7, 1879, as the measure of damages, instead of the market price in September, when the iron was to be delivered, and, when, it is alleged, the breach of the contract occurred. But, although the defendants did not deliver any of the iron on or about September 1, 1879, nor as soon as they had manufactured the required amount, yet it appears from the findings of fact, considered together, that the breach of the contract did not take place until November 7, 1879. The statement in the findings, that the defendants 'postponed the execution of the contract from time to time,' and finally insisted upon certain requirements as conditions of the delivery of the iron, must be accepted as a statement that the postponement of the execution of the contract * * * was with the assent of the plaintiff. From the fact that, as late as November 7, 1879, the defendants were naming conditions on which they would deliver the iron, it must be inferred that the question of delivery was still regarded by both parties as an open one, and that the mere failure to deliver the iron by the 1st of September, 1879, or even thereafter as soon as the required amount had been manufactured, was not regarded by either party as a breach of the contract."

To the same effect where delivery is deferred by request of buyer, see Kutztown Foundry & M. Co. v. Sloss-Sheffield S. & I. Co. (C. C. A.) 279 F. 627. Almost the identical principle was applied in an action where an anticipatory breach was coupled with an embargo, during the late World War. In the case of U. S. Trading Corp. v. Newmark G. Co., 56 Cal. App. 176, 205 P. 29, it was held that—

"Notwithstanding defendant's attempted anticipatory breach on October 7, 1919, plaintiff, at its election, could refuse to accept such attempted renunciation by defendant of its contract obligations, could treat the contract as subsisting, and could sue for a breach of contract * * * after the termination of the embargo."

[5, 6] Appellant's next assertion is that there was no breach of the contract by the defendant. We quote one sentence from appellant's brief on this point which answers defendant's own argument:

"The evidence in this case clearly shows that while in an embarrassed position the defendant kept putting off from time to time the actual taking of the product, and the plaintiff from time

to time acquiesced in this situation by its failure to declare any breach and even while further negotiations were pending and before they had been acted upon the plaintiff started an action."

The sum of this argument is that because plaintiff had excused the breach in the past it should continue to excuse it in the future until under the offer made by defendant to enter into a new contract, as evidence by its letter of March 11, 1922, the shipments had been completed at the rate of 6 cars per month. Plaintiff was under no obligation to accept this new offer. Nor can there be any doubt that defendant's failure and refusal for 9 or 10 months to supply shipping advices constituted a breach.

[7] Appellant also claims a material and fatal variance between the allegations of the complaint which alleged that by "an agreement in writing, * * * the plaintiff sold to the defendant and the said defendant bought of said plaintiff 60 tank cars * * * of * * * special gas oil, to be delivered in fairly even monthly quantities—5 tank cars each month between January 10, 1921, and January 10, 1922, at Fillmore, Cal.," and the proof which consisted of the contract heretofore recited. There was also an allegation in the complaint concerning the market value in "the market nearest to the place at which it should have been accepted." We fail to see any material variance. Defendant was undoubtedly apprised of the true situation and could not have been prejudiced by plaintiff's failure to allege in precise language "that defendant had *agreed to buy*" instead of the words actually used "defendant bought." (Italics ours.)

From the discussion so far it is evident that it is not necessary for us to treat the point raised in appellant's reply brief that the court failed to find that the sale made by defendant was within a reasonable time. In the first place the sale was not a resale of the property agreed to be purchased, and therefore that question was not in issue. In the second place we have already determined that the market value was to be determined as of a reasonable time after January 10, 1922.

Judgment affirmed.

We concur: JOHNSON, Justice pro tem.; CRAIG, J.

83 Cal. App. 155

DOWN v. DE GROOT et al. (Civ. 4728.)★

District Court of Appeal, Second District, Division 1, California. May 17, 1927.

Hearing Denied by Supreme Court July 13, 1927.

1. Brokers ⇨63(1)—Broker who obtained person ready and willing to purchase at price named held entitled to commission, where failure to consummate sale was due to vendor's repudiation.

Broker producing person ready and willing to purchase property at specified sum under receipt which provided deposit was to be returned in case satisfactory arrangements for payment should not be effected, held entitled to recover commission, where deposit was returned, not as result of inability to effect satisfactory arrangements, but because vendors changed their minds and refused to sell property.

2. Brokers ⇨63(1)—Vendors who repudiated sale could not complain, in broker's action for commission, that consummation of sale was dependent on satisfactory arrangements for payment.

In suit by broker for commission for sale of real estate, vendors, who prevented consummation of sale by their repudiation of agreement, could not complain that satisfactory arrangements for payment, contemplated by receipt for earnest money, had not been effected.

3. Contracts ⇨303(4)—One who prevents performance of act upon which obligation depends cannot assert such nonperformance as defense.

Where one voluntarily prevents performance of some act upon which obligation depends, he is precluded from setting up such nonperformance as defense.

4. Brokers ⇨54—Broker who has produced purchaser ready, able, and willing to buy on seller's terms is entitled to commission.

Under contract in writing to pay broker commission on sale of real estate, broker who has produced purchaser ready, able, and willing to buy on terms proposed by seller has performed his part of contract and is entitled to payment of agreed commission.

5. Brokers ⇨39—Broker's right to commission on sale which vendor repudiated was not defeated by recovery of commission on subsequent sale to same purchaser of other property.

Fact that broker subsequently sold different piece of property to identical purchaser and received commission therefor did not prevent broker's recovery for sale, consummation of which was prevented by seller's repudiation, as right to compensation on first sale became fixed and was not subject to be defeated.

6. Brokers ⇨39—Broker's right to commission on performance of service specified by contract is unaffected by any future service to third persons.

On performance of contract by which broker is to be paid certain sum of money for specified service right to payment follows, unaffected by any future service which may be rendered to other persons.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by N. C. Down against M. De Groot and another. Judgment for plaintiff, and defendants appeal. Affirmed.

J. E. Light, of Glendale, for appellants.

A. C. Galloway, of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a judgment in favor of plaintiff in an action brought for a commission earned by him on a sale of real property for the defendants.

The facts appear to be that the property which was the subject of the sale was listed for sale with plaintiff by the defendants at a price of \$8,400, payable \$2,500 cash, with the balance to be paid at the rate of \$75 per month, including interest, the buyer to assume a mortgage of \$1,000 on the property; that thereafter plaintiff produced a person who was ready, able, and willing to purchase the property in question, and who thereupon paid to defendants the sum of \$25, for which defendants issued to the purchaser a receipt in the following form, to wit:

"Received of James Oswald through the N. C. Down Company, \$25 deposit on the property located at 1648 West 55th street, Los Angeles, price to be \$8,400. Terms to be arranged on or before Monday, October 8. This deal subject to usual brokers' five per cent. commission. This deposit to be returned to James Oswald if satisfactory arrangements are not effected of \$2,100 down, \$75 TD."

Thereafter, and on the same day on which the said receipt was delivered to the purchaser, the defendants stated to the intending purchaser and the plaintiff that they "had changed their minds" and that they did not wish to, and would not, sell the property, and thereupon returned to the intending purchaser the \$25 which theretofore had been paid as a deposit in connection with the transaction. However, on the same "night, late," the defendants "changed their minds again" and delivered to the intending purchaser a letter, the body of which was as follows:

"I am sorry that we have disappointed you in regards this deal and hope that you will forgive us for doing this. There has been some misunderstanding in regards our privilege of changing our minds. So now we have decided to let you people have the place, as we have it understood between each other."

By that time, however, the proposed buyer of the property was "getting disgusted" and "wanted no more to do with Mr. De Groot," and thereafter, although insistently urged to do so by plaintiff, declined and refused to proceed with the purchase of the property. On the day following, acting as agent for an owner of other property, plaintiff sold such property to the man who had expected to buy

the property in question from defendants. Thereafter the instant action was brought by plaintiff against defendants, which, as hereinafore stated, resulted in a judgment in favor of plaintiff, and from which judgment defendants have appealed to this court.

[1-3] The evidence shows that plaintiff found a person who was ready, able, and willing to buy the property belonging to defendants on terms and conditions satisfactory to each of the proposed contracting parties to the agreement of sale. Although the deposit of \$25 given by the prospective buyer to the defendants was returned to such buyer, that act was not the result of the failure of the parties to effect "satisfactory arrangements," as recited in the receipt signed by defendant De Groot, but apparently was done solely because the defendants "changed their minds" and refused to sell the property. It therefore was by no means the fault of the intending purchaser that the sale was not consummated, but rather because the defendants prevented the sale from taking place. While originally the consummation of the sale may have depended upon "satisfactory arrangements" being effected between the proposed purchaser and the defendants, if the defendants prevented any such arrangements from being made, they are in no position to complain on that account. For aught that appears the intending purchaser agreed, or would have consented, to each and every suggestion or demand which might have been made by the defendants. As is laid down in the case of *Carl v. Eade* (Cal. App.) 253 P. 750, where the authorities are cited:

"One who voluntarily prevents the performance of some act, on which an obligation depends, will be precluded from setting up such nonperformance as a defense."

[4] The rule with reference to the liability of one who in writing agrees to pay a broker a commission for the sale of real property is almost universally understood to be that when the broker has produced a purchaser ready, able, and willing to buy on the terms proposed by the seller, the broker has performed his part of the contract and is entitled to the payment to him of the commission as agreed upon by the parties.

The case of *Merriman v. Wickersham*, 141 Cal. 567, 75 P. 180, is illustrative of both the facts and the law in the instant case. We quote therefrom:

"It is contended by appellant, however, that the contract between Wickersham and the Burnham & Marsh Company, contemplated an actual and completed sale, and that, as Wickersham repudiated the contract before its full execution by the transfer of title, he was not bound to pay the commissions contemplated. But, the answer to this is twofold. First, the contract which Wickersham approved was a sale of his property and thus the literal terms of his contract with the Burnham & Marsh Company had been complied with. It was a conditional sale, to be

sure, but none the less it was a sale. Second, the law as to this contract is no different from the law as to brokers' contracts generally; that is to say, where the contract fixes the broker's right to remuneration upon his sale, if he shall produce a purchaser able and willing to buy, he has performed his part of the contract, and the owner's liability for his compensation or commission is complete, and cannot be avoided by any arbitrary or wanton refusal to consummate the sale. (*Crane v. McCormick*, 92 Cal. 176 [28 P. 222]; *Smith v. Schiele*, 93 Cal. 144 [28 P. 857]; *Gregory v. Bonney*, 135 Cal. 589 [67 P. 1038])."

[5] Appellants urge the point that the trial court erred to defendants' prejudice in sustaining an objection to a question propounded to plaintiff as to whether on the subsequent sale of other property made to the intending purchaser of the property belonging to defendants, plaintiff received a commission. The effect of the point raised by appellant is that, even assuming that plaintiff had earned a commission for the sale of defendants' property, yet if subsequently thereto plaintiff sold a different piece of property to the same person who had anticipated purchasing property from defendants and received a commission therefor, plaintiff would not be entitled to be twice paid for his services; and consequently that there should be no recovery as against defendants.

[6] In that regard the evidence shows that, while the purchaser was in the market for one piece of property only, nevertheless, according to the testimony of the proposed purchaser, "we was able to buy two places if we wanted to." Moreover, from what heretofore has been said, it is clear that before the second sale had been made by plaintiff he had earned his commission for the sale of defendants' property. That labor had been fully completed. The work of making a new sale to the same customer probably entailed as much, if not greater, effort on the part of the agent than did the first sale, and likewise may have required greater efficiency in salesmanship. The actual time and labor required in making the first sale had been expended. Whatever its effect, was of the past. Unless recovery for a commission earned could be had by plaintiff from defendants, the incident represented a total loss of energy and time expended. The rights, duties, and obligations arising therefrom were fully accrued. No future acts by the parties or by either of them as affecting either his or their new contractual rights could be influenced or affected by reason of what had gone before. It was not like a contract to deliver goods in which, on the failure of the person obligated to supply the goods for delivery, the carrier delivers other goods for other persons within the same time that it would have taken to deliver the goods contracted with the first person to be delivered. *Utter v. Chapman*, 38 Cal. 659. Neither did it resemble an agreement to render personal serv-

ices for a stipulated period at a fixed price. It was a contract for the payment of a certain sum of money in compensation for a specified service; on the performance of which, the right to payment therefor followed, unaffected by any future service which might be rendered to other persons.

It is therefore concluded that no error was committed by the trial court in sustaining the objection to the question as to whether plaintiff received a commission on sale of property subsequent to the failure of defendants to proceed with the consummation of the sale theretofore effected by plaintiff.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 40

PEOPLE v. GODDARD. (Cr. 1407.)

District Court of Appeal, First District, Division 1, California. May 12, 1927.

1. Bail ⚡44—Admission to bail, pending appeal from judgment on plea of guilty of bigamy, is within court's sound discretion.

Application for admission to bail, pending appeal from judgment on plea of guilty of bigamy, is addressed to sound discretion of court.

2. Criminal law ⚡1148—Trial court's refusal to admit to bail should not be interfered with, unless discretion is abused.

Determination of trial court refusing admission to bail pending appeal after plea of guilty should not be disturbed, unless abuse of discretion is clearly shown.

3. Bail ⚡44—Refusal of bail pending appeal from judgment on plea of guilty of bigamy held not abuse of discretion, in view of doubtful legal questions.

Denial of application for admission to bail, pending appeal from judgment, entered after denial of motion to permit withdrawal of plea of guilty of bigamy because of subsequently learned facts affecting validity of previous marriage, held not abuse of discretion, in view of doubtful legal questions presented by appeal.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Application by Pruette Kearns Goddard for admission to bail, pending appeal from a judgment sentencing him to imprisonment after a plea of guilty of bigamy. Application denied.

Soren X. Christensen, of San Francisco, and J. C. Wood, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., Earle Warren, Dist. Atty., and Leonard J. Meltzer, Deputy Dist. Atty., both of Oakland, for the People.

CASHIN, J. An application for an order admitting the defendant to bail.

An information was filed in the superior court of Alameda county charging defendant with the commission in that county of a felony, to wit, the crime of bigamy, to which he entered a plea of guilty. Subsequently a motion for an order permitting a withdrawal of the plea was denied. By the judgment of the court he was sentenced to be confined in the state prison at San Quentin. An appeal was thereafter taken from the judgment, and an application made to the trial court for an order admitting him to bail, pending the appeal, which was denied.

[1-3] The appeal—which is based on the contention that the trial court abused its discretion in refusing to permit the defendant to withdraw his plea of guilty—involves the question of the validity of his previous marriage, it being claimed that certain facts in that connection were unknown to him at the time the plea was entered. Applications of this character are addressed to the sound discretion of the trial court, and its determination should not be disturbed except where an abuse of discretion is clearly shown. In re Preciado, 30 Cal. App. 323, 158 P. 1063; People v. Ephraim, 72 Cal. App. 479, 237 P. 801. In view of the doubtful questions of law presented by the appeal and which were considered by the trial court, we cannot say that its denial of the application was an abuse of discretion.

The application is denied.

We concur: TYLER, P. J.; KNIGHT, J.

83 Cal. App. 148

TUCKER et al. v. NEWTON et al. (Civ. 4842.)

District Court of Appeal, Second District, Division 1, California. May 17, 1927.

1. Exchange of property ⚡5—Evidence held to support finding that written exchange agreement was modified by oral agreement to convey property subject to incumbrances.

In suit for specific performance of agreement to exchange realty, defendants' evidence held sufficient to support finding that written agreement was modified by oral agreement whereby defendants were to convey their property subject to incumbrances of record.

2. Appeal and error ⚡1010(1)—Appellate court is bound by trial court's fact finding supported by sufficient evidence.

Appellate court is bound by trial court's finding, supported by sufficient evidence, that written agreement, sought to be specifically enforced, was modified by oral agreement.

3. Appeal and error ⚡882(6)—Variance between pleadings and proof is not available on appeal, where trial proceeded on theory that all facts should be brought out.

Where parties to suit for specific performance of agreement to exchange real property

proceeded at trial on theory that all surrounding facts should be brought out in evidence, plaintiffs cannot first object on appeal that there was fatal variance between pleadings and proof in that answer did not plead executed oral agreement modifying written agreement.

4. Appeal and error ⇨197(1)—Party not objecting to sufficiency of pleading to raise issue cannot say in appellate court that finding is outside issue.

Where parties proceed to trial on pleading, without objection to its sufficiency to raise particular issue, and evidence is received as to facts and the issue found on, party whose duty it was to object will not be heard to say in appellate court that finding is not within issue.

5. Appeal and error ⇨197(7)—Appellants cannot rely on objection not made below, especially when removable by amending answer (Code Civ. Proc. § 469).

Appellants cannot avail themselves of objection, which they failed to make in superior court, especially when ground of objection could have been removed by amendment to answer, as under Code Civ. Proc. § 469, in case of variance between pleading and proof.

6. Exchange of property ⇨5—Failure to assign trust deed as security for defense of suit to quiet title held not to show that oral agreement modifying written exchange agreement was not fully executed.

Defendants' failure to assign trust deed as security for defense of suit to quiet title held not to show that oral agreement, modifying written agreement for exchange of realty, was not fully executed, where defendants filed bond to guarantee defense, no attempt was made to prosecute such suit, deed was delivered, and parties entered into possession immediately after oral agreement; agreement to assign trust deed being merely incidental or collateral.

7. Exchange of property ⇨5—Abandonment of written exchange agreement and substitution of new terms, whereby each party received valuable property subject to incumbrances, held "valuable consideration" for subsequent oral agreement.

Abandonment of written agreement for exchange of realty, except as to parties and descriptions of properties, and substitution of new terms of exchange, whereby each party received property of value subject to existing incumbrances, held to constitute valuable consideration for subsequent oral agreement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Valuable Consideration.]

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Suit by Marjorie M. Tucker and another against J. W. Newton and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Holcomb & Holcomb and Denis & Griffith, all of Los Angeles, for appellants.

H. S. Laughlin and Frank L. Muhleman, both of Los Angeles, for respondents.

McLUCAS, Justice pro tem. This is a suit for specific performance of an agreement to exchange real property. Plaintiffs appeal from the judgment rendered for defendants.

The complaint alleges that on the 4th day of March, 1922, plaintiffs and defendants entered into an agreement for exchange of properties and to take immediate possession of the properties exchanged, and further agreed that the property of plaintiffs should be conveyed to defendants subject to a mortgage of \$4,250, and that the property of defendants should be conveyed to plaintiffs free from all incumbrances; that the plaintiffs, in addition to the conveyance of their property, should pay the defendants the sum of \$4,250; and that the defendants, in addition to the conveyance of their property, should pay to the plaintiffs the sum of \$2,000; that thereafter plaintiffs and defendants entered into possession of the properties so agreed to be exchanged, and plaintiffs had conveyed their property to defendants; that defendants have not conveyed, or offered to convey, their property to plaintiffs, free and clear of incumbrance, nor have they paid or offered to pay to plaintiffs the said sum of \$2,000; that plaintiffs have offered and do offer to perform all the terms of said agreement on their part, but that defendants refuse to comply with said agreement.

The answer denies that the parties exchanged their respective properties upon the agreement set forth in the complaint, and alleges that a subsequent agreement was made and entered into between the parties, whereby the properties were exchanged and the possession thereof taken by plaintiffs and defendants. Defendants admit that they have not paid or offered to pay the said sum of \$2,000, and allege that under a separate agreement defendants have delivered deeds to convey the said property, and that plaintiffs have accepted said deeds subject to a mortgage of \$5,760; that defendants have placed security with plaintiffs, guaranteeing to defend the title against suit. Defendants deny that plaintiffs have offered or tendered to defendants the sum of \$4,250, and defendants allege that they have done everything required of them to be performed by said subsequent agreement.

The trial court made findings that on or about March 4, 1922, plaintiffs and defendants made and signed the written agreement for exchange of properties referred to in plaintiffs' complaint and designated as Exhibit A and made a part thereof; that at the time of signing said agreement the parties had orally agreed that plaintiffs were to obtain a loan on the property exchanged by defendants in the sum of approximately \$7,000,

so as to carry out the agreement and to provide certain additional money; that on or about March 8, 1922, plaintiffs and defendants agreed orally to exchange the said properties, each taking the property of the other subject to existing incumbrances of record; that pursuant to said oral agreement one of the plaintiffs inserted in the deed conveying the property of the defendants a provision to the effect that the same was taken subject to incumbrances of record; that on the same day, and in furtherance of said oral agreement, plaintiffs and defendants signed certain escrow instructions, marked Exhibit A and attached to defendants' answer and made a part of the same, wherein and whereby it appears that the said property exchanged by the defendants to the plaintiffs is to be taken subject to incumbrances of record; that pursuant to said oral agreement plaintiffs and defendants took possession of the respective properties; that plaintiffs and defendants, after signing the original agreement of exchange and after plaintiffs were unable to obtain said loan, did, on the 8th day of March, 1922, modify the said written agreement of exchange of March 4, 1922, orally and by said escrow instructions so made and signed, in all matters save and except as to the parties to said agreement and as to the properties agreed to be exchanged, and that such modification has been executed by the parties respectively.

[1, 2] It appears from the evidence that the parties did enter into a written agreement of exchange on the 4th day of March, 1922, as alleged in the complaint. The testimony is in conflict as to whether the written agreement was modified by an oral agreement, and as to whether such oral agreement was fully executed. We believe the testimony offered by defendants was sufficient to support the finding of the trial court that the written agreement was actually modified by an oral agreement. Where such evidence appears this court is bound by the finding of fact made by the trial court. Defendants' evidence was to the effect that the original agreement of exchange and the deeds were signed and exchanged by the parties on March 4th; that thereafter plaintiffs applied for a loan of \$7,000 in order to carry out the terms of the agreement, but were unable to secure the loan; that on March 8th the parties agreed to exchange equity for equity, and on that day there was inserted by the plaintiff Marjorie M. Tucker in the deed from defendants to plaintiffs, after the words "free and clear of all incumbrances," the following language: "Except mortgage \$4,260 of record and trust deed for \$1,500 of record; except the last half of 1921-22 taxes." Mrs. Yale, the escrow officer, testified that the parties signed the escrow on March 8th and left in her possession a deed from defendants to plaintiffs. The escrow data referred only

to this deed and contained the following word: "Mortgage assumed of record \$4,260." "By second mortgage to of record \$1,500." "Other payments prop. exch. \$8,240." "Total consideration \$14,000." "Amount assumed by buyer \$5,760." "Date of present incumbrances—Due." "Newton to defend suit against same, leave trust deed and assign interest in same to secure defense of suit." It will be seen from the most casual observation of the above provisions that they are totally inconsistent with the terms of the original agreement whereby the defendants Newton were required to convey their property free from all incumbrances. On the other hand, the terms of this escrow are all consistent with the testimony offered by defendants. Mrs. Yale further testified that the following document was handed to her by defendant J. W. Newton, in the presence of the plaintiffs, as a part of the instructions:

"Tuckers to assume \$4,260.00 at 8 per cent. and \$1,500.00 at 8 per cent. on 20 acres, Newton to assume \$2,500 at 8 per cent. and \$1,000, 8 per cent., on courts also furniture lease, Newtons to assume not to exceed \$750. All interest, taxes & insurance etc. to be prorated at March 4th, 1922. Newton to put up as security his equity of \$4,250 in a certain trust deed to guarantee to Tuckers that a suit to quiet title to the 20 acres will be defended & cleared of record.

"J. W. Newton. O. K. M.D.Y."

The above was also incompatible with the terms of the original agreement. The witness further testified that, pursuant to her suggestion, a \$1,000 bond was left in escrow by defendants to guarantee defending the title, in addition to the trust deed, which was not accompanied by the note. Mrs. Yale also testified that the parties made certain alterations in the original exchange agreement and left the altered copy in escrow on March 8th. These alterations provided for payment for the personal property by defendants Newton, and canceled a cash payment of \$2,000. While the subsequent transaction was very informal and in many respects not in accordance with the rules of good business practice in real estate matters, yet we find evidence sufficient to support the finding of the trial court that the parties entered into a new oral agreement subsequent to the written agreement of March 4th.

Appellants urge, and respondents concede, that the escrow data of March 8th did not constitute a contract. It was not the finding of the trial court that the escrow instructions constituted a contract, but the court did find that the parties entered into a new oral agreement on March 8th, and "that on the same day and in furtherance of the said oral agreement, plaintiffs and defendants signed certain escrow instructions, a copy of which is annexed to defendants' answer, marked Ex-

hibit A and made a part of the same, wherein and whereby it appears that the said property exchanged by the defendants to the plaintiffs is to be taken subject to the incumbrances of record."

[3-5] It is claimed by appellants that there is a fatal variance between the pleadings and the proof, for the reason that the defendants abandoned the theory of defense pleaded in their answer, namely, that the agreement sued upon was canceled and the exchange consummated pursuant to the signed agreement called "escrow data," without seeking leave to amend the answer to conform to the proof that the exchange was consummated by an executed oral agreement. Appellants are correct in their statement that the answer does not plead an executed oral agreement, but does merely plead that the escrow instructions constituted the subsequent agreement made and entered into by plaintiffs and defendants. However, the proof offered by defendants was upon the theory of an executed oral agreement between the parties. Appellants' brief contains this statement: "Counsel on both sides and the trial judge proceeded on the theory that all the surrounding facts should be brought out in evidence." Having proceeded on this theory at the trial, appellants cannot be heard to object for the first time on appeal. The rule is well established that where the parties have proceeded to trial upon a pleading, without objection to its sufficiency to raise a particular issue, and evidence has been received as to facts and the issue found upon, the party whose duty it was to object will not be heard in this court to say that the finding is not within the issue. *Rutz v. Obear*, 15 Cal. App. 435, 115 P. 67; *Illinois T. & S. Bank v. Pacific Ry. Co.*, 115 Cal. 297, 47 P. 60; *Yik Hon v. Spring Valley Water Works*, 65 Cal. 619, 4 P. 666. The plaintiffs cannot avail themselves here of an objection which they failed to make in the superior court, especially when it appears that the ground of objection could have been removed by amendment to the answer, if it had been made. *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 P. 594. Section 469 of the Code of Civil Procedure provides:

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just."

Had the appellants been misled they could have objected to evidence of the oral agreement, and the court then could have ordered the pleading to be amended upon such terms as might seem just. Appellants also object to a variance between the proof and the findings; but we find sufficient evidence to support the findings.

[6] Appellants also contend that the oral agreement was ineffective to alter the written contract, because not fully executed. In support of this argument appellants' only specification is that defendants agreed to assign a trust deed as security for the defense of the title suit, and that this was not done. This agreement was incidental or collateral to the oral agreement of exchange. As before stated, it was suggested by the escrow officer that the trust deed would have no value as security unless accompanied by the note; and, upon this suggestion being made, with the assent of plaintiffs, a bond of \$1,000 was filed by the defendants as guaranty of defense of the quiet-title suit. It further appears from the evidence that no defense to the action had been made for the reason that defendants had not been served with summons and complaint and no attempt had been made to prosecute the action. According to the evidence the parties entered into possession immediately after the oral agreement of March 8th. The delivery of the deed and the exchange had in all respects been fully executed. There has been no failure of defendants to perform an incidental agreement to defend the quiet-title suit, and failure to assign the trust deed under the circumstances of this case does not, in our opinion, point to the conclusion that the oral agreement of exchange was not fully executed.

[7] Appellants' contention that the subsequent agreement was void for lack of consideration is without merit. Abandonment of the original agreement except as to parties and descriptions of properties, and the substitution of new terms of exchange whereby each party receives property of value subject to existing incumbrances, constitute, in our belief, a valuable consideration.

Appellants finally object to the findings as a whole. We have examined the findings and the testimony offered by defendants in support thereof, and see no prejudicial error in the findings.

It is therefore ordered that the judgment be affirmed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 72

PETRICH v. FRANCIS et al. (Civ. 4338.)

District Court of Appeal, Second District. Division 2. California. May 12, 1927.

1. Exemptions ⇨122—Affidavit that money garnisheed was exempt from execution as earnings of seagoing fisherman held insufficient, as stating only legal conclusions (Code Civ. Proc. § 690, subd. 9).

Affidavit in language of Code Civ. Proc. § 690, subd. 9, that money garnisheed was exempt from execution because it constituted affiant's earnings as a seagoing fisherman, *held* insufficient, as stating only conclusions of law.

2. Exemptions ⇨148—One claiming benefit of exemption laws must show that he belongs to class mentioned therein.

One claiming benefit of exemption laws must bring himself within their spirit, or, in other words, show that he belongs to one of classes mentioned therein.

3. Exemptions ⇨148—Burden is on one claiming exemption to show right thereto.

Burden is on one claiming benefit of exemption laws to show that he is entitled to exemption.

4. Exemptions ⇨122—One claiming exemption must establish right by facts, not affidavit stating only legal conclusions.

One contending for exemption from execution must establish his rights by facts, and affidavit stating only conclusions of law is insufficient.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Paul Petrich, doing business under the firm name and style of the Coronado Fish Company, against Joe Francis and John Santich, in which plaintiff garnished money payable to defendant Santich. From an order releasing the garnishment, plaintiff appeals. Reversed.

Stickney & Stickney, of San Diego, for appellant.

WORKS, P. J. Plaintiff, to secure the payment of an anticipated judgment in his favor upon the claim upon which he brought suit, caused a garnishment to be served upon a corporation which had in its possession money payable to defendant Santich. The latter made claim that the money was exempt from execution and the trial court sustained his contention. Plaintiff appeals from the order made in that behalf.

[1] The order finds its sole support in an affidavit made by Santich, which showed only that he claimed the exemption because the money constituted "the earnings of affiant earned and acquired by him as a seagoing fisherman and while engaged in such occupation," and because "affiant is now, and at all times herein mentioned has been, a sea-

going fisherman." This language represents the entire attempt on the part of Santich to bring himself within the provisions of the statute to the effect that "the wages of all * * * seagoing fishermen," not exceeding a certain amount, which is greater than the amount specified by Santich in his affidavit, are exempt from execution. Code Civ. Proc. § 690, subd. 9.

[2-4] One who claims the benefit of exemption laws must bring himself within their spirit (25 C. J. 12), or, in other words, he "must show that he belongs to one of the classes mentioned" in them (*Swanz v. Clark*, 71 Mont. 385, 229 P. 1108). Again, the burden is upon him to show that he is entitled to the exemption. *Murphy v. Harris*, 77 Cal. 194, 19 P. 377. These rules necessarily mean that one who contends for an exemption must establish his right by evidence, by facts. The affidavit of Santich merely follows the language of the statute, and states nothing but conclusions of law. Such an affidavit proves nothing. 1 Cal. Jur. 669, 670. Order reversed.

We concur: THOMPSON, J.; MURPHEY, Justice pro tem.

82 Cal. App. 269

CRAMER et al. v. JENKINS. (Civ. 3017.)

District Court of Appeal, Third District, California. May 11, 1927.

1. Appeal and error ⇨1071(3)—Whether evidence sustained finding that sheep trespassed on specific day held immaterial, where no damages were awarded therefor.

In action for trespass of defendant's sheep on plaintiff's land, whether evidence sustained trial court's finding that defendant herded and grazed sheep on plaintiff's land on specific day *held* immaterial, where no damages were awarded for trespass on that day.

2. Animals ⇨100(4)—Finding that trespassing sheep were herded, not running at large on range, held sustained by evidence.

In action for damages for trespass of sheep, evidence *held* to sustain trial court's finding that the sheep were being herded and were not animals running at large on the range.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 255 P. 877.

Barry & Barry, of Susanville, for appellant.

R. M. Hardy, of Susanville, for respondents.

PER CURIAM. [1] The appellant on petition for rehearing herein calls attention to the fact that there is no testimony support-

ing the finding of the trial court that the sheep committing the trespass alleged to have taken place on the 7th day of May, 1924, were the sheep belonging to the defendant, and, also, that there is no testimony that the defendant knew of such trespass.

The trial court found that on or about the 7th day of May, 1924, the defendant, Reese T. Jenkins, by his agents, representatives, and servants, herded and grazed about 250 ewes and lambs upon the premises (described as belonging to the plaintiff) without first having obtained consent of such owner or of the tenants in possession.

The appellant's opening brief contains the following statement:

"There is absolutely no testimony to support the second finding that the defendant herded and grazed sheep upon plaintiff's lands, but as the court finds that there was no damage for this so-called trespassing, there is no use of discussing that point."

The second finding above referred to is the finding of the court which we have just set forth. There being no further argument made by counsel for appellant upon said finding, we assumed that the finding was probably correct, but whether correct or incorrect, as no damages were awarded for that purpose, it became wholly immaterial. It is now argued, however, that because in the opinion heretofore filed in this cause by this court, we referred to the trespass committed on the 9th day of May, 1924, as having been committed by the same sheep, a rehearing should be granted, because it does not sufficiently appear that the same sheep committed the trespass, or that the sheep that committed the trespass on May 7th actually belonged to the defendant. While we referred to the trespass committed by the sheep on May 7th as being of the same band of sheep committing the trespass on May 9, 1924, for which damages were awarded, we attach absolutely no legal significance as to whether it was or was not the same band of sheep. We might state that a re-examination of the testimony would indicate that the findings of the court that the sheep committing the trespass on May 7, 1924, belonged to the defendant has but little to support it, and for the purposes of what we are about to state, it may be conceded that the finding is not supported by the testimony. It appears that the plaintiffs based their allegations of ownership and their conclusions as to the ownership of the band of sheep committing the trespass on May 7th upon what a herder employed by the defendant had told them. This evidence was not admitted into the record.

[2] The real question which the court was deciding was whether the sheep committing the trespass on May 9th were sheep running at large upon the range or whether they were sheep being herded. This question is so

completely answered by one of the defendant's witnesses, who was one of the persons in charge of the sheep, that we will set it forth verbatim. It may be further stated that this testimony shows that the herder had knowledge of a trespass by the same sheep upon the same premises on two different occasions, when the damages were inflicted by the band of sheep. The testimony of the witness Urtsan, to whom we have referred, called by the defendant, testified as follows:

"By Mr. Barry: Q. What is your name? A. Steve Urtsan.

"Q. You know Reese Jenkins? A. Yes.

"Q. You worked for him last year? A. Yes.

"Q. You know where the Cramer's place is out to Horse Lake? A. Yes, sir.

"Q. Were you working out there in 1924? A. Yes, sir.

"Q. What were you doing? A. Tending camp for Jenkins.

"Q. And did he have sheep out there? A. Yes, sir.

"Q. Were you out there when he sheared? A. Yes, sir.

"Q. Do you remember a bunch of those sheep getting in the Cramer field? A. Yes, sir.

"Q. What time was that? A. I don't exactly know what day it was.

"Q. You know what month? A. It was in May.

"Q. Who was with the sheep when they got in the field? A. The herder and me.

"Q. And how many did you have? A. We had little over 2,000; 1,100 ewes and 1,100 lambs.

"Q. You had about 2,000 ewes and lambs? A. Yes.

"Q. Did some of them get away? A. Yes.

"Q. How many? A. I don't know how many altogether.

"Q. About how many? A. I seen a bunch go through into the field—was about couple of hundred the way it looks to me.

"Q. What did you do when they got into the field? A. Went after them.

"Q. Were you with the sheep when they got in the field? A. Yes, sir.

"Q. Did anybody come in from the Cramer ranch? A. Two men horseback.

"Q. Who were they. A. I don't know. I wasn't close enough.

"Q. What did you do with the sheep? A. Try to bring them back to the bunch, but before I got there two fellows come on horseback and get there and take bunch and drive them home.

"Q. How far were they from the fence when you first saw them? A. Inside you mean?

"Q. Yes. A. Two or three hundred yards.

"Q. What was you going to do with them? A. Take them back to the bunch.

"Q. Get them out of the field? A. Yes.

"Q. These fellows took them and drove them over to the house? A. Yes, sir.

"Q. Were the sheep trying to graze or were they after water? A. They was trying for the water. They didn't look for feed at that time.

"Q. And if they had let you could you have got them out and got them to water? A. I don't understand.

"Q. If they hadn't taken them to the house what would you have done with them? A.

Bring them back right away. We had water little ways from there.

"Q. You would have taken them over to the water? A. Yes.

"Q. Did any more sheep get away that day? A. Not out of that bunch.

"Q. Later, did any sheep get away and go in the field? A. Not later in that bunch.

"Q. Did you see anybody from the Cramer place any more that day? A. No, sir.

"Q. Was that the only time any of the Jenkins sheep went under the fence? A. Before that bunch? The first bunch they took in the corral, I never saw that bunch.

"Q. They had taken a bunch that morning? A. Yes.

"Q. About what time of day was that when you were there? A. It was from 12 o'clock to half past 12, something like that.

"Q. You were with the sheep, you and the herder? A. Yes, they had that bunch get away; the herder come to get his dinner."

This testimony amply justifies the finding of the trial court that the sheep were being herded and did not come within the classification of animals running at large upon the range. In this we think the trial court did not err.

The petition for rehearing is denied.

83 Cal. App. 23

POZEN v. PAVLOVSKI et al. (Civ. 4725.)

District Court of Appeal, Second District, Division One, California. May 11, 1927.

Appeal and error $\Rightarrow$ 1010(1)—**Proper judgment on fact findings, supported by evidence, will be affirmed, though evidence warrants findings for appellants.**

Proper judgment on fact findings, supported by sufficient evidence, will be affirmed, though evidence authorizes findings favorable to appellants.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Frank Pozen against W. A. Pavlovski and another, doing business under the fictitious name of the Pavlovski-Stone Company. Judgment for plaintiff, and defendants appeal. Affirmed.

I. R. Rubin and M. G. C. Harris, both of Los Angeles, for appellants.

Shapiro & Shapiro, of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a money judgment rendered in favor of plaintiff and against the defendants for the sum of \$836.75 and costs. As determined by the trial court, the facts of the case in substance are that plaintiff paid to defendants the sum of \$836.75 on the promise made to plaintiff by defendants that they would "furnish tickets

to cover three fares, third class, prepaids, from the city of Odessa, Russia, to the city of Los Angeles, Cal., for the relatives of said plaintiff herein"; that defendants would cause such immigration of the said persons within three months from the date of the receipt of said money, or, in the event that defendants were unable to bring about said immigration, defendants would return to plaintiff the said sum of \$836.75; that, notwithstanding the fact that a period of more than three months elapsed after the payment of the money to defendants, the said relatives of plaintiff were not furnished with said transportation tickets, and defendants failed and refused to return to plaintiff the said sum of \$836.75, or any part thereof.

The appeal comes to this court by the so-called "alternative method." Although the brief filed herein contains no specification of errors, nor any headings or titles by which may be definitely ascertained the foundational point upon which appellants rely for a reversal of the judgment, appellants' criticism appears to be directed to the objection that the facts adduced at the hearing of the action were insufficient to sustain the findings of fact made by the trial court; that the findings of fact should have recited an entirely different state of facts, and with such facts as a basis that the conclusions thereon and the judgment by the court should have been in favor of defendants.

Notwithstanding the failure of appellants to conform to the rule which requires that the appellant "must present each point separately, under an appropriate subheading, showing the nature of the question to be presented," this court, disregarding the possible penalty to appellants therefor of dismissing their appeal, has examined the transcript of the proceedings on the trial of the action, from which it clearly appears that the evidence was sufficient to justify the trial court in its several conclusions as to the facts in the case. Indeed, the brief filed by appellants contains many admissions and restatements of the evidence, which in and of itself would insure a foundation for the very findings of fact to which they apparently take exception. It would serve no useful purpose to set forth the evidence. Suffice it to say that, while it may have been open to a determination of facts favoring the theory and contention advanced by the defendants, it was ample in substance to fully satisfy the requirements of the law regarding the findings which were made by the trial court.

No question is raised by appellants as to the propriety of the judgment on the facts as found. It follows that the judgment should be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 796

I. ARGULA, Plaintiff and Respondent, v. W. A. PAVLOVSKI and Glen G. Stone, Doing Business under the Fictitious Name of Pavlovski-Stone Company, Defendants and Appellants. (Civ. 4726.)

District Court of Appeal, Second District, Division One, California. May 11, 1927.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

I. R. Rubin and M. G. C. Harris, both of Los Angeles, for appellants.

Shapiro & Shapiro, of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a money judgment rendered in favor of plaintiff and against the defendants for the sum of \$366. The facts in the case, as determined by the trial court, are nearly an exact duplicate of those found in the companion case of *Pozen v. Pavlovski*, 256 P. 446, this day determined by this court, to which reference may be had.

With reference to the briefs filed by appellants, an identical situation is presented as is presented in the *Pozen* Case. The two cases were tried together, and the evidence in the one case is similar to that adduced in the other. In other words, it may be said that in no respect, whether in the pleadings, the evidence, the findings, judgment of the court, the appeal, or the briefs, does one of the cases present any substantial difference from the other.

Relying on the authority of the said case of *Pozen v. Pavlovski*, it is ordered that the judgment in the instant case be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

82 Cal. App. 610

TREAT et ux. v. LOS ANGELES GAS & ELECTRIC CORPORATION.
(Civ. 4591.)

District Court of Appeal, Second District, Division 2, California. April 29, 1927.

1. Statutes $\S$ 109—Under Constitution, Legislature may insert in single act all legislation germane to the general subject expressed by title (Const. art. 4, $\S$ 24, art. 1, $\S$ 22).

Under Const. art. 4, $\S$ 24, and article 1, $\S$ 22, the Legislature may insert in a single act all legislation germane to the general subject as expressed in its title and within the field of legislation suggested by that title.

2. Statutes $\S$ 114(2)—Provisions for nondependents held within scope of Workmen's Compensation Act as indicated in title stating act is "complete plan of workmen's compensation" (Workmen's Compensation Act).

Workmen's Compensation Act (St. 1917, p. 831) covers the entire field and substitutes its plan for all prior rights and all actions of every person against an employer based on an employee's death, and hence provisions for compensation to nondependents after employee's

death by injury are within the scope of the act as expressed in its title, which states that the act provides for "a complete plan of workmen's compensation by creating a liability on the immediate employers."

3. Death $\S$ 11—Right of action for death is matter of statutory provision.

The right of action for wrongful death is unqualifiedly a matter of statutory provision and completely within the jurisdiction of the Legislature.

4. Master and servant $\S$ 347—That Workmen's Compensation Act is police regulation does not prevent incorporation therein of provision within legislative authority, independently of police power (Workmen's Compensation Act).

The mere fact that the Workmen's Compensation Act (St. 1917, p. 831) is a police regulation does not nullify the authority of the Legislature to incorporate therein a provision indisputably within the right of that body to enact independently of the exercise of the police power.

5. Master and servant $\S$ 355—Provision of Workmen's Compensation Act that remedy is exclusive held applicable to nondependents bringing action for son's death (Workmen's Compensation Act, $\S$ 6[b], and $\S$ 9[c], [3], as amended by St. 1919, pp. 912, 913, $\S\S$ 2, 4).

The Workmen's Compensation Act, $\S$ 6(b), as amended by St. 1919, p. 912, $\S$ 2, stating that "this shall be the exclusive remedy" is applicable to a case wherein nondependents bring action for the death of their son while employed by defendant, since, where the conditions of compensation exist, section 9(c), (3), as amended by St. 1919, p. 913, $\S$ 4, requires payment of benefits for employee's death.

6. Master and servant $\S$ 351—Workmen's compensation "in lieu of any other liability," means any other liability whatsoever to any one, dependent or nondependent (Workmen's Compensation Act, $\S$ 6[a], as amended by St. 1919, p. 912, $\S$ 2).

Workmen's Compensation Act, $\S$ 6(a), as amended by St. 1919, p. 912, $\S$ 2, stating that liability for the compensation provided shall be "in lieu of any other liability" whatsoever to any person, means any liability on the part of the employer to any person whatsoever by reason of the injury to the employee, whether such person be a dependent or nondependent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Lieu of.]

7. Master and servant $\S$ 351—Workmen's Compensation Act provision for benefits to surviving nondependents held not to include right of action under another statute (Workmen's Compensation Act, $\S$ 9[c], [3] and [d], as amended by St. 1919, p. 913, $\S$ 4; Code Civ. Proc. $\S$ 376).

Workmen's Compensation Act, $\S$ 9(c), (3), as amended by St. 1919, p. 913, $\S$ 4, providing that death benefit to deceased employee leaving no dependents shall consist of burial expense and "other benefit" provided by law, held not

to include right of action authorized by Code Civ. Proc. § 376, in view of section 9(d).

8. Master and servant **386(1)**—Phrase "other benefit" in Workmen's Compensation Act death benefit section held to mean only other benefit as might be provided (Workmen's Compensation Act, § 9(c), [3] and [d], as amended by St. 1919, p. 913, § 4).

Any benefit to come within the purview of the phrase "other benefit" mentioned in Workmen's Compensation Act, § 9(c) (3), as amended by St. 1919, p. 913, § 4, providing that, if deceased employee leaves no dependents, the death benefit shall consist of burial expenses, and such other benefit as may be provided by law must be of such a character as to be administered under the scheme of the act and under the direction of the commission, in view of section 9(d).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

9. Master and servant **371**—"Conditions of compensation" held not contingent upon survival of dependents in case of employee's death (Workmen's Compensation Act).

Conditions of compensation in the Workmen's Compensation Act (St. 1917, p. 831) are: That an injury has occurred to an employee at a time when he and his employer were subject to the compensation provisions; that he was at the time performing a service incident to his employment, within the scope thereof; that the injury was proximately caused by the employment, not due to intoxication, or self-inflicted. These facts existing, whether person making claim based on injury to employee is dependent or nondependent is immaterial.

10. Constitutional law **70(3)**—Appellate court is bound by legislative expression of intent in interpreting Workmen's Compensation Act, and cannot decide according to its own ideas of public policy (Workmen's Compensation Act).

In interpreting the Workmen's Compensation Act (St. 1917, p. 831), appellate court is bound by the intent as expressed by the Legislature, and cannot interpret the law to effect a result calculated to put its own ideas of public welfare into effect.

11. Master and servant **355**—Complaint under death statute, alleging plaintiffs were non-dependent parents of minor injured while employed by defendant, held demurrable (Code Civ. Proc. § 376).

Demurrer to complaint, attempting to allege action for wrongful death, under Code Civ. Proc. § 376, which alleged that plaintiffs were parents of a minor who was employed by the defendant corporation and while so employed received injuries resulting in his death, and further stating that plaintiffs were not dependent on the earnings of deceased, held properly sustained.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Harold L. Treat and wife against the Los Angeles Gas & Electric Corporation.

Judgment for defendant, and plaintiffs appeal. Affirmed.

John C. Miles and Bertrand J. Wellman, both of Los Angeles, for appellants.

Paul Overton, S. W. Guthrie, Samuel Poorman, Jr., and Douglas Van Dyke, all of Los Angeles, for respondent.

CRAIG, Acting P. J. This action is one in which the appellants alleged that they were the parents of a minor, 18 years of age, who was employed by the defendant corporation and while so employed received injuries which resulted in his death. It is expressly stated that "plaintiffs were not at the time dependent either in part or in whole upon the earnings of said deceased for their support." A demurrer to the complaint was interposed, which was sustained, and appeal is taken from the judgment in favor of the defendant thereafter rendered upon such ruling.

The principal point made by the appellants is that only employees and their dependents are within the scope of the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831), and that the plaintiffs herein are therefore entitled to sue and recover under section 376 of the Code of Civil Procedure. Several reasons are urged in support of this position, and it is also seriously argued that any law which would compel employers without fault to pay benefits to nondependents would be unconstitutional, as beyond the police power; so, also, that such provisions of the Workmen's Compensation Act which purport to take away the right of action for wrongful death of a minor employee as heretofore created to nondependent parents by section 376 of the Code of Civil Procedure are unconstitutional.

[1] It is said that provisions in the Workmen's Compensation Act dealing with nondependents are not within the scope of the act as indicated by its title, and are void under section 24, art. 4, and section 22, art. 1, of the Constitution of California. Under these sections the Legislature may insert in a single act all legislation germane to the general subject as expressed in its title and within the field of legislation suggested by that title. *Hunt v. Manning*, 24 Cal. App. 44, 140 P. 39; *People v. Jordan*, 172 Cal. 391, 156 P. 451.

In *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390, after calling attention to the fact that at common law the right of action of the injured person and that of representatives for a wrongful act causing death were entirely distinct, our Supreme Court states that this new scheme provided by the Workmen's Compensation Act "undertakes to supersede the common law altogether, and to create a different standard of rights and obligations, covering the entire field of injury to workmen in the course of their employment. * * *

We think the language of the constitutional amendment was not inapt to describe a scheme of liability which should include the entire field embraced within the prior laws.

* * * Compensation to employees for injuries incurred by them may fairly be said to mean not only a money payment to the employee himself, but provision or indemnification for the various elements of loss which may be the direct result of his injury."

[2] The purposes of the act in question as set forth in its title, comprehensively stated, are "to promote the comfort, health, safety and general welfare of the people of this state as affected by injury causing the disability or death of employees in the course of their employment. * * *" The major objects which this involves, as the title indicates, are provision "for a complete plan of workmen's compensation by creating a liability on the part of the immediate employers" (in other words, to provide all liability of the employers from the aforementioned causes), and "to compensate employees and their dependents for such disability or death irrespective of the fault of any party."

It is clear that to accomplish this purpose the scheme was intended to cover the entire field and substitute the plan here enacted for all prior rights and all actions of any and every person as against the employer based upon the fact of the death of the employee. Among the theretofore existing claims required to be taken into account, those of nondependents of the employee were relatively of minor importance. Such rights, however, are surely "germane to the general subject" as expressed in the portions of the title above quoted, and within the "field of legislation therein expressed." If, in return for added liability upon the part of the employer, such as liability to make compensation even where the injury was not in any way attributable to fault upon his part, some adjustment was to be made by way of relieving him of former burdens, in the whole realm involved, what better place to begin than by eliminating the cause of action of persons in no way dependent upon the deceased employee for support? Legislation disposing of such claims is undoubtedly germane to the topic of the liability of the employer through the death of the employee. Indeed, the statute would seem to be inadequate as a "complete plan of workmen's compensation," as the object is in the title avowed to be, without some provision in reference to the claims theretofore existing of nondependents.

[3, 4] Both of the contentions advanced by appellant, that the right to compensation of nondependent heirs is a property right, and may not be abrogated by statute, and that (upon the assumption that such right of nondependents is not the subject of regulation under the police power) to deal with it under the Workmen's Compensation Act would be

unconstitutional, are disposed of by the mere recognition of the fact that the right of action for wrongful death is unqualifiedly a matter of statutory provision and completely within the jurisdiction of the Legislature.

It follows that the existence of such a right may be abrogated in whole or in part by legislative enactment. If this be so, the mere fact that the Workmen's Compensation Act is a police regulation does not militate against the authority of the Legislature to incorporate therein a provision indisputably within the right of that body to enact independently of the exercise of the police power. We are cited to no authority, and know of none, upholding the proposition that in the exercise of the police power the Legislature must confine itself to acts deriving authority from that source alone.

[5, 6] Appellants assert that the act gives nondependents no compensation and that hence the provision of section 6, par. (b) (as amended by St. 1919, p. 912, § 2), that "this act shall be the exclusive remedy," has no reference to them. The assumption that none but dependents are entitled to benefits is erroneous, for, where the conditions of compensation exist, section 9 (c), (3) (as amended by St. 1919, p. 913, § 4), requires the payment of benefits by the employer upon the death of the employee. It is clear that here we have a provision by which some nondependent persons shall receive a benefit which the employer shall pay. It is declared by section 6 (b) that, where the conditions of compensation exist pursuant to the provisions of this act, the right to recover compensation under it shall be the exclusive remedy against the employer, and that section 9 (c) (3) has reference to cases where the conditions of compensation exist cannot be disputed. Also section 6 (a) states that liability for the compensation provided by the act shall be in lieu "of any other liability whatsoever to any person." We think this declaration of the Legislature is not to be regarded in the narrow sense argued by appellants as excluding other liability than to the employee and his dependents alone, but in the broader view of the exclusion of liability on the part of the employer to any person whatsoever by reason of the injury accruing to the employee whether such person be a dependent or nondependent.

Appellants call attention to section 9 (c) (3), which reads as follows:

"If No Dependents. If the deceased employee leaves no person dependent upon him for support, the death benefit shall consist of the reasonable expense of his burial, not exceeding one hundred dollars and such other benefit as may be provided by law."

[7, 8] It is insisted that the words "and such other benefit as may be provided by law" include the right of action authorized by section 376 of the Code of Civil Procedure. Considering the context as well as the language

in question, we cannot think that an action at law was intended to be classed as a benefit as that word is used in the act. That compensation includes benefits also mentioned therein is clear, for section 9 states that where liability for compensation under this act exists the same shall be paid by the employer and be "as provided in the following schedule." Included within this schedule are the death benefits. Whatever the Legislature may have had in mind, it is certain that any benefit to come within the purview of the phrase "other benefit" mentioned in section 9 (c) (3) must be one of such a character as to be dealt with and administered under the scheme of the Workmen's Compensation, Insurance and Safety Act, and under the direction of the commission, for in the section which follows that last referred to, to wit, 9 (d), it is said that payment of compensation in accordance with the order and direction of the commission shall discharge the employer from all claims therefor. There is nothing in this language to indicate that the "other benefit" referred to in section 9 (c) (3) is excepted from the provision of section 9 (d). This consideration alone is enough to demonstrate that a suit for damages in a court could not have been contemplated. It seems obvious that the benefits intended were others of the same character as those referred to in section 9 (c) (1) (2) and the first part of 3, or others which might be provided by subsequent amendment of this act or by other acts having to do with the same subject.

[9] Appellants assert that where no dependents survive the employee the conditions of compensation do not exist, and hence that the provisions of the act have no application to the rights of such nondependents to maintain any action to which they would have recourse without regard to the Workmen's Compensation Act. This idea results from a mistaken notion of the meaning of the term "conditions of compensation." The conditions referred to are: That an injury has occurred to some one; that the person injured was an employee; that at the time of the injury both he and the employer were subject to the compensation provisions of the act; that at that time the employee was performing a service growing out of and incidental to his employment; that he was acting within the scope thereof; and that the injury was proximately caused by the employment, not due to the employee's intoxication, or intentionally self-inflicted. If these facts exist, the conditions of compensation are present, and the identity of the person who may attempt to make a claim based upon the injury to the employee, or his relation to the latter, cannot in any way affect the application of the provisions of the act, or remove the case from that class where the "conditions of compensation" exist.

[10] Concerning that portion of appellants'

argument which appears to be addressed to considerations of public policy, in its advocacy of a construction upon the various provisions of the act which are involved in this discussion, which they aver would better subserve the purpose of making it a "safety law" as well as a compensation act, we can only say that, where the Legislature has expressed itself unequivocally, courts cannot give weight to their ideas of the wisdom of a law to effectuate a result calculated to subserve the public welfare. Such considerations are for the Legislature and not for the judicial department of the government. By the terms of this act it has been provided that where an employee is injured "by reason of the serious and willful misconduct of the employer * * * the amount of compensation otherwise recoverable from injury or death * * * shall be increased one-half." Also the employer who violates any safety provision of the act is guilty of a misdemeanor. It is apparent that by these provisions the Legislature intended to remove the evil of serious and willful misconduct of employees, and to insure compliance with the safety provisions which they had enacted.

[11] We think the demurrer to the complaint was properly sustained on the ground that it failed to state a cause of action, and the judgment is affirmed.

We concur: THOMPSON, J.; JOHNSON, Justice pro tem.

83 Cal. App. 55

PEOPLE v. RICE. (Cr. 1473.)

District Court of Appeal, Second District, Division 2, California. May 12, 1927.

1. Criminal law ☞625—Court order is unnecessary to recall defendant from insane hospital for trial after medical superintendent declared him sane (Pen. Code, §§ 1367-1370, 1372).

Where defendant was taken to insane hospital pending trial, order of court is unnecessary, after he has been declared sane by hospital medical superintendent, to bring defendant back for trial, in view of Pen. Code, §§ 1367-1370, 1372.

2. Criminal law ☞1166½(1)—Reading order directing that defendant be brought back from insane hospital for trial, though error, held harmless.

In trial of defendant, who had been taken to insane hospital but subsequently declared sane, reading order directing that he be brought back from hospital for trial, though error, held harmless, where no request was made at trial for submission of the then mental status of defendant.

3. Criminal law §625—Trial court has jurisdiction to try defendant after release from insane hospital without judicial determination of mental status (Pen. Code, § 288).

Trial court had jurisdiction to try defendant on charge of sex perversion, under Pen. Code, § 288, after his release from insane hospital, without determination of present mental status by judicial inquiry.

4. Criminal law §625—Question of defendant's mental status at time of trial is largely within trial court's discretion.

Question of mental status of defendant at time of trial is one submitted largely to discretion of trial court.

5. Criminal law §1166(1)—Irregularities in procedure leading up to bringing of defendant from insane hospital for trial held immaterial, in absence of request for submission of defendant's present mental status.

In absence of request to submit question of the then mental status of defendant to jury in trial after defendant's release from insane hospital, any irregularities in procedure leading up to bringing of defendant from hospital before court were immaterial and of no consequence.

Appeal from Superior Court, San Diego County; Franklin J. Cole, Judge.

George W. Rice was convicted of lewd and lascivious acts on the body of a child, in violation of Penal Code, § 288, and he appeals. Affirmed.

J. E. O'Keefe, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

MURPHEY, Justice pro tem. On the 20th day of January, 1926, appellant, Rice, was charged by an information filed by the district attorney of San Diego county with the commission of lewd and lascivious acts upon the body of a child. Before the trial of the appellant a doubt arose in the mind of the court as to his sanity, and the question was submitted to a jury, which found the appellant insane. The defendant was then committed to the state hospital for the insane at Napa, Cal. Subsequently and on the 27th day of August, 1926, an order was made by the superior court directing the return of the defendant and appellant from the Napa state hospital for the insane. Pursuant to said order appellant was returned and tried in said court with the offense charged in the information aforesaid. This appeal is prosecuted by the appellant from a judgment of conviction and from an order denying his motion for a new trial.

The appellant's main contention in this trial is that the procedure contemplated by sections 1367-1370 of the Penal Code of this state was not complied with in returning the defendant from the state hospital at Napa

to the superior court in San Diego for trial. Section 1372 of the Penal Code provides that:

"Defendant Detained in Hospital until He Becomes Sane.—If the defendant is received into the state hospital he must be detained there until he becomes sane. When he becomes sane, the superintendent must certify that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the state hospital, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged."

[1] There is nothing in the record in this case to show upon what information the court acted in making the order directing the sheriff to return the appellant from the state hospital at Napa. Presumably, the sheriff or the district attorney received information as to defendant's sanity from the superintendent of the state hospital and submitted it to the court. It is our opinion that under the law the order of the court was unnecessary. No certificate or other writing is to be found in the record indicating that the superintendent of the state hospital had conveyed to either the sheriff or the district attorney his judgment and conclusion as to the mental status of the defendant. It is suggested in the record that letters were received from the superintendent conveying this information, although such letter or letters were not introduced at the time of the trial. The recitals in the order made by the judge indicate that he had been informed that the superintendent had declared the appellant sane, and presumably this information came through the regular channels. In any event, in response to the order made by the judge the defendant was brought before the court for trial and the respective parties announced themselves ready to proceed with the trial. No objection or suggestion that the defendant at that time was insane was made to the court. The defendant was permitted by the court to offer a further defense to the effect that at the time of the alleged commission of the act complained of in the information the defendant was insane, and it was announced by counsel for defendant at the opening of the trial that such would be the defense relied upon by the defendant. At no time during the course of the trial did the defendant object to proceeding therewith upon the ground that at the time of the trial the defendant was insane, but all objections were directed to the fact that the proceedings leading up to and resulting in removing the defendant from the state hospital to the county of San Diego for trial were irregular and not warranted by law.

[2] During the course of the trial and as a part of the record in the case the order made by the court directing that the defend-

ant be brought before the court for trial was read in the presence of the jury and is as follows:

"Order Directing Return of Defendant From Napa State Hospital for the Insane.—The defendant above named, George W. Rice, having heretofore been duly and regularly arraigned before the above-entitled court upon an information charging and accusing the said defendant with the commission of a felony, to wit, sex perversion, and upon the arraignment, so as aforesaid, it having been made to appear to the above-entitled court that a doubt had arisen in the mind of the court as to the sanity of the above named defendant, George W. Rice, the court, on the 25th day of May, 1926, made an order in the above-entitled action directing that the question as to the sanity of the said defendant be submitted to a jury and suspending further proceedings upon the trial until the question of said defendant's sanity should be determined by the verdict of the jury, and on the date last aforesaid a jury having been called by the court from the venire duly and regularly in attendance upon said court, and the said issue of sanity being submitted to the said jury, and evidence, both oral and documentary, having been introduced on behalf of said defendant and on behalf of said plaintiff, the people of the state of California and the cause having been submitted to the jury for its consideration and decision, and said jury having thereafter found, rendered and returned a verdict finding the said defendant then and there insane, and an order having thereafter, to wit, on the 26th day of May, 1926, been made by the above-entitled court ordering and directing that the trial of the said defendant upon such alleged offense be and the same was thereby suspended until said defendant became sane, and further ordering and directing that said defendant, George W. Rice, be committed to and confined in the Napa state hospital for the insane at Napa, Cal.; and further ordering and directing that the sheriff of the county of San Diego take, convey and deliver said defendant, George W. Rice, to the superintendent of said state hospital for the insane at Napa, Cal., to be held and confined therein as an insane person; and it appearing that in pursuance of the order of the court so as aforesaid made, the sheriff of the county of San Diego, state of California, thereafter did take, convey and deliver said defendant, George W. Rice, into the custody of the said superintendent of said state hospital for the insane at Napa, Cal., and that the said George W. Rice, is now confined in said state hospital at Napa, Cal.; and it further appearing to the court that the said George W. Rice was admitted to said hospital on the 2d day of June, 1926, and that thereafter on or about the 11th day of August, 1926, the said defendant, George W. Rice, was, by the medical superintendent of said state hospital for the insane at Napa, Cal., found to be and declared to be restored to reason and sanity; and it further appearing that the said George W. Rice is now sane; and the court having in such aforesaid order ordered and directed that the said George W. Rice, upon his becoming sane, be redelivered to the sheriff of the county of San Diego, state of California, to be by him thereupon brought before the above-entitled court for further order and disposition

herein—it is now, therefore, ordered, adjudged, and decreed that the said sheriff of the county of San Diego, state of California, proceed with all convenient dispatch to the said state hospital for the insane at Napa, Cal., and demand, take, and receive into his custody the said George W. Rice, and bring him, the said George W. Rice, before this court for further order herein. And it is further ordered and directed that the said superintendent of the said state hospital for the insane at Napa, Cal., upon receipt of a certified copy of this order, deliver up into the custody of the sheriff of the county of San Diego, the said defendant herein, George W. Rice, to be by the said sheriff thereupon brought before this court for further order herein. Done in open court, this 27th day of August, 1926. C. N. Andrews, Judge of said Superior Court."

The defendant objected to the reading of this order in the presence of the jury, contending that it was hearsay and not admissible in evidence. At no time was there any suggestion that the order was read as evidence in the case, but simply as a record in the proceedings. There was no issue properly before the trial court as to the then mental condition of the defendant except in so far possibly as it might be a circumstance to be considered by the jury in determining the real issue in the case as to the mental responsibility of the defendant at the time of the commission of the offense charged in the information. In our opinion this order was entirely unnecessary and was improperly read in the presence of the jury, but the error was not of such consequence in our judgment as to warrant a retrial of the case, and this is particularly true in view of the fact that at no time during the trial did the defendant or anyone else ask that the then mental status of the defendant be submitted to a jury.

[3] The contention of the defendant that the court was without jurisdiction to retry the case, until the question of the present mental status of the defendant was determined by some sort of a judicial inquiry, is without merit and was directly determined against the defendant in the case of *People v. Farrell*, 31 Cal. 576. There the court stated that it was the contention of the defendant that it was error "for the court to proceed to the trial of the case without having first instituted some sort of judicial inquiry into the present sanity of the defendant, which would have resulted in a formal reversal or vacation of the previous judgment of the court that he was insane; or, in other words, that the verdict and judgment of the previous term to the effect that the defendant was then insane operated as a bar to any further proceedings until formally vacated upon a further proceeding of some sort confined to the consideration of the same question. If such was the law, the proper time to make the question was before the trial was commenced. But such is not the law. The

statute requires no such proceeding." It may be said here that the statute in force at the time the decision in the case of *People v. Farrell*, supra, was decided was substantially the same as the present statute upon that subject. The court further proceeded:

"At the previous term, upon the finding of the jury that the defendant was insane, the court made an order committing him to the custody of the officers of the insane asylum, pursuant to the provisions of section 589. It is provided in the 591 section that when the defendant has become sane the person or persons to whose custody he may have been committed shall give the sheriff and district attorney of the proper county notice of the fact, and that the sheriff shall thereupon proceed, without delay, to take him from the custody of such persons and place him in the proper custody until he be brought to trial or judgment. Whether this course was pursued in this case the record fails to show, but the presumption is that it was. But whether it was or not is of no consequence, for in either event the result would be the same. When a defendant once found insane is called for trial a second time, if there is any doubt as to his sanity, and the people demand a trial, the court proceeds, as at first, and tries the question of sanity anew, and so on to the end, as often as occasion may require."

It is our conclusion that when the defendant was tried on the issue as to his then sanity that trial supplanted the trial on the felony charge, and the trial upon that charge was merely suspended; that at no time did the court lose jurisdiction to proceed with the trial upon the information when the defendant was brought before the court for trial through official channels.

We are satisfied from the entire record that the defendant was properly brought before the court for trial on the information, after having been committed to the state hospital, and that at all times the court had jurisdiction to proceed with the trial; that no error affecting the substantial rights of the defendant was committed during the trial of the case.

[4, 5] The question of the mental status of the defendant at the time of the trial is one submitted largely to the discretion of the trial court. In the case of *People v. Keyes*, 178 Cal. 794, at page 802, 175 P. 6, 9, the court says:

"The right to a jury trial in proceedings inaugurated under said section 1368 is addressed to the sound discretion of the judge before whom the cause is pending, and the showing must be sufficient to create a doubt in the mind of the judge as to the sanity of the defendant before he is required to submit the question to a jury."

In the instant case no application was made by any person to submit the question of the then mental status of the defendant to a jury for determination; in the absence of any such request and where no objection

was made at the opening of the trial to proceeding therewith by the defendant, any irregularities, if there were such, in the procedure leading up to the bringing of the defendant from the state hospital before the superior court for trial, were immaterial and of no consequence, and did not in any way affect his substantial rights.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

83 Cal. App. 144

CROSS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR IMPERIAL COUNTY. (Civ. 5611; L. A. 9958.)★

District Court of Appeal, Second District, Division 1. California. May 17, 1927.

Hearing Denied by Supreme Court July 15, 1927.

1. Justices of the peace $\S$ 166(2)—Stipulation to "set" case for trial held not to satisfy statute that appeal from justice court must be "brought" to trial within year (Code Civ. Proc. $\S$ 981a).

Stipulation that case might be "set" for trial held not to satisfy the requirement of Code Civ. Proc. $\S$ 981a, providing that an appeal from the justice court must be "brought" to trial within one year from the date of filing the appeal unless the time was extended by stipulation.

2. Justices of the peace $\S$ 166(2)—Plaintiff held not to waive rights to assert statutory limitation by signing stipulation, over year after appeal from justice court, to "set" case for trial (Code Civ. Proc. $\S$ 981a).

Where defendant appealing from a decision of the justice court failed to "bring" case to trial within one year, plaintiff held not to waive rights to assert limitation, under Code Civ. Proc. $\S$ 981a, by thereafter signing stipulation that the case might be "set" for trial.

3. Estoppel $\S$ 58—Waiver may be inferred only where party's conduct prejudices opponent's rights.

Waiver can result only from an intentional relinquishment of a known right and may be inferred only where the conduct of a party has prejudiced his opponent's rights because of belief that a waiver was intended.

Application for writ of mandate by Fred R. Cross, to be directed to the Superior Court of the State of California in and for the County of Imperial, M. W. Conkling, Judge, requiring the court to dismiss an appeal from the justices' court. Writ granted.

Jas. W. Glassford, of El Centro, for petitioner.

Harry W. Horton and M. W. Conkling, both of El Centro, for respondent.

HOUSER, J. [1] Briefly, the facts are that in an action brought in the justice court the plaintiff (petitioner herein) therein recovered

judgment. Thereupon an appeal from such judgment was taken by the defendant to the superior court. More than one year after such appeal had been perfected, the attorney for the plaintiff signed the following stipulation, "It is stipulated the above case may be set for trial." Thereafter, under the provisions of section 981a of the Code of Civil Procedure, the plaintiff moved the superior court to dismiss the appeal on the ground that it had not been brought to trial within one year from the date of the filing of such appeal. The motion was denied, whereupon the instant proceeding was instituted by the plaintiff for the purpose of obtaining an order from this court directing the said superior court to dismiss said appeal.

Petitioner contends that the stipulation by him that the action "may be set for trial" is not the equivalent of a stipulation that the cause might be *brought* to trial. A distinction between the two propositions is apparent. A situation such as might be presented by a stipulation that the cause might be *set* for trial might arise from a desire on the part of the moving party to avoid the trouble incident to giving notice of a motion to set the cause for trial. It might be more convenient and possibly involve the expenditure of less time and labor to secure such a stipulation than it would be to serve and file a notice of motion. In such circumstances, a stipulation that the cause might be *set* for trial would not necessarily include a stipulation that the cause might be *brought* to trial on the day on which it was set for hearing. In this connection, see *Boyd v. Southern Pacific R. R. Co.*, 185 Cal. 345, 197 P. 58, and *Hoopes v. Superior Court*, 71 Cal. App. 564, 235 P. 739.

The facts in the case of *Rio Vista Mining Co. v. Superior Court*, 187 Cal. 1, 200 P. 616, resemble those in the instant case in that, after the statutory period had run, the parties sent a telegram to the judge of the trial court by which the parties agreed on a date for the trial of the action. Certain correspondence between the parties also figured in the matter. It was held that such correspondence, followed by the signed telegram, constituted a stipulation in writing signed by the parties, agreeing to bring the case to trial at a date beyond the period prescribed by the statute.

In the case of *California L. & A. Co. v. Superior Court*, 70 Cal. App. 767, 234 P. 408, it is held that where the petitioner for the writ of mandate, before the expiration of the statutory period, had himself caused the case to be set for trial, he was "estopped to take advantage of the defect." The force of the ruling in that case, however, is offset by a contrary ruling on similar facts in the case of *Abbott v. Superior Court* (Cal. App.) 251 P. 221. See, also, *Swim v. Superior Court*, 193 Cal. 539, 226 P. 2. But in any event, the facts in either of those cases are unlike the facts in the instant case, in that in each of such cases the

act of the nonappealing party took place before the time limited by the statute for the trial of the action had expired, while in the case now under consideration the act of the nonappealing party occurred after the statutory period had run.

Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 219 P. 1006, is the most thoroughly considered case to which the attention of this court has been directed. The authorities are there reviewed, and the conclusion reached is that the terms of the statute will not permit of a waiver arising by implication or inference, and that nothing short of a written stipulation by which it must clearly appear that the benefit of the statutory provision was intentionally waived will have the effect of extending the time limited by the statute. Among other things, the court said:

"The provision that a written stipulation be entered into was intended to preclude all disputes, with their attendant charges and countercharges of overreaching and unethical conduct, by a requirement that clear and uncontrovertible evidence be presented to the court that the statutory time was deliberately intended to be extended by both parties."

[2, 3] As in the instant case the stipulation was not entered into until after the expiration of the time fixed by the statute, it becomes apparent that thereafter no conduct on the part of the plaintiff with reference to the case could prejudice the rights of the defendant in the premises. His statutory rights, so far as being able to bring the appeal to trial, were entirely ended, and no estoppel could be predicated on the assumption that the plaintiff had done something which defendant in reliance thereon had caused him to alter his position to his injury. Likewise, in the circumstances, the doctrine of waiver is equally unavailing to the defendant. The general rule is that a waiver can result only from an intentional relinquishment of a known right, and that it may be inferred only where the conduct of the party has resulted in a prejudice to the rights of his opponent caused by an honest belief that the waiver was intended. 25 Cal. Jur. 926, et seq.

As hereinbefore noted, the stipulation here under consideration was susceptible of two meanings—one that the action might be *set* for trial, and the other that the action might be *brought* to trial. To attach to the stipulation the broader meaning that the cause might be *brought* to trial would require a construction which would not even be founded on an inference arising from any conduct on the part of the plaintiff. Aside from the stipulation itself, so far as the record discloses, plaintiff had neither said nor done anything which would give rise to an honest belief in the defendant that plaintiff had intentionally relinquished his right to urge the provision of the statute in the enforcement of the benefits to which he was entitled. The one act of the

plaintiff was equivocal. There was no evidence of the essential element of a deliberate intention on his part to extend the time limited by the terms of the statute. It follows that the plaintiff was entitled to have the appeal dismissed.

The writ should issue as prayed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for hearing in this court is denied. In denying the same, however, we do not desire to be understood as approving the holding of the District Court of Appeal that there is a necessarily controlling distinction between a stipulation that a cause "may be set for trial" and a stipulation that a cause "may be brought to trial." The decision otherwise is amply sufficient to support the judgment.

83 Cal. App. 34

PEOPLE v. TOGNOLA. (Cr. 968.)

District Court of Appeal, Third District, California. May 11, 1927.

1. Robbery $\S$ 28—Verdict finding defendant guilty of robbery in first degree as charged in the information held not void for uncertainty.

Verdict, "We, the jury, find the defendant guilty of robbery in the first degree as charged in the information," held not void for uncertainty; language "as charged in the information" being surplusage, which may be disregarded.

2. Criminal law $\S$ 886—Surplusage in verdict should be disregarded where intention of jury is clear.

Where intention of jury is clear from verdict, it is sufficient to convict of crime charged or any crime necessarily included in information, and surplusage and informalities should be disregarded.

3. Criminal law $\S$ 893—Verdict must be construed in light of record to give effect to intention of jury.

Verdict must be construed in light of facts disclosed by record so as to give effect to manifest intention of jury.

4. Robbery $\S$ 28—Verdict of guilty in prosecution for robbery must specify degree of crime (Pen. Code, $\S$ 211a).

Verdict of guilty in prosecution for robbery must specify degree of crime in view of Pen. Code, $\S$ 211a, dividing robbery into first and second degrees.

5. Indictment and information $\S$ 189(11)—Information for robbery following statutory language is sufficient to support conviction of either degree of crime which evidence discloses (Pen. Code, $\S$ 211, 211a).

Information in prosecution for robbery need not charge specific degree on which conviction is sought, but is sufficient if it follows language of Pen. Code, $\S$ 211, and will then support ver-

dict of either degree of crime which evidence discloses notwithstanding $\S$ 211a.

6. Robbery $\S$ 17(1)—Information for robbery of first degree need not describe accused's deadly weapon or allege that he was armed with such.

To support conviction for robbery of first degree, it is not necessary that information should describe or name deadly weapon with which accused is armed, or allege that he was armed with any deadly weapon.

7. Robbery $\S$ 28—Where accused is charged with robbery in statutory language and evidence shows crime committed by one armed with deadly weapon, verdict of guilty of first degree robbery is valid (Pen. Code, $\S$ 211).

Where accused is charged with robbery in language of Pen. Code, $\S$ 211, and evidence shows that crime was committed by one while armed with deadly weapon, verdict finding him guilty of robbery of first degree is valid.

8. Criminal law $\S$ 730(12)—Argument defendant was clever crook held not reversible, court instructing to disregard.

In prosecution for robbery, district attorney's argument that accused was crook who was more clever than any he had dealt with for some time held not reversible error, particularly where judge promptly charged jury to disregard statement.

9. Criminal law $\S$ 713—Argument in criminal case should be confined to bounds of logic and reason.

For purposes of illustration, argument may be afforded a considerable latitude in criminal case, but it should be confined to bounds of logic and reason.

10. Criminal law $\S$ 719(1)—Argument to show officer's mistake in thinking prosecuting witness first failed to identify defendant, containing reference to another prosecution, held not reversible error.

In prosecution for robbery, argument to show officer's mistake in thinking prosecuting witness first failed to identify defendant held not prejudicial, though accompanied by reference to conviction in former murder trial in which similar situation arose.

11. Criminal law $\S$ 1170(2)—Any error in sustaining objection to question as to what witness told officer was cured by subsequent proof without objection of entire conversation.

Any error in sustaining objection to impeaching question as to what witness told officer, in prosecution for robbery, was cured by subsequently proving without objection entire conversation which was being inquired into.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

William Tognola was convicted of robbery in the first degree, and he appeals. Affirmed.

A. M. Bundy, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

THOMPSON, Justice pro tem. The defendant was charged jointly with one Heber Norton with the crime of robbery alleged to have

been committed by forcibly taking from the person of one Lala Singh the sum of \$10. Norton pleaded guilty. Upon trial evidence most persuasive of defendant's guilt was adduced, upon which the jury rendered the following verdict:

"We, the jury, * * * find the defendant William Tognola guilty of robbery in the first degree, as charged in the information."

Defendant claims: (1) That the verdict is inconsistent and void for uncertainty; (2) that it is the result of prejudice on the part of the jury, created by the employment of opprobrious language with reference to the defendant, used by the prosecuting attorney in the course of his argument to the jury; and (3) error on the part of the trial court in sustaining an objection to an impeaching question asked by the defendant on cross-examination.

The evidence satisfactorily shows that about 8 o'clock on the night of November 14, 1926, this defendant and his confederate Norton, armed with a loaded revolver, which belonged to this defendant, went down, by prearrangement, to the locality of First and B streets in Marysville, which was the Chinese and Hindu quarter of that city, situated at the levee. There they encountered the prosecuting witness, Lala Singh, a Hindu, and, attacking him, one of the assailants held the victim while the other beat him about the head with the butt of the revolver, knocking him down and robbing him of \$10. During the mêlée, the revolver was discharged. The culprits then fled. Their victim soon arose and hastened to the store of Charley Chan, a countryman, where he reported the robbery. From there he proceeded to police headquarters, where he arrived within half an hour of the escapade, with his shirt saturated and his face covered with blood flowing from several ugly wounds about the head. He once more reported the robbery, and the officers immediately went in search of his assailants, whom, by means of a flashlight, they soon located down by the levee. When the defendants were taken into custody Norton had in his possession the sum of \$9.50 and also the loaded revolver, upon the butt of which were fresh bloodstains. One of the chambers of the revolver was empty. On the person of Tognola was found the sum of \$11.34, and in his side pocket was an empty shell of the caliber which fitted the revolver. Later the officers visited the room formerly occupied by this defendant and found his empty revolver case and a large number of the same sized shells. On being confronted by the prosecuting witness Norton was positively identified as the one who had beaten him with the revolver, and Tognola was finally identified as the one who held him during the robbery. The evidence is somewhat conflicting as to whether the prosecuting witness may not have at first failed to identify this defendant. The Hindu spoke English poorly and finally explained that Tognola, when first presented to him for identification, looked different be-

cause he wore a different pair of eyeglasses at the time of the assault. On the trial, however, the Hindu denied that he had ever failed to identify Tognola, and explained that in response to a question propounded to him by the officer, as follows: "Do you recognize this man as one who hit you on the head?" he said, "No, sir."

Subsequently, without promise or hope of reward, Norton confessed his guilt and told the story of the robbery in detail, implicating Tognola as the chief instigator of the crime.

[1, 2] A verdict reciting that, "We, the jury, find the defendant guilty of robbery in the first degree, as charged in the information," is not void for uncertainty. The language "as charged in the information" is surplusage and may be disregarded. 8 Cal. Jur. 401; *People v. Brady*, 6 Cal. Unrep. Cas. 719, 65 P. 823; *State v. Schweitzer*, 18 Idaho, 609, 111 P. 130. Surplusage and informalities employed in the language of a verdict should be disregarded. The language is sufficient, and the verdict is valid if the intention of the jury is clear, to convict the accused of the crime charged, or of any crime necessarily included in the information. 8 Cal. Jur. 401; *People v. McCarty*, 48 Cal. 557; *People v. Sheik* (Cal. App.) 243 P. 39; *People v. Mercado*, 59 Cal. App. 69, 209 P. 1035.

[3-7] A verdict must be construed in the light of the facts disclosed by the record so as to give effect to the manifest intention of the jury, and if the language of the verdict is unambiguous and it is included within the charge pleaded in the information, it is valid. *People v. Hatch*, 163 Cal. 368, 125 P. 907. Since the amendment by section 211a, of the Penal Code, dividing robbery into the first and second degrees, a verdict of guilty must specify the degree of the crime, but it is unnecessary that the information should charge the specific degree upon which a conviction is sought. The information is sufficient if it follows the language of section 211 of the Penal Code, and will then support a verdict of either degree of the crime which the evidence discloses. To support a verdict of robbery of the first degree, it is not necessary that the information should describe or name the deadly weapon with which the accused is armed, or allege that he was armed with any deadly weapon at all. In *re Colford*, 68 Cal. App. 308, 229 P. 63. If the accused is charged with robbery in the language of section 211 of the Penal Code and the evidence shows that the crime was committed by one while he is armed with a deadly weapon, and the verdict finds him guilty of robbery of the first degree, the verdict is valid.

[8] The language used by the district attorney in his argument to the jury as follows: "I want to say this in the beginning, we are dealing with a crook who is a good deal more clever than any I have dealt with for some time"—is not reversible error, particularly since the trial judge promptly charged the jury to disregard the statement. *People v. Bose*, 28 Cal. App. 743, 153 P. 965; 8 Cal. Jur. 267.

[9, 10] The following language, also used by the district attorney in his argument to the jury, appears to have been addressed to the evidence of an officer who intimated that the prosecuting witness first failed to identify Tognola, and was in the nature of an illustration used for the purpose of argument and was not prejudicial:

"There has been * * * some attack made on the Hindu's identification of Tognola. * * * What if this complaining witness had failed * * * to identify Tognola? * * * At a murder case years ago, one officer came into court * * * and testified that my complaining witness, the only person I had * * * who identified the person charged with the crime, stated that the boy had said to him he could not identify any of the parties. Yet officers—where do they get these impressions; why they do it, I don't understand. But the fact remains that other officers who were following the case * * * knew that there was some misunderstanding, some mistake, because if you remember the jury went ahead and brought in a verdict of murder of the first degree, and the party convicted confessed and implicated all three, so you see sometimes an officer gets the wrong impression."

While it is true that, for the purposes of illustration, argument may be afforded a considerable latitude, yet it should be confined to the bounds of logic and reason.

In *Tucker v. Henniker*, 41 N. H. 317, it is said, with respect to the scope of legitimate argument:

"His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination." *People v. Molina*, 126 Cal. 505, 59 P. 34.

In the instant case the district attorney's boasting of securing a conviction of murder in another case "years ago," in spite of an officer's statement that the prosecuting witness failed to identify the accused, had no logical application to the case which he was arguing; but the language with which it was associated was intended to imply, because an officer was mistaken in his evidence of lack of identity in another case, that therefore the officer who testified in this case to a similar failure to identify this defendant might also be mistaken. The argument, if it may be dignified by that term, may have contained the veiled suggestion that the testimony of the officer was not the result of mistake, but was prompted by some ulterior motive. At least it cannot be said to be without some possibly legitimate application, and the reference to the conviction in the former murder trial was not prejudicial.

[11] The objection sustained to defendant's impeaching question, "What did you tell the police officer?" was cured by defendant subsequently proving without objection that entire conversation with the officer.

For the foregoing reasons the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

82 Cal. App. 660
POWER v. CROWN STAGE CO. et al.
(two cases). (Civ. 4836.)★

District Court of Appeal, Second District, Division 1, California. May 3, 1927.

Hearing Denied by Supreme Court June 30, 1927.

1. Highways ⇨176—Bus driver, driving too close to automobile ahead and forced on wrong side of road when it slowed, held negligent.

In action by plaintiff for injuries from collision with autobus, bus driver, driving too close to automobile ahead, so that when it slowed it was necessary for him to drive clear off the highway on the wrong side, held guilty of negligence.

2. Highways ⇨175(1)—Plaintiff colliding with bus held not contributorily negligent in not stopping his automobile when suddenly confronted with dangerous situation.

Where plaintiff, injured in collision with autobus, was suddenly placed in a position of imminent danger because of bus approaching on wrong side of highway, held that he was not guilty of contributory negligence in failing to stop his car.

3. Negligence ⇨72—One in great peril need not exercise carefulness required under ordinary circumstances.

One in great peril, when immediate action is necessary to avoid it, is not required to exercise all the presence of mind which is required under ordinary circumstances.

4. Negligence ⇨136(9)—Contributory negligence is question of law only when facts point conclusively to plaintiff's negligence.

Contributory negligence is question of law only when the court is impelled to say that reasonable men can draw from the facts only an inference pointing conclusively to plaintiff's negligence contributing to his injury.

5. Highways ⇨184(3)—Contributory negligence of plaintiff injured in collision with automobile bus held for jury.

Contributory negligence of plaintiff injured in collision with automobile bus held question of fact for the jury.

6. Highways ⇨184(3)—Plaintiff held not contributorily negligent as matter of law because of inexperience in driving automobile.

Plaintiff injured in collision with autobus held not guilty of contributory negligence as a matter of law because of his inexperience in driving automobile.

7. Highways ⇨177—Automobile bus only 3 to 30 feet behind automobile running at 35 miles per hour is exceeding speed limit (St. 1919, p. 220, § 13).

Under St. 1919, p. 220, § 13, providing that vehicles are not entitled to exceed speed of 30 miles per hour, except when there is no vehi-

cle visible ahead within 400 feet, automobile bus running 35 miles per hour only 3 to 30 feet behind another auto is exceeding speed limit.

8. Highways ⚡177—Speed of automobile may be negligent though not above statutory limits.

Even though the statutory limit of speed has not been exceeded, the rate of speed at which an automobile is traveling may be *held*, under some circumstances, to be negligent.

9. Trial ⚡244(4)—Instruction that if defendant bus driver violated speed law defendant was liable unless plaintiff "was guilty of some negligence" held not unduly emphasizing defendant's duties.

Instruction, in case resulting from automobile collision, stating that if defendant auto bus driver violated speed law, defendant was negligent unless the plaintiff was also guilty of some negligence proximately contributing to the injury, *held* not to unduly emphasize defendant's alleged violation of a law without pointing out plaintiff's reciprocal duties.

10. Trial ⚡296(4, 5)—Instruction failing to state that even slight contributory negligence would defeat plaintiff held not error, especially when point was stated in another instruction.

Instruction failing to emphasize rule of contributory negligence by stating that plaintiff's negligence, however slight, would defeat his recovery, *held* not error, especially since another instruction emphasized this point as defendant desired.

11. Trial ⚡296(3)—Instruction that if defendant autobus driver's negligence "proximately contributed" to injury plaintiff should recover held not misleading, since other instructions correctly stated "proximate cause."

Instruction stating that if defendant autobus driver's negligence "proximately contributed" to plaintiff's injury, plaintiff should recover, *held* not error misleading the jury, since other instructions sufficiently stated the rule that defendant's negligence must have been the proximate cause of plaintiff's injury.

12. Appeal and error ⚡1068(5)—Erroneously refusing to instruct that husband's contributory negligence in driving automobile would be imputed to wife held not prejudicial, since jury found husband not negligent.

Erroneously refusing to give an instruction requested to the effect that the husband's contributory negligence in driving automobile would be imputed to wife *held* not prejudicial since husband's case and wife's case were jointly tried, and jury's verdict against defendant in both cases implied finding of defendant's negligence and husband's freedom from contributory negligence.

13. Highways ⚡184(4)—Under evidence, plaintiff injured in automobile collision held entitled to instruction on imminent danger theory.

Under evidence showing that plaintiff injured in auto collision was suddenly confronted

with dangerous situation, plaintiff *held* entitled to instruction on imminent danger theory.

14. Highways ⚡184(4)—Imminent danger instruction, not stating that plaintiff's danger must have been brought about through defendant's negligence, held not error.

Instruction on imminent danger, stating that plaintiff "was suddenly confronted with danger, not brought about by his own negligence," *held* not error because failing to limit the situation to one brought about through defendant's negligence.

15. Highways ⚡184(4)—Same rule as to imminent danger should apply to both parties in automobile collision.

In action for injuries sustained from automobile collision, the same rule as to imminent danger should apply to both plaintiffs and defendants, and, if one is given the benefit of imminent danger caused by any one at all, the other should be given the benefit of the same rule.

16. Judgment ⚡256(5)—In action against principal and agent, where verdict was for plaintiffs, judgment mistakenly entered against principal only held not void.

In action for injuries sustained from auto collision against bus company and its driver where verdict was brought for plaintiffs, judgment mistakenly entered against company alone *held* not void, since company and its agent were jointly and severally liable.

17. Judgment ⚡310 — Judgment entered against principal alone may be amended to include agent, where verdict was against both and both were liable.

In action against a principal and agent, where verdict was brought for plaintiffs and judgment was mistakenly entered against the principal alone, the judgment may be amended to include the agent; the principal and agent being jointly and severally liable.

18. Appeal and error ⚡1170(12)—Judgment will not be reversed because of mistake of entering judgment against principal only, where it should have been against principal and agent (Code Civ. Proc. § 475; Const. art. 6, § 4½).

Under Code Civ. Proc. § 475, providing that no judgment shall be reversed unless error is prejudicial, and Const. art. 6, § 4½, providing that no judgment shall be set aside for any matter of procedure unless there has been a miscarriage of justice, judgment will not be reversed because of mistake of entering judgment against principal alone, where it should have been entered against both principal and agent.

Appeals from Superior Court, Los Angeles County; Charles Monroe, Judge.

Actions by Kate Power against the Crown Stage Company and C. Parks, and by William Power against the same defendants. Judgments for plaintiffs, and defendants appeal. Affirmed.

W. I. Gilbert and B. P. Gibbs, both of Los Angeles, for appellants.

John L. Richardson and T. E. Parke, both of Los Angeles, for respondents.

McLUCAS, Justice pro tem. This is an appeal from a judgment in the sum of \$2,033 in favor of the plaintiff, Kate Power, and against the defendant Crown Stage Company; also an appeal from a judgment in the sum of \$2,000 in favor of the plaintiff William Power and against the defendant Crown Stage Company.

Plaintiff Kate Power brought an action against the defendants Crown Stage Company and C. Parks for damages in the sum of \$10,000 for injuries, and special damages in the sum of \$33 for injuries and damages, alleged to have been received by her through the negligence of C. Parks, an agent and employee of defendant Crown Stage Company. The jury returned a verdict for plaintiff in the sum of \$2,033. Plaintiff William Power brought an action against the defendants Crown Stage Company and C. Parks for damages in the sum of \$10,000 for injuries, and special damages in the sum of \$721.85 for injuries alleged to have been received by him through the negligence of C. Parks, an agent and employee of defendant Crown Stage Company, and \$1,000 for loss of services of his wife, Kate Power. The jury returned a verdict for the plaintiff in the sum of \$2,000.

The answers of defendants specifically deny the allegations of negligence contained in the complaint; and as a further defense allege, in the case of William Power:

"That defendant Parks was driving and operating said motorbus carefully and prudently along the proper side of the boulevard, when suddenly and without warning, a machine with human beings therein stopped with such abruptness that, in order to avoid a collision with said automobile and to avoid injuring the persons therein, and to avoid injuries to the defendant's passengers, it became necessary for said defendant to swerve his car to the left, and that the plaintiff was then driving and operating his said Chevrolet car east on Telegraph road at a high and dangerous rate of speed, to wit, at a speed in excess of 30 miles per hour; that he was keeping an insufficient lookout for traffic ahead of him upon the highway, and was not exercising ordinary care or any care in the operation of his said Chevrolet automobile, all of which was negligently done, and said negligence directly and proximately contributed to the happening of the accident in question."

Similar allegations are in defendants' answer in the case of Kate Power. Both of these actions were tried at the same time, before the same jury, and on the same evidence, and judgments rendered thereon as above stated.

On the 2d day of September, 1922, defendant Crown Stage Company was operat-

ing an autobus on Telegraph road, a public highway running between Los Angeles and Santa Fe Springs. The paved portion of Telegraph road was 20 feet wide, and the dirt portion of the highway between the pavement and the fence was 12 feet wide. Defendant C. Parks, the driver, was operating the bus in an easterly direction and traveling at a rate of speed between 25 and 40 miles per hour, following a Ford automobile at a distance of between 3 and 30 feet. The Ford swerved to the left in order to pass a Buick automobile which was either standing or backing up on the highway. The bus turned abruptly to the left of the Ford, departed from the paved portion of the highway onto and across the unpaved portion on the northerly side thereof, and came into collision with the plaintiff's automobile at or near the fence bordering the highway, where both cars stopped. The bus driver testified that he did not see any obstruction ahead until the Ford car swerved to the left onto the center of the road and almost stopped, when he saw the Buick car backing up; that he saw a Chevrolet coming toward him, turned abruptly to the left, and went straight across the road into the fence, where the Chevrolet collided with his car on the right front wheel and fender; that he turned across the highway to avoid a collision with the Ford and the Buick. Plaintiff William Power was driving a Chevrolet in a westerly direction at a speed of about 15 miles per hour. He testified that he first saw the approaching bus at a distance of 130 to 140 feet, when it turned to pass the Ford, at a speed of 35 or 40 miles per hour, and left the highway; that at the same time he turned to the right, off from the paved portion of the highway, at a point about 90 feet distant from the bus, slowed down, and came almost to a stop on the dirt portion of the highway within a distance of 25 feet, when his automobile was struck on the left front portion by the right front wheel of the bus and carried for a distance of 7 or 8 feet to the fence; that he could have stopped his automobile within a distance of less than 25 feet, but that it would have been directly in the path of the oncoming bus.

[1-5] Although the evidence was in conflict in many particulars, the record discloses sufficient evidence to support the verdict of the jury, unless there was contributory negligence on the part of the plaintiff. It appears from the bus driver's own testimony that he was guilty of negligence in driving at a rapid rate of speed so close to the Ford car that his view ahead was obstructed, so that when the Ford slowed down it was necessary for him to turn to the left in the path of the west-bound traffic when his car was not under control, making it necessary for him to drive clear off the highway onto the dirt on the wrong side of the highway.

Under such circumstances, it cannot be held that plaintiff William Power was guilty of contributory negligence in failing to stop his car within a distance of 25 feet while the bus was traveling off the highway a distance of 65 feet. The plaintiff William Power was entitled to believe that the driver of the bus would return to the highway after passing the Ford car, and was under no obligation to make any attempt to stop his car until he saw that a collision was imminent. If he had attempted to pass to the left of the bus, he might then have been charged with negligence in attempting to pass on the wrong side, had a collision occurred, even though a prudent driver might under certain circumstances be justified in turning to the left. He was in a position of imminent danger and would not be held to the same degree of care as under ordinary conditions. One in great peril, when immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. *Tousley v. Pacific Electric Ry. Co.*, 166 Cal. 457, 137 P. 31. Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury. *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125. Whether plaintiff William Power was guilty of contributory negligence was a question of fact to be determined by the jury under all the circumstances of the case. In *Shupe v. Rodolf*, 185 Cal. 371, 197 P. 57, it is said:

"But the question in the case is not whether the plaintiff could have turned farther to the right and have avoided the collision, but whether, assuming that he could, his failure to do so was necessarily due to lack of reasonable care to avoid the impending collision. The two things are not the same. It may be that the plaintiff, if he had turned more quickly to the right, might have avoided the collision. It may also be that he could have avoided it by turning to the left. The point is that when the defendants' car started to turn to the left, the plaintiff was confronted with a situation of imminent danger requiring instant action, and there may have been no negligence on his part in taking the action he did, although if he had done something else he would have escaped. As was said in *Karr v. Parks*, 40 Cal. 188, 193, 'it would be absurd to hold that even an adult person, in time of imminent danger, is negligent, unless he takes every precaution that a careful calculation afterward will show he might have taken.' Whether under the circumstances here presented the plaintiff did what he reasonably could to avoid the collision is very apparently a question about which there might be a reasonable difference of opinion. Such being the case, the answer to the question was exclusively within the province of the jury and we cannot disturb their conclusion."

[6] Plaintiff William Power was at no time guilty of negligence as a matter of law in the operation of his automobile, although the record discloses the fact that he had driven a total distance of only 491 miles. Inexperience in itself is not negligence. If this were true, all persons learning to drive automobiles would be guilty of negligence in attempting to operate them. An act of negligence may be committed by an experienced as well as by an inexperienced automobile driver.

[7] Appellants assert that the trial court committed error in giving and refusing certain instructions. Appellants requested the following instruction, which was refused except as given in other instructions:

"You are instructed that at the time and place of the accident, the defendants were entitled to operate their bus, in so far as the speed is concerned, at the rate of 35 miles per hour; and upon the question of speed considered alone, I instruct you that it was not negligence for the defendants to operate their car at 35 miles per hour."

Appellants' requested instruction was not a correct statement of the law as applied to the facts in this case. Under the Motor Vehicle Act as it existed at that time, defendants were not entitled to operate their bus in excess of 30 miles per hour, "except in the daytime and except when * * * there is no person, vehicle or other object visible ahead on such highway * * * within four hundred feet. * * *" *Stats.* 1919, p. 220, § 13. Under the evidence the conditions which existed at the time of the accident did not permit a speed of more than 30 miles per hour. In lieu of the above instruction, the court gave the following:

"Any person operating or driving a motor or other vehicle upon a public highway shall operate or drive the same in a careful and prudent manner, at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway; and no such person shall operate or drive a motor vehicle or other vehicle upon the public highway at such a rate of speed as to endanger the life or limb of any person or the safety of any property. Now, it is true that in this case there is no question but that the limit at the place in controversy was 35 miles an hour; but the fact that that is the limit does not necessarily mean that anybody going at that speed under all circumstances is careful, because, as I have just read to you, regardless of the limit, every person operating or driving a motor or other vehicle upon the public highway shall operate and drive the same in a careful and prudent manner, and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway; and no person shall operate or drive a motor vehicle or other vehicle upon a public highway at such a rate of speed as to endanger the life or limb of any person or the safety of any property. So that if either one of these parties was violating that provi-

sion of the law, that party was guilty of negligence, and if the defendant violated that provision of the law, it was negligence, and if that negligence was the proximate cause of the injury, then the defendant would be liable, unless the plaintiff was also guilty of some negligence proximately contributing to the injury."

[8, 9] Even though the statutory limitation of speed has not been exceeded, the rate of speed at which an automobile may be traveling may be held under some circumstances to be negligence. *Reaugh v. Cudahy Packing Co.*, supra. We cannot agree with appellants' contention that the instruction laid stress upon defendants' alleged violation of the law without pointing out the reciprocal duties of the plaintiff. The instruction specifically stated that if either party violated these provisions of the law, that party was guilty of negligence, and then stated that if defendants were guilty of negligence which proximately caused the injury, defendants would be liable, unless plaintiff was also guilty of some negligence proximately contributing to the injury. "Some negligence" on the part of the plaintiff could only refer to the negligence defined in this and other instructions. The instruction did not lay stress upon the speed of appellants' driver, but rather was a general statement of the law as applied to both parties. In a previous instruction the court said:

"If you should determine that the defendant's driver was not negligent, that ends the case and you don't have to go any further. If you determine that the driver was negligent, then you must also determine whether the plaintiff, driving his own machine, Mr. Power, whether he was guilty of any negligence which proximately contributed to the injury. If he was, notwithstanding that you find that the defendant was guilty of negligence—if you find that the plaintiff was guilty of negligence, then there can be no recovery, because if both parties are negligent, if there is mutual negligence, there can be no recovery by either party. If the defendant is negligent and the plaintiff is guilty of negligence, no matter how slight, which proximately contributes to the injury, there can be no recovery, because you have no right to compare the negligence of one with the other. If both are negligent, without reference to the degree of negligence, there can be no recovery."

Appellants requested the following instruction:

"You are instructed that the duty was upon the plaintiffs at all times to operate their automobile with ordinary care and with due regard for other traffic upon the road, and if they saw, or by the exercise of ordinary care could have seen, that the traffic at the point of impact was becoming congested, then it was their duty to slow up or do such other things as would have been reasonably necessary to a prudent person in order to avoid becoming confronted with danger, and if they failed to do this, that failure was negligence, and if such negligence directly and proximately contributed to the happening of the accident in any degree, how-

ever slight, your verdict will be for the defendant notwithstanding the fact you may believe that the defendants were guilty of negligence at the time and place of the accident."

[10] Instead of the foregoing, the court gave the following instruction:

"It was the duty of both parties at all times to operate their machines with ordinary care and with due regard to other traffic upon the road; and if they saw, or by the exercise of ordinary care could have seen, that the traffic at the point of impact was becoming congested, then it was their duty to slow up or to do such other things as would have been reasonably necessary to a prudent person in order to avoid becoming confronted with danger. If they failed to do this, their failure was negligence.

"If the plaintiff was negligent in that respect, and his negligence proximately contributed to the injury, he cannot recover; and if the defendant was negligent in that respect, and that negligence proximately contributed to the injury, and the plaintiff was not negligent, then the plaintiff can recover."

Appellants urge in respect to the second paragraph of the foregoing instruction that the court failed to instruct the jury with regard to the degree of negligence that would prevent plaintiff from recovering. It is insisted that the following language should have been used by the court: "If the plaintiff was negligent in that respect and such negligence on his part directly and proximately contributed to the happening of the accident in any degree, however slight," he cannot recover. The equivalent of this suggested instruction had previously been given by the court and is quoted, supra. In *People v. Mohammed*, 189 Cal. 429, 208 P. 963, it is said that the fact that each instruction does not cover the whole case does not make such instruction erroneous, if the instructions as a whole do so. In view of all the instructions given by the court, we cannot agree with appellants' contention that comparative negligence might have been made by the jury in favor of the respondents to the prejudice of appellants. In *Sinclair v. Pioneer Truck Co.*, 51 Cal. App. 174, 196 P. 281, the court said:

"The sole point urged by the appellants relates to the giving or refusing of instructions to the jury. The defendants requested the court to instruct the jury as follows: 'If the jury believe from the evidence that the plaintiff by his own negligence directly contributed in any degree to the injury sued for, they will find for the defendants.' The court gave substantially this instruction and several others on the subject of contributory negligence, omitting from each of them, however, the words 'in any degree' included in the proposed instruction. It is urged that the court's refusal to thus emphasize the measure of any contributory negligence chargeable to the plaintiff was error sufficiently prejudicial to entitle the defendants to a new trial. This contention is not maintainable. It is true that in some of the cases cited by the appellants this phrase is used in connection

with the legal effect of contributory negligence, but it is nowhere held that it is an essential qualification of such negligence, but adds emphasis only. Where, as here, the court instructs the jury that if the plaintiff was negligent, and his negligence amounted to want of ordinary care, and contributed proximately to the injury, he cannot recover, such an instruction is sufficient."

[11] Appellants point out that in the present case the court in its instruction did not use the qualifying term "(plaintiff's) negligence amounting to a want of ordinary care," as was used in the above instruction, and for that reason urge that the instruction here does not come within the language quoted from that instruction. However, in the case at bar, negligence was defined by the court in another instruction as failure to use ordinary care. This, of course, applied to both the plaintiffs and the defendants. Also, in the first part of the above instruction given in the instant case the court said it was the duty of both parties at all times to operate their machines with ordinary care. Appellants particularly object to the italicized portion of the foregoing instruction, as follows:

"And if the defendant was negligent in that respect, and *that negligence proximately contributed to the injury*, and plaintiff was not negligent, then the plaintiff can recover." (Italics ours.)

It is urged that the above is an incorrect statement of the law and is misleading to the jury and prejudicial error for the reason that the words "proximate cause of the injury" should have been used when referring to the defendants' negligence. It may be conceded that the words "proximate cause" should have been used in this instruction, but we do not think the use of the words "proximately contributing to the injury" was misleading to the jury, as the court in other instructions had said to the jury "that the burden of proof is upon the plaintiff not only to prove that defendant was negligent, but that that negligence was the proximate cause of the injury"; and in referring to the provisions of the Motor Vehicle Act the court said: "If the defendant violated that provision of the law, it was negligence, and if that negligence was the proximate cause of the injury, then the defendant would be liable." Thus no doubt was left in the minds of the jury but that plaintiff could only recover for negligence of defendant proximately causing the injury.

[12] The court refused the following instruction, except as given in other instructions, and no other instruction was given on imputed negligence:

"You are instructed that this is an action prosecuted both by the husband and the wife. The undisputed testimony of the plaintiff is that the husband was driving the car at the time and place of the accident. Under the law of this state the negligence of the husband is

imputed to the wife. That is to say, that if the husband, in law and in fact, was guilty of negligence, then the wife, in law and in fact, was guilty of negligence, and if the negligence of the husband, the driver of the car, directly or proximately contributed to the happening of the accident, in any degree, however slight, your verdict will be for the defendants notwithstanding the fact you may believe that the defendants themselves were guilty of negligence at the time and place of the accident."

This instruction should very properly have been given, and it was error to refuse it. *McFadden v. Santa Ana, etc., Ry. Co.*, 87 Cal. 464, 25 P. 681, 11 L. R. A. 252; *Dunbar v. San Francisco-Oakland T. Railways*, 54 Cal. App. 15, 201 P. 330. However, we do not regard the error as prejudicial, for the reason that both cases were tried at the same time, before the same judge, and on the same evidence, and it was so stipulated. The jury was repeatedly instructed that if plaintiff was guilty of contributory negligence no recovery could be had. The jury was instructed:

"If you determine that the driver was negligent, then you must also determine whether the plaintiff driving his own machine, Mr. Power, was guilty of negligence—if you find that the plaintiff was guilty of negligence, then there can be no recovery."

Necessarily, this instruction applied to both cases. The jury returned a verdict in favor of plaintiff William Power, and therefore found that he was not guilty of contributory negligence. If there was no contributory negligence on the part of the husband, William Power, then there was none such to be imputed to the plaintiff Kate Power.

[13, 14] Appellants argue that respondents were not entitled to instructions on the theory of imminent danger, but that if so entitled, the instruction so given was erroneous, improper, and prejudicial to defendants. We have before indicated that the testimony shows that plaintiffs were in a position of imminent danger. It therefore follows that respondents were entitled to a proper instruction on that subject. The court instructed the jury that if they found "that the plaintiff while in the exercise of ordinary care was suddenly confronted with danger, not brought on by his own negligence," etc. Appellants object to the words, "not brought on by his own negligence," for the reason that the instruction does not limit the situation of danger with which plaintiffs were confronted as being brought about through the negligence of defendant C. Parks. In support of their contention, appellants cite *Howard v. Worthington*, 50 Cal. App. 556, 195 P. 709. It is true that the court in this case said:

"It will be observed that in stating this rule with reference to the plaintiff Howard the court, very correctly, gave him the benefit thereof only in the event that he was confronted with danger caused through the negligence of the defendant. But in specifying the duty of

the defendant's driver, the court gives defendant the benefit of this rule, if confronted with sudden danger, without the limitation that it must have been caused through the negligence of the plaintiff. It is not questioned that the rule should have been applied alike in both instances."

[15] In that case there was no evidence of negligence committed by third persons. Under such circumstances the court very properly criticized the instruction because the rule was not applied alike to both parties, and for the further reason that under the instruction as given, defendant would have the benefit of the rule of imminent danger, even though the emergency was created by defendant's own negligence. In the instant case the rule of imminent danger was applied to the defendant in language similar to that used in the instruction from which we have just quoted. Appellants argue that a different rule should apply to the defendant than to the plaintiff; that is to say, appellants contend that in applying the imminent danger rule the defendants should have the benefit of imminent danger created by any person, including the plaintiff; but that plaintiff should have the benefit of imminent danger created by the acts of defendant C. Parks alone. We cannot agree with this contention. The same rule should apply to both parties. In *Alameda County v. Tieslau*, 44 Cal. App. 332, 186 P. 398, the plaintiff was given the benefit of the imminent danger rule even though the acts causing the danger were done by third persons. At all events, in the case at bar there was evidence sufficient to support the verdict of the jury that defendants' negligence was the proximate cause of the injuries to plaintiffs.

[16] The jury returned verdicts in favor of the plaintiffs, but the clerk entered judgment against the defendant Crown Stage Company only, and not against defendant C. Parks. Appellants contend that the judgments are void for this reason. In support of their argument appellants cite the cases of *Thompson v. Southern Pacific Co.*, 31 Cal. App. 567, 161 P. 21, and *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am. St. Rep. 171, holding that where recovery is sought based upon the act or omission of an agent which the principal did not direct and in which he did not participate, an acquittal of the agent of negligence is an acquittal of the principal. Also, the case of *Doremus v. Root*, 23 Wash. 710, 63 P. 572, 54 L. R. A. 649, where the verdict was silent as to the agent. These cases are not in point. In the instant case the verdicts neither acquitted the agent, nor were they silent as to the agent while speaking as to the principal. The verdicts were general

in form and applied equally to both of the defendants. They read as follows:

"We, the jury in the above-entitled action, find for the plaintiff Kate Power and assess the damages in the sum of two thousand and thirty-three dollars (\$2,033) this 14th day of June, 1923. Frank G. Sprake, Foreman."

A similar verdict was returned in favor of the plaintiff William Power. The judgment reads as follows:

"Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff Kate Power have and recover from said defendant Crown Stage Company the sum of two thousand and thirty-three dollars (\$2,033) together with her costs and disbursements incurred in this action, amounting to the sum of 38 and 25/100 dollars."

[17, 18] A similar judgment was entered in favor of the plaintiff William Power. While judgments should have been entered against both defendants, it does not follow that the judgments as entered against the Crown Stage Company only are void. The liability of principal and agent was both joint and several. Such error in the judgment may be amended by the trial court at any time in such manner that it should properly designate both defendants, provided the amendment does not affect the substantial rights of the defendants, but consists of a clerical mistake appearing on the face of the record. *Boust v. Superior Court*, 162 Cal. 343, 122 P. 956. In the present case such amendment would not affect the substantial rights of either defendant and would consist in the rectifying of a clerical mistake appearing on the face of the record. Appellants have not been prejudiced by the omission of one of the defendants from the judgment, and the error is clearly within the provisions of section 475 of the Code of Civil Procedure, where it is specified that no judgment shall be reversed by reason of any error unless such error was prejudicial, and that by reason of such error substantial injury was sustained by the appealing party. "No judgment shall be set aside, * * * for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const. art. 6, § 4½. We have examined the entire cause, including the evidence, and are not of the opinion that the error complained of has resulted in a miscarriage of justice.

There being no prejudicial error, it is ordered that the judgments be affirmed.

We concur: CONREY, P. J.; HOUSER, J.

83 Cal. App. 161

NUMITOR GOLD MINING CO. v. KATZER et al. (Civ. 3263.)★

District Court of Appeal, Third District, California. May 17, 1927.

Hearing Denied by Supreme Court July 13, 1927.

1. Taxation ⚡734(1)—Tax deed is void unless every essential step leading to execution is strictly followed.

A tax deed is void unless every essential step leading to its execution is strictly followed.

2. Taxation ⚡658(4)—Description of land in tax sale notice as tracts lying east of creek, stating subdivisions of section and areas, held sufficient (Pol. Code, §§ 3764, 3771a).

Descriptions of land in notice under Pol. Code, § 3764, of tax sale, under section 3771a, as "portion E. of Greenhorn creek of E. ½ of S. W. ¼ of N. E. ¼ of Sec. 15, Twp. 15 N., R. 9 E. Mt. D. B. and M., cont. 5 acres," "portion E. of Greenhorn creek of E. ½ of E. ½ of Sec. 15, Twp. 15 N., R. 9 E. Mt. D. B. and M., containing 80 acres," held sufficient.

3. Taxation ⚡658(4)—Description of land in tax sale notice as section subdivision of stated acreage, excepting part in river, held sufficient (Pol. Code, §§ 3764, 3771a).

Description of land in notice, under Pol. Code § 3764, of tax sale, under section 3771a, as "S. W. ¼ (except part in Bear river) and S. ½ of S. ½ of N. W. ¼ of Sec. 14, Twp. 15 N., R. 9 E. Mt. D. B. and M., containing 180 acres," held sufficient.

4. Taxation ⚡421(1)—Description of land for purposes of taxation is prima facie sufficient if land can be readily identified (Pol. Code, §§ 3764, 3771a).

A description of land for purposes of taxation is prima facie sufficient if the land can be readily identified and located so as not to mislead the owner, within Pol. Code, §§ 3764, 3771a, relating to sales of land for delinquent taxes.

5. Taxation ⚡658(3)—Caption to addenda notice of tax sale "property to be sold" held not notice property would be sold (Pol. Code, §§ 3764, 3771a).

A caption to addenda notice, under Pol. Code, § 3764, of tax sale, under section 3771a, of "property to be sold" held not strictly a notice that the property would actually be sold.

6. Taxation ⚡658(3)—Clerical error in body of tax sale notice by inserting date of prior year rendered notice fatally defective (Pol. Code, §§ 3764, 3771a).

A clerical error in the body of a notice, under Pol. Code, § 3764, of a tax sale, under section 3771a, in inserting the year 1922 instead of 1923, rendered the notice fatally defective.

7. Taxation ⚡658(3)—Correct date in caption of tax sale notice cannot overcome defect of erroneous date in body (Pol. Code, §§ 3764, 3771a).

Reference to the caption of a notice, under Pol. Code, § 3764, of a tax sale, under section

3771a, which gives the correct date, cannot be resorted to, to overcome the fatal defect of an incorrect date in the body of the notice.

8. Taxation ⚡658(3)—Notice that tax collector would be in office and would sell property held not strictly to state time or place of sale (Pol. Code, §§ 3764, 3771a).

Notice, under Pol. Code, § 3764, of tax sale, under section 3771a, that the tax collector would "be in office and sell" property, construed strictly, held not notice of time and place of sale.

9. Taxation ⚡658(1)—Return before sale date of unclaimed jurisdictional notice of sale sent by mail renders tax deed void (Pol. Code, § 3771a).

A notice sent by registered mail before a tax sale, under Pol. Code, § 3771a, to the last known address of the owner is jurisdictional, and, if returned unclaimed before the sale date, renders the tax deed issued pursuant to the sale void, since, if the notice remained in the post office up to the time of sale, the owner might claim it.

10. Taxation ⚡658(1)—Jurisdictional prerequisite of registered mail notice of tax sale is not waived by return of notice unclaimed under postal laws (Pol. Code, § 3771a; U. S. Postal Laws, § 956, as amended in 1918).

The jurisdictional prerequisite of a registered mail notice of tax sale, under Pol. Code, § 3771a, is not waived by return of notice unclaimed under U. S. Postal Laws, § 956, as amended in 1918, providing for return of registered letters remaining undelivered, since under the provisions thereof mail may remain on sender's request 90 days before being returned.

11. Taxation ⚡834—Statute providing for reimbursement to holder of void tax deed does not make owner liable for improvements made by holder (Pol. Code, § 3898, subd. 5).

Pol. Code, § 3898, subd. 5, providing that, before a conveyance of real property made upon sale for delinquent taxes can be set aside as void, the holder must be reimbursed the amount of taxes, penalties, and costs paid out by him, does not make the owner liable for improvements made by the holder of such void deed.

12. Taxation ⚡834—"Costs," as used in statute requiring owner to reimburse holder of void tax deed, does not include expenditures for betterments (Pol. Code, § 3898, subd. 5).

The term "costs," as used in Pol. Code, § 3898, subd. 5, providing that, before a conveyance of real property sold for delinquent taxes can be set aside as void, the holder must first be repaid taxes, penalties, and costs paid out by him, does not include improvements.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Costs.]

13. Taxation ⚡834—General rule, in absence of statute, does not make owner liable for betterments to holder of void tax deed.

The general rule of law, in the absence of statute, does not make the owner liable for the cost of improvements made by the holder of a void tax deed.

14. Taxation $\hookrightarrow$ 829—Expenses of undetermined litigation to terminate right of way held too speculative for reimbursement to holder of void tax deed, even if entitled to compensation for betterments.

The expenses of undetermined litigation instituted by the holder of a void tax deed to terminate a right of way held too speculative to require reimbursement by the owner, even if the holder of such deed would be entitled to compensation for improvements and betterments made by him.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Suit by the Numitor Gold Mining Company against Stephen M. Katzer and another. From a judgment for plaintiff quieting title and declaring a tax deed void because of defective notice of sale, the defendants appeal. Affirmed.

Gerald R. Johnson and Thomas Ashby, both of Sacramento, for appellants.

J. M. Walling, of Nevada City, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment quieting plaintiff's title to real property, and declaring defendants' tax deed void on account of a defective notice of sale.

The defendants assert that the notice of sale was a sufficient compliance with the statute and charge the trial court with error in the exclusion of evidence of the cost of improvements, which they claim to have incurred, and which should have been allowed as a prerequisite to the granting of the decree.

Plaintiff was the owner of 6 tracts of land situated in Nevada county, Cal., aggregating 161 acres of land, which were sold to the state June 25, 1918, for delinquent taxes. On June 4, 1923, pursuant to section 3764 of the Political Code, the tax collector published notice of the sale of these lands in *The Morning Union*, a newspaper of Grass Valley, which notice in part read:

"Addenda Notice.

"Property to be Sold at Public Auction on June 27, 1923, for Delinquent Taxes of 1918.

"Public notice is hereby given that the five-year period allowed by law for the redemption of property sold to the state for delinquent taxes will have expired on the 25th day of June, 1923, on all of the property sold to the state for delinquent taxes in the year 1918, as herein listed (unless redeemed or canceled on or before the date of sale), and that pursuant to the provisions of section 3771a of the Political Code, I, Wm. T. Garland, as county tax collector of the county of Nevada, will be on the 27th day of June, 1922, at 10 o'clock a. m. of said day, and continuing each day thereafter, if additional time is required to complete the sale, in the tax collector's office in the courthouse in the county of Nevada, state of Cali-

fornia, the undersigned tax collector will sell at public auction to the highest bidder, for cash in lawful money of the United States, the several parcels and lots of property hereinafter described. * * *

On June 27, 1923, the land in question was sold to defendants in consideration of the payment of the accrued delinquent taxes and costs, and two days later a deed of conveyance was executed and delivered to them. The validity of the deed is challenged for the following alleged irregularities in the tax sale proceedings, to wit, inaccurate description of the separate parcels of land and defective notice of sale.

[1] The rule is firmly established that the proceedings on tax sales are in invitum, and that every essential step leading to the execution of a tax deed must be strictly followed, or the deed executed pursuant thereto will be void. 24 Cal. Jur. 324, § 296; Russell v. Mann, 22 Cal. 131; Lachman v. Clark, 14 Cal. 131; Kelsey v. Abbott, 13 Cal. 609; Lewis v. Tulare Rec. Dist. 749, 56 Cal. App. 52, 204 P. 421; Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, L. R. A. 1915C, 492.

The statute requires the notice of sale to specify the time, place, and description of the property to be sold. "Such notice shall state the day and hour and place of sale. * * *" Pol. Code, § 3764.

[2] The following descriptions of land were challenged as insufficient:

"Portion E. of Greenhorn creek of E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 15, Twp. 15 N., R. 9 E. Mt. D. B. and M., cont. 5 acres."

This description clearly includes all that portion of the specifically described land lying east of Greenhorn creek, which portion consists of 5 acres and is not uncertain.

For the same reason the following description is sufficient, to wit:

"Portion E. of Greenhorn creek of E. $\frac{1}{2}$ of E. $\frac{1}{2}$ of Sec. 15, Twp. 15 N., R. 9 E. Mt. D. B. and M., containing 80 acres."

[3] Nor is the following description uncertain:

The "S. W. $\frac{1}{4}$ (except part in Bear river) and S. $\frac{1}{2}$ of S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of Sec. 14, Twp. 15 N., R. 9 E. Mt. D. B. and M., containing 180 acres."

This description includes 200 acres of land, except the portion thereof contained within the boundaries of the river which evidently flows through this tract, and which excluded portion by elimination consists of 20 acres of land. There can be no doubt as to the land described, nor as to the portion thereof which is excepted from the levy.

[4] While it is true that a description of land for the purposes of taxation must be certain, yet the description is prima facie sufficient if the land can be readily identified

and located so as not to mislead the owner. Black on Tax Titles, p. 139, § 112; 3 Cooley on Taxation, p. 2363, § 1175; Corson v. Crocker, 31 Cal. App. 626, 161 P. 287.

Strictly construed, the notice which was published in this case stated neither the time nor the place of sale. An error also occurred in the date of sale. We are of the opinion that this notice was, therefore, fatally defective.

[5, 6] The caption to the addenda which reads, "Property to be sold at public auction on June 27, 1923, for delinquent taxes of 1918," is not a definite statement that the property would, in fact, be sold on that date. Moreover, if it can be said to be an affirmative statement that the property would be sold on June 27, 1923, it is in direct conflict with the following language employed in the body of the notice:

"I, Wm. T. Garland, as county tax collector of the county of Nevada, *will be* on the 27th day of June, 1922, at 10 o'clock a. m. of said day, and continuing each day thereafter, if additional time is required to complete the sale, *in the tax collector's office.* * * *

[7] Evidently a clerical error occurred in inserting in this notice the year 1922 instead of 1923. Of course, the figures 1922 indicated an impossible date of sale, since at the time of the publication that date had already elapsed. Nor can it be held that reference to the caption of a notice can be resorted to to correct and actually change an erroneous date contained in the body of the instrument. The notice of the time of sale is statutory and jurisdictional, and the court may not speculate as to the actual date intended to have been inserted. Lewis v. Tulare Rec. Dist., 56 Cal. App. 52, 204 P. 421; Simmons v. McCarthy, 118 Cal. 622, 50 P. 761. In Black on Tax Titles, § 207, it is said:

"It (the notice) must designate the time and place of the sale with such certainty that there can be no reasonable misconception in regard to it." 3 Cooley on Taxation (4th Ed.) p. 2804, § 1415; Knowlton v. Moore, 136 Mass. 32.

[8] A strict construction of the language employed in this notice impels the conclusion that there was an omission to state that the property would actually be sold, even upon that inaccurate date of 1922, for the language is:

"I, Wm. T. Garland, as county tax collector * * * will be * * * in the tax collector's office," on "June 27, 1922, * * * and continuing each day thereafter," etc., and "will sell at public auction * * * the several parcels and lots of property hereinafter described. * * *

This language, construed strictly according to the rule invoked, means that Wm. T. Garland, county tax collector, gave notice that he would be in his office June 27, 1922, and continuing thereafter, and would sell

the property in question, without stating when or where he would dispose of it.

[9] In addition to the publication of notice of sale, the tax collector is required by the provisions of section 3771a to send by registered mail a copy of the notice to the last known address of the party to whom the land was last assessed. This notice must be mailed within 5 days of the first publication, and at least 21 days before the date of sale. The purpose of this mailing of notice is to afford personal service upon the owner, if reasonably possible, and enable him to redeem the property. A copy of this printed notice, with the inaccurate date of 1922 first changed to 1923, in the copy, was on June 4, 1923, forwarded by registered mail to the plaintiff's last known address at Chicago, Ill. The wrapper of this parcel contained printed instructions to return the parcel to the sender within 10 days, if not claimed. It was thereafter returned unclaimed before the date upon which the sale was made.

The service of this notice by mail is also jurisdictional, and, where it is returned prior to the sale without having been delivered, it is an insufficient service of notice, and a deed executed pursuant to such a defective notice is void. The purpose of the statute in requiring this notice to be sent to the owner 21 days before the sale is that he may be thereby given a reasonable opportunity of obtaining personal notice of the sale. If the notice remains in the post office up to the time of sale, there is always a possibility that the owner may claim his mail and thus obtain knowledge of the proposed sale. If it is withdrawn and returned before the sale, this opportunity may be defeated. 24 Cal. Jur. 346, §§ 323, 329; Heulton v. Morrison, 162 Cal. 668, 124 P. 240; Joslin v. Shaffer, 66 Cal. App. 69, 225 P. 307.

[10] Nor is this jurisdictional prerequisite waived, by virtue of the reason that the United States postal rules, in the absence of instructions from the sender to the contrary, require the return of the parcel prior to the expiration of the 21 days required by the statute. Section 956 of the United States Postal Laws, as amended in 1918, provides:

"Domestic registered letters and parcels which remain undelivered for the period stated in paragraph 1 of section 633, or such period as may be named in the sender's return request, if any, not less than three nor more than ninety days, shall be marked on the face with the reason for non-delivery, and be disposed of as here-in provided."

This postal rule clearly implies that a sender of registered mail may request the retaining of the parcel at its destination not to exceed 90 days. The postal rules are, therefore, not in conflict with the California statute respecting the service by mail of notice of proposed tax sales. The failure of the tax collector to request the holding of

the parcel at Chicago for the required 21 days, and his inadvertence in placing upon the wrapper the request to return it if unclaimed within 10 days, was, no doubt, the cause of the premature return of the notice. Whatever may have been the cause, the statute was not fulfilled, and the notice of mailing was therefore defective and inadequate.

The defendants offered to prove that, subsequent to acquiring their title, they expended the sum of \$1,000 prosecuting a suit to terminate a right of way over the property in question, which right of way had been conveyed by the Nevada County Narrow Gauge Railroad Company, a former owner thereof, to one Nolan by deed dated September 19, 1911, and recorded July 10, 1923. It was claimed that this expenditure was in the nature of betterments or improvements to the property and resulted in enhancing the value thereof. Pursuant to this theory, the deed was offered in evidence and was rejected as incompetent on the ground that the statute does not contemplate repayment for improvements or betterments.

[11] Subdivision 5 of section 3898 of the Political Code provides that in an action at law, before a conveyance of real property made upon a sale for delinquent taxes can be set aside as void, the holder of such deed must first be repaid "the full amount of taxes, penalties and costs paid out and expended by him. * * *"

[12] This statutory provision appears to embrace all classes of expenditures, the repayment of which the Legislature intended to make a prerequisite to the entry of a decree declaring a tax deed void on account of irregularities, and it does not pretend to include expenditures for betterments or improvements. Nor can the term "costs," as it is used in this section, be construed to include improvements. Evidently the Legislature, in the use of this term, was considering only the costs which might be incurred on the sale of the property for delinquent taxes.

The case of *Holland v. Hotchkiss*, 162 Cal. 366, 132 P. 258, L. R. A. 1915C, 492, upon which appellant relies, and which contains some language favorable to his contention, involved nothing but a question as to whether the tax deed holder was entitled to interest on the sum of \$327 paid by him for the purchase of the tax title. This case was decided in 1912, before there was any California statute requiring the tax deed holder to be reimbursed for the money expended by him for the purchase of his tax title. It seems a significant fact that, apparently in response to this very decision, the Legislature, the following year of 1913, amended section 3898 of the Political Code, and specifically enumerated just what character of expenditures must be refunded in case of a void tax deed. It would require the exer-

cise of a vivid imagination to read into this statute the requirement to compensate for improvements, and this omission raises almost a conclusive presumption that the Legislature intended to absolve the owner from this liability.

[13] The general rule of law, in the absence of statute, does not hold the owner liable for the cost of improvements, where the tax deed is void. In 3 *Thompson on Real Property*, p. 933, § 2777, it is said:

"The rule of caveat emptor applies with great strictness to a purchaser at a tax sale; and if he fails to secure a good title to the property he attempts to purchase, because of the invalidity of the tax sale, he cannot recover the amount paid therefor, unless some statute expressly provides some such remedy. The purchaser at such sale usually buys at a nominal price, and assumes the liability of having his title prove to be worthless. If he gets nothing by his purchase, he has, in the absence of a statutory provision, no recourse upon any one. The statutes in some states * * * provide that the party seeking to have the sale set aside must reimburse the purchaser to the extent of the taxes legally assessed, with costs of the sale and interest. The effect of such a statute is to modify the rule of caveat emptor as applied to such sales. * * * So the extent of the purchaser's title in a particular case depends on the statute under which the sale is made." 3 *Devlin on Deeds* (3d Ed.) § 1349.

In *Black on Taxes* (2d Ed.) p. 592, § 463, it is said:

"If the tax sale is absolutely void, the payment of the tax by the purchaser stands on the footing of a voluntary payment, not made at the request of the owner of the land, and which a court of equity will not require him to refund." *Harper v. Rowe*, 53 Cal. 233.

The texts relied upon by appellant either declare a limited and conditional requirement on the part of the owner to recompense the disseized tax deed holder for improvements, or bases this necessity upon the existence of a definite statute to that effect.

In 4 *Cooley on Taxation* (4th Ed.) p. 3058, § 1557, the author says:

"If the holder of a tax title goes into possession and in good faith makes improvements, he is ordinarily entitled to compensation for such improvements on the owner's recovering the property, so far as such value exceeds rental value. It is generally required that the defeated tax purchaser account for rents and profits received by him.

"A common statutory provision is that the owner of the original title, in the event of his establishing the title to the land, shall pay to the tax purchaser the enhanced value of the land in consequence of the expenditures the latter has made upon it. The requirement that payment shall be made of the fair value of betterments which an adverse claimant has made in good faith upon the land, and which the party making them must now lose, is one that, under ordinary circumstances, is eminently just and proper.

"No serious question of the right of the Legis-

lature to make such requirements can well arise. The requirement is at this time very generally made, either by statutes especially applicable only to tax sales, or by general 'occupying claimant' statutes applicable to tax sales as well as other sales, but no recovery for improvements is possible where the statute providing therefor has not been complied with, nor where the purchaser has entered into possession in violation of a statute."

In 26 R. C. L. p. 441, § 397, it is said:

"In many of the states the remedy for improvements, made in good faith by persons in possession under color of title, has been established by statute, and the rule of the common law * * * has been (thereby) greatly extended."

Likewise the same text-writer, in 26 R. C. L. p. 439, § 395, says:

"When an owner's land has been sold for taxes under an invalid sale, and he comes into a court of equity and asks for a decree setting aside the sale and quieting the title * * * he should be required to reimburse the person who purchased the land at the tax sale for so much of the purchase price as was applicable to the payment of the tax, as a condition precedent to relief on the general principle that 'he who seeks equity must do equity.' In many states the foregoing principle is established by statute, and in but a few states is it now the law that the doctrine of caveat emptor will be extended so far as to enable the owner to obtain relief in equity against an invalid sale without reimbursing the purchaser to the amount of the taxes of which the owner has been relieved."

Some confusion exists among the authorities as to the liability of an owner of land to recompense the holder of an invalid tax deed for the value of improvements placed upon the premises upon the good faith of his tax title. There is a sharp conflict between the doctrine of caveat emptor which applies to the purchaser of a tax title, and the maxim that "he who seeks equity must do equity," applying to an owner who seeks to quiet title against an invalid tax deed. Many states have enacted statutes, termed betterment laws, which are intended to recognize the equities and enable a bona fide holder of a tax title to recover the enhanced value of property, on account of improvements placed by the purchaser upon premises in good faith. 26 R. C. L. p. 441, § 397; 14 R. C. L. p. 19, § 7; 31 C. J. p. 315, § 18. In a few states, independent of such betterment statutes, it has been held that where an owner brings his action in equity for an accounting for rents and profits, or to quiet title against a tax deed held by a bona fide holder, the owner must recompense such holder for the value of improvements. 31 C. J. p. 314, § 16; 14 R. C. L. p. 18, § 6. Most cases confine this doctrine to actions in equity instituted by the owner, and do not extend it to cases where the tax holder

is the actor in the litigation. 31 C. J. p. 314, §§ 16, 17. And in many cases it has been held that the value of improvements may be recouped by the tax deed holder, only as an offset, when the owner has sought for an accounting for rents and profits. "It has been held that if no claim is made for rents and profits, no allowance can be made for improvements." 31 C. J. p. 314, § 16; Green v. Biddle, 8 Wheat. 1, 5 L. Ed. 547.

An examination of the authorities indicates that the common-law rule, which precludes the recovery of the value of improvements made by a holder of tax title under a void deed, has been very cautiously extended. Recognizing the far-reaching effect and the possible irreparable injury to the owner by abandoning the rule of caveat emptor with respect to tax titles, the courts have been loath to extend the rule compelling compensation for improvements, in the absence of statutory requirements. The language of the text-writers and of the decisions, which supports the doctrine compelling an owner to recompense a tax deed holder for the value of improvements, is usually based upon the existence of betterment statutes. And those authorities which have required payments as a pure doctrine of equity independent of statute have usually confined this requirement to the mere repayment of assessments, taxes, penalties, costs, and interest. That is the full extent to which the case of *Holland v. Hotchkiss*, supra, can be said to go, for the question of interest on the taxes paid by the purchaser of the title was the sole problem there involved. We have been cited to no case in the California reports which extends the rule beyond this limit. Indeed, it would seem to be revolutionary and dangerous to do so. For generations the theory of the law has been that the purchaser of a tax title is a mere speculator, who, owing to the misfortune or carelessness of the owner, has become possessed of a desirable property for an infinitesimal proportion of its actual value. In the absence of negligence or laches on the part of the owner, the purchaser, on the doctrine of caveat emptor, should improve or radically alter the character of the property at his peril, at least until he had remained the undisputed owner for a reasonable length of time. Justice would seem to require the protection of an unfortunate owner against too hasty or radical changes in the character of the property by an ambitious tax buyer, which might amount to appropriation, even though the deed proved to be void and the purchaser was without title.

[14] In the instant case, the plaintiff was a foreign corporation with a residence at Chicago, and therefore there was a greater probability of its being ignorant of the existence of delinquent taxes. Defendants became the purchaser of the tax deed on June

27, 1923, without any actual knowledge of the sale on the part of plaintiff. This suit to quiet title was commenced January 9, 1924, within 6 months and 12 days from the time defendants received their deed. Yet within this brief period defendants are claiming to have instituted litigation to terminate a right of way across the land and ask to be reimbursed to the extent of \$1,000.

All that defendants offered to prove was that they had commenced this action; it had not been terminated in their favor, or at all. There was no offer to show that it was even likely to terminate favorable to the defendants. For aught that appears, it may have been ill-advised litigation with no reasonable hopes of success. Indeed, the grantees apparently held a good deed of conveyance to the right of way. Moreover, there was no proof, nor offer of proof, that the litigation, even though it terminated successfully for the defendants, would enhance the value of the premises to any extent whatever. The showing in this case is too speculative, remote, and uncertain to warrant the assumption that the mere commencement of an action of that character would constitute an enhancement of value or a betterment to the property involved.

For this reason and because we are of the opinion that, under our statute, the owner of property is not liable for the value of improvements or betterments placed upon property by the holder of a void tax deed, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

MOJAVE RIVER IRR. DIST. v. SUPERIOR COURT OF STATE OF CALIFORNIA WITHIN AND FOR SAN BERNARDINO COUNTY et al. (Civ. 5507.) ★

District Court of Appeal, Second District, Division 2, California. April 28, 1927.

Hearing Granted by Supreme Court June 27, 1927.

1. Constitutional law §43(2)—Petitioner appropriating water under act held not to have waived right to question constitutionality of provision for review in superior court (Water Appropriation Act, § 1b).

Petitioner for water right under the Water Commission Act (St. 1923, p. 162) because it received permission to appropriate water thereunder held not to waive right to object to constitutionality of section 1b, providing for review in the superior court by party aggrieved, especially where section 1b was severable from other sections.

2. Courts §20—"Special cases and proceedings" as respects superior court's jurisdiction are new cases and proceedings unknown to general framework of law and equity (Const. art. 6, § 5).

Where 30 years prior to adoption of Constitution of 1879, phrase "special cases and pro-

ceedings" was judicially defined as new cases, the creation of statutes and the proceedings under which are unknown to the general framework of courts of law and equity, since it must be presumed the language of article 6, § 5, of the present Constitution was intended to have the same meaning as when used in the same sense and context as that of 1879, such definition is applicable to present article 6, § 5, giving superior court original jurisdiction of "special cases and proceedings" not otherwise provided for.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Proceeding.]

3. Waters and water courses §142—Appropriation under statute merely gives preference over subsequent appropriator and fixes date of inception of claim (Water Commission Act).

Effect of appropriation of water under the Water Commission Act (St. 1923, p. 162) is merely to give a preference over a subsequent appropriation or diverter who takes under no other right or title and to fix date of posting of notice as inception of claim under it.

4. Waters and water courses §152(1)—Action to review order of state water commission held not one in certiorari (Water Commission Act, § 1b).

Proceeding under Water Commission Act, § 1b (St. 1923, p. 162), to review order of state water commission in granting application to appropriate water, held not one in certiorari, since remedy afforded is in affirmance, reversal, or modification of order of the division of water rights and not to set aside a decision of that body.

5. Waters and water courses §152(4)—Superior court held without jurisdiction of appeal or writ of review from order of division of water rights, granting permit (Water Commission Act, § 1b).

Since the division of water rights under the water commission act (St. 1923, p. 162) cannot exercise judicial functions nor be vested with judicial authority, the superior court is without jurisdiction under Water Commission Act, § 1b, of appeal or writ of review from its order granting permit to appropriate water.

6. Constitutional law §48—Construction upholding legislative act is favored over one rendering it void.

Courts favor a construction which will uphold a legislative act rather than one rendering it void.

7. Waters and water courses §128—Statutory review of order of water commission by superior court held not a "special case or proceeding" not otherwise provided for within Constitution (Water Commission Act, § 1b; Const. art. 6, § 5).

Water Commission Act, § 1b (St. 1923, p. 162), permitting action in the superior court to review order of the state water commission issuing or refusing to issue permit to appropriate water, held not, in view of remedies afforded to persons aggrieved to provide for "special case or proceeding," within Const. art. 6, § 5,

providing superior court shall have jurisdiction of special cases and proceedings not otherwise provided for.

8. Statutes $\S$ 85(4)—Act permitting review of quasi judicial order of water commission by superior court held invalid as "special law" regulating practice in courts (Water Commission Act, $\S$ 1b; Const. art. 4, $\S$ 25).

Water Commission Act, $\S$ 1b (St. 1923, p. 162), permitting action in the superior court to review quasi judicial order of the state water commission issuing or refusing to issue permit to appropriate water, *held* invalid under Const. art. 4, $\S$ 25, as a "special law" regulating practice in the courts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Law.]

9. Statutes $\S$ 76(3)—Act permitting review of order of water commission by superior court held invalid as special law where general law is applicable (Water Commission Act, $\S$ 1b; Const. art. 4, $\S$ 25, subd. 33).

Water Commission Act, $\S$ 1b (St. 1923, p. 162), permitting action in the superior court to review order of the state water commission issuing or refusing to issue permit to appropriate water, *held*, in view of other remedies of parties aggrieved, invalid under Const. art. 4, $\S$ 25, subd. 33, as a special law where general law was applicable.

10. Constitutional law $\S$ 56—Waters and water courses $\S$ 128—Act permitting review of order of water commission held invalid as conferring nonjudicial duty on superior court (Water Commission Act, $\S$ 1b; Const. art. 6, $\S$ 1).

Since duties of the superior court under Water Commission Act, $\S$ 1b (St. 1923, p. 162), in reviewing order of the state water commission in issuing or refusing to issue permit to appropriate water, are regulatory and ministerial, act *held* void under Const. art. 6, $\S$ 1, as conferring on court duties of nonjudicial nature.

11. Prohibition $\S$ 3(5)—Prohibition may be granted by Supreme Court though right of appeal exists if appeal from superior court's order would be inadequate (Water Commission Act, $\S$ 1b).

Where existing right of appeal if the superior court proceeded under Water Commission Act, $\S$ 1b (St. 1923, p. 162), to review order of the state water commission granting permit to appropriate water of a river would not be adequate remedy, petitioner is entitled to writ preventing the court from taking further steps to review the commission's order.

Original prohibition by the Mojave River Irrigation District against the Superior Court of the State of California within and for the County of San Bernardino and others. Writ granted.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for petitioner.

Byron Waters and Grant Holcomb, both of San Bernardino, for respondents.

Spencer Burroughs, of Sacramento, T. P. Wittschen, of Oakland, and Hadsell, Sweet & Ingalls, of San Francisco, amici curiæ.

CRAIG, J. The purpose of this proceeding is to prevent the respondent court from taking further steps in a certain suit instituted therein and entitled Van Dyke et al. v. Department of Public Works of the State of California et al. That action is one under section 1b of the Water Commission Act, enacted in 1923 (Stats. 1923, p. 162). It was brought to secure a review of an order of the division of water rights of the department of public works (herein referred to as the division of water rights), granting the Mojave River irrigation district a permit to appropriate water of the Mojave river.

The petitioner relies principally upon the claim that section 1b of the Water Commission Act is unconstitutional. The section reads as follows:

"Any person, firm, association, or corporation interested in any application for a permit to appropriate water or any party protestant before the state water commission may within thirty days after issuance of a permit or an order refusing to issue a permit and rejecting an application bring an action in the superior court in and for the county wherein the proposed point of diversion or a proposed point of diversion lies. Said action shall be for a review of the order of the state water commission. Said court shall review all correspondence, maps, data and other records on file with the state water commission which pertain to said application and all evidence taken before said commission and take such additional evidence as it may require or as may be submitted by the parties in interest or the state water commission and shall then render judgment affirming, reversing, or modifying the action of the state water commission. The priority of right of an applicant shall continue until final judgment is rendered."

One of the provisions of the Constitution with which this section is said to conflict is the third paragraph of section 25, article 4, by which the Legislature is prohibited from passing local or special laws regulating the practice of the courts of justice. That this criticism is good cannot be disputed unless the procedure provided is justified as within the practice of the common-law or equity actions or proceedings as administered by courts of law or equity as such at the time of the adoption of our Constitution, or as belonging to the class of special cases or special proceedings allowed by the Constitution to be created by the Legislature. It is expedient first to determine the nature of the proceeding in the superior court, and to do this our principal task is to construe the provision under which it was instituted, and which for purposes of brevity will be referred to herein merely as section 1b. With slight variations in the phraseology of this section it might be

interpreted as intended to provide for a proceeding in the superior court in the nature of certiorari, an appeal, or for special cases or special proceedings such as those to which reference is made in section 5, article 6, of the Constitution.

[1] A preliminary objection is interposed to the maintenance of this proceeding by the petitioner on the ground that it is estopped to question the constitutionality of the Water Commission Act by reason of the fact that it has taken advantage of the provisions thereof by applying for and receiving an order from the division of water rights permitting the appropriation of water of the Mojave river, which order is the one sought to be reviewed in the action involved in this proceeding. We think the principle of estoppel cannot be extended this far. If, having applied to the division of water rights for permission to appropriate water, petitioners had disputed the constitutionality of the act giving it the right to grant such permission, an estoppel would exist against the assertion of such a claim. The authorities cited, *Gregory v. Hecke*, 73 Cal. App. 268, 238 P. 787; *Cofman v. Ousterhous*, 40 N. D. 390, 168 N. W. 826, 18 A. L. R. 219, as well as *Stuart v. Norviel*, 26 Ariz. 493, 226 P. 908, justify this conclusion, but they do not hold or suggest that one who has sought and secured a benefit from a single provision of an act is estopped to assert that another and a severable provision is unconstitutional. It is obvious that section 1b is severable from other sections of the act, and especially that under which the division of water rights is authorized to allow permission to appropriate water. Section 1b not only has no necessary connection with the latter provision, but in the sense that it permits of the annulment of any order made thereunder it is inconsistent therewith. Hence, an applicant for such a permit does not waive the right to object to the legality of section 1b.

[2] Section 5, article 6, of the Constitution, reads as follows:

"Sec. 5. The superior court shall have original jurisdiction * * * of all such special cases and proceedings as are not otherwise provided for."

The inquiry logically narrows to the ascertainment of the scope and definition of the term "special cases and proceedings" as it is here used. This is particularly essential because of the constitutional inhibition heretofore mentioned, declaring that the Legislature shall not pass "local or special laws regulating the practice of courts of justice," and among the subjects within the constitutional inhibition are cases where a general law can be made applicable. Article 4, §§ 25, subd. 33. Special cases give new rights and afford new remedies. *Saunders v. Haynes*, 13 Cal. 145; *Appeal of Houghton*, 42 Cal. 35. Concerning the phrase "special cases and proceedings," used in section 5, article 6, of the Constitu-

tion of 1879, it is said in *Bixler's Appeal*, 59 Cal. 550, 555:

"Nearly thirty years prior to the adoption of the Constitution of 1879, they had been defined by the Supreme Court of the state as something entirely different—'new cases, the creation of statutes, and the proceedings under which are unknown to the general framework of courts of law and equity'—as not including any class of cases for which courts of general jurisdiction had always supplied a remedy."

And the opinion approves this definition. A similar expression is to be found in *Re Central Irrigation District*, 117 Cal. 382, 49 P. 354.

It must be presumed that the language found in the present Constitution was intended to have the same meaning as when used in the same sense and context as that of 1879, and hence the definition above quoted is applicable to the present provision of section 5, article 6, of the Constitution.

[3] The determination of this proceeding then hinges upon whether or not a party having rights which may be affected by the order of the division of water rights on application for permit to appropriate water has a remedy through the institution of a suit within the general jurisdiction always possessed by courts of law or equity. What may be the rights of others than the applicant which may be infringed by the granting of such a permit by the division of water rights? What may be the rights to be acquired by the applicant for such a permit? What effect has an appropriation upon the rights of others? The last question may be answered first, that "its effect is merely to give a preference over a subsequent appropriator or diverter who takes under no other right or title, and to fix the date of the posting of the notice as the inception of the claim under it." *Herminghaus v. Southern California Edison Co.* (Cal. Sup.) 252 P. 607.

[4] The proceeding is not an ordinary one in certiorari, since the remedy afforded is the affirmance, reversal, or modification of the order of the division of water rights and not the setting aside of a decision of that body. Again, if section 1b contemplated a writ of review the tribunal making the order would be the respondent, and the only one. Here the successful party in the proceeding before the division of water rights is such a party. Also the hearing before the superior court is one at which evidence not presented to the division of water rights is authorized to be considered, whereas only the record before the inferior tribunal is before the reviewing court on certiorari.

[5] The review of the order here involved cannot be intended as an appeal to the superior court, because such an appeal can only be taken from the decision or judgment of an inferior court (Const. art. 6, § 5; *Chinn v. Superior Court*, 156 Cal. 478, 105 P. 580), and

this principle is also applicable to a writ of review (Dept. of Public Works v. Superior Court, 197 Cal. 215, 239 P. 107C). But the division of water rights of the water commission is in no sense judicial, the Legislature is without power to vest it with judicial authority, and it cannot exercise judicial functions. Dept. of Public Works v. Superior Court, supra.

We might state the proposition in another way, and say that if section 1b should be construed as an attempt to provide for appeal to the superior court from an order of the division of water rights it would be unconstitutional, for the reason just stated. Also, if it should be decided that by section 1b provision was meant to be made for a different or extended form of writ of review beyond the common-law scope as it existed when the present Constitution was adopted, this would be unconstitutional. *People v. Barbera* (Cal. App.) 248 P. 304; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35; *Maurer v. Mitchell*, 53 Cal. 289; *State v. Durand*, 36 Utah, 93, 104 P. 760.

In view of another phase of the argument which will require consideration later, it may be appropriate to state at this point that were it to be held that by section 1b provision has been made for an appeal from the order of the division of water rights, it would necessarily follow that this would constitute an unconstitutional attempt to vest judicial power and the performance of a judicial function in that body.

[6] We proceed, then, to consider whether or not the legislative intent was to authorize a special case or special proceeding, and if so to determine its legality. That this was the purpose is urged by those seeking to uphold the law and who oppose the granting of this petition, and we think at this point it may be assumed that section 1b was meant to provide for an original proceeding in the superior court, for if an appeal or enlarged form of certiorari were intended such legislation would be unconstitutional, and courts always favor a construction which will uphold rather than render void a legislative act.

[7] The rights of others than the applicant may have originated by purchase, prescription, condemnation, or otherwise. They may be possessed by individuals or by corporations, public or private. They may be for purposes of irrigation, power production, domestic uses, or what not. The right to exercise them may be continual or occasional, or at certain times only. They may be independent of others, or dependent and secondary to them. They may be vested or merely inchoate, but capable of becoming vested, and through the doctrine of relation finally attach from the date of their initiation. But concerning all of these rights ample provision has always existed for their protection. Remedies by way of injunction, mandamus, suit to quiet title, prohibition, damages, and cer-

tiorari have afforded adequate protection to every interest in water heretofore or now known to the law. As to such rights no new interests are conferred in any instance by the Water Commission Act, and cases provided by section 1b are not those for which courts of general jurisdiction have lacked a remedy.

In appraising the rights to be acquired by the applicant for a permit to appropriate water, it must first be observed that the extent of the right is merely permission to make claim to a water right, and to subsequently acquire title thereto. Title is not conferred or even confirmed by the order of the division of water rights. The effect of such an order may be nullified by the decision of the court in a proper proceeding. If the division of water rights improperly refuses a permit, mandamus will issue to require that it be granted. If permission be wrongfully granted, those having rights which are prejudiced thereby have ample protection through the well established remedies above mentioned, and even if, as argued by some of those who uphold the constitutionality of the section, it were to be held that since the amendment of 1923 the division of water rights acts in a quasi judicial capacity in passing upon applications for permits its decision might be reviewed upon certiorari.

Up to 1913 the same right to appropriate water existed which is recognized by the Water Commission Act. The latter has created no new right in water, but only a different procedure for the acquisition thereof, and the title of one who has taken the first step toward making an appropriation is an interest in realty, and as such may be protected through a suit to quiet title. *Inyo Cons. Water Co. v. Jess*, 161 Cal. 516, 119 P. 934.

It is suggested that proceedings before the division of water rights are highly complicated; that many parties and numerous issues may be involved in a single hearing, and these considerations are apparently advanced to show that without section 1b no remedy exists or existed before its enactment for an adjudication of water rights which may be the subject of dispute. We have read the long list of issues and subissues which are set forth in the briefs of an *amicus curiae* in this behalf, but have found none which may not be determined and the rights of the parties therein adjudicated in some one of the ordinary actions or proceedings at law or in equity.

It is said that where a ministerial officer exercising quasi judicial powers acts upon conflicting evidence his decision is discretionary, and not merely ministerial. However, it must be conceded that this rule is not peculiar to its application to the acts of the division of water rights, but applies to them only because it is a principle general in its scope and application affecting all officers charged with the discharge of regulatory duties involving quasi judicial decisions of preliminary ques-

tions of fact. Many instances where the decisions of such officers have been held to be discretionary are found throughout the decisions. The latest of that type is *Bank of Italy v. Johnson* (Cal. Sup.) 251 P. 784, where it is determined that the banking business is an appropriate subject for police regulation, and the powers of the bank commissioner in withholding his approval of the establishment of branch banks is held to be discretionary; and further that while the writ of mandamus may be used to compel a public official possessing discretionary power to act, the court may not substitute its discretion for that vested in the officer. If the rule operates to subserve public justice as governing the conduct of other officers of a similar class exercising like authority, there is nothing to indicate that it is not producing the same beneficial result when applied to the orders of the division of water rights in issuing permits to appropriate water. It must be remembered that in such cases jurisdictional matters may always be ascertained in a proceeding in certiorari, and that in that behalf the court may inquire into the existence of the facts necessary to give the executive officer authority to act. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35.

Difficulties often arise in the application of even the most clearly established principles of law to deeply involved conditions in extreme cases. That such a result might follow from the judicial recognition of the doctrine of correlative rights as apply to percolating waters was admitted by the court in its decision in *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, but it was nevertheless held that such difficulties in the performance of judicial duty, even though it might be seriously argued that they were so great as to present the impossibility of the performance thereof, would present no bar to the maintenance of property rights. Our courts have never admitted the impossibility of performance of judicial functions because of the difficulty of the task imposed upon them by reason of the great number of parties, or of issues.

[8] We conclude that, although the action provided by section 1b may be a special proceeding, it is not "a special case or special proceeding" as that phrase is used in section 5, article 6, of the Constitution of California. On the other hand, it requires but a cursory examination to disclose that the section is a special law regulating the practice of courts of justice. A single observation is sufficient to establish that this is true. The only remedial action authorized by section 1b to be taken by the superior court in the exercise of jurisdiction conferred is that of affirming, reversing, or modifying the order of the division of water rights. The division of water rights is not a court or judicial body, and its orders are regulatory and ministerial. *Department of Public Works v. Superior Court*,

supra. It requires no citation of authorities to point out that in ascribing to a trial court such duties, as part of its judicial procedure in the exercise of original jurisdiction in the trial of a case, the Legislature has provided a special procedure in courts of justice. Although the division of water rights is not strictly a court or judicial tribunal, it nevertheless performs quasi judicial functions, exercising discretionary powers, but this would not under general laws regulating the procedure in courts permit the superior court to affirm, reverse, or modify the order of the quasi judicial body. The regular and ordinary procedure in such a case is a review of such order by certiorari. *Suckow v. Alderson*, 182 Cal. 247, 187 P. 965; *Imperial Water Co. No. 1 v. Supervisors*, 162 Cal. 14, 120 P. 780.

[9] Section 1b is also repugnant to article 4, section 325, subdivision 33, against special laws where a general law can be made applicable, for, as we have shown, the general laws now available are adequately remedial (which section 1b would not be, even if upheld) for the protection of all interests which can possibly exist in water rights. We say that even if section 1b were held to be constitutional it would not furnish an adequate remedy in the matter of the improper issuance of permits to appropriate water. A single instance will make this plain, although others might be stated. Suppose that after a hearing in the superior court upon an order of the division of water rights it were determined that a permit was improperly refused to one applicant and granted to another. The only action which the court is authorized to take would be to reverse the order. It has no authority to issue a permit nor even to direct the division of water rights to issue one. The reversal of the order being accomplished, there is no legal hindrance to the division granting a permit to another applicant who has perhaps appeared while the appeal to the superior court was in progress and again refusing the appealing applicant his permit. He might appeal again, and so on, ad infinitum, without ever securing an effective order from the division of water rights for himself. If the superior court under its authority to modify such an order should attempt to exercise the right in such a case to issue a permit to the appealing applicant, this would surely involve the exercise of an administrative function, and be without its jurisdiction.

An examination of the cases cited in the brief of the state division of water rights to support the constitutionality of section 1b against the claim that it is a special law regulating the practice of courts of justice shows that the acts construed were upheld upon the ground that the law in question was general and not special, or that an entirely new right was created which, of course, placed the statute in question within the class of "special cases and special proceedings not otherwise

provided for." For example, in *Title, etc., Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 P. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199, it is said:

"A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special." *McDonald v. Conniff*, 99 Cal. 386, 391, 34 P. 71. * * *

"Under these rules we think the proceeding created by the act in question is sufficiently distinct and different from ordinary civil actions covered by the general rules of the code to justify the creation of a class which shall be characterized by the special rules of procedure here provided. * * *

Elberta Oil Co. et al. v. Superior Court (Cal. App.) 239 P. 415, illustrates the other type of cases. The statute there construed created a new right, in that it gave a stockholder the right to institute a proceeding to set aside an election of directors of a corporation. The opinion states:

"Prior to the enactment of these sections of the Code, or of legislation similar thereto, the only method of setting aside an election of directors at a stockholders' meeting was by quo warranto proceedings, instituted in the name of the people of the state. *Whitehead v. Sweet*, 126 Cal. 67, 58 P. 376."

The confirmation act involved in *Re Central Irrigation District*, 117 Cal. 382, 49 P. 354, also clearly falls within this classification. There the entire subject concerning the organization of irrigation districts and other matters designated in the act is statutory, and concerns rights and remedies unknown to the common law. The same is true of the act construed in *Roche v. Superior Court*, 30 Cal. App. 255, 157 P. 830. In such cases the Legislature may provide procedure unknown to the common law so long as property rights are not divested without due process of law.

The acts construed in *Gridley v. Fellows*, 166 Cal. 765, 138 P. 355, and *Cohen v. City of Alameda*, 168 Cal. 265, 142 P. 885, are clearly distinguishable from section 1b of the Water Commission Act. Both cases involved mere questions of the classification of causes of action. Neither has to do with the creation of new rights or new and different actions. In *Department of Public Works v. Superior Court*, 197 Cal. 215, 239 P. 1076, it was held that all acts of the division of water rights are ministerial and regulatory, but the decision relates to section 12.

Much reliance is placed upon *U. S. v. Ritchie*, 17 How. 525, 21 Curt. 656, 15 L. Ed. 236, holding that an act which provided that after a board of commissioners had rendered final decision an appeal might be taken to the United States district court was in fact intended to provide for an original proceeding in that court. No consideration was given to the possible conflict of that enactment with such an organic inhibition as that contained

in section 25, article 4, of our Constitution, for there was no such limitation upon the power of Congress to pass a special act.

[10] We also agree with the petitioner that since all acts of the division of water rights relative to applicants for permits to appropriate water are regulatory and ministerial, and not judicial, and since the jurisdiction of the superior court is limited by section 1b to merely the right to affirm, reverse, or modify orders of the division of water rights, the function thus required to be performed by the superior court would be regulatory and ministerial only and in no sense judicial. Of course, this would not follow if the superior court were reviewing the record of the division of water rights upon certiorari, but the conclusion above stated must result since the action authorized in the superior court cannot for the reasons we have heretofore stated be upheld as such a proceeding and only, if at all, upon the theory that it is meant to provide an original action in the superior court. Hence, the provision is unconstitutional, for duties of a nonjudicial nature cannot be conferred upon courts. Section 1, art. 6, Const; *People v. Sanderson*, 30 Cal. 168; *Phelan v. City and County of San Francisco*, 20 Cal. 40; *Tyson v. Washington County*, 78 Neb. 211, 110 N. W. 634, 12 L. R. A. (N. S.) 350. The same principle is recognized in *Smith v. Strother*, 68 Cal. 194, 8 P. 852.

In considering this issue the Water Commission Act must not be confused with that class of statutes which place quasi judicial powers in the hands of administrative officers charged with the enforcement of police regulations. In *County of Los Angeles v. Spencer*, 126 Cal. 670, 59 P. 202, 77 Am. St. Rep. 217, an act giving horticultural commissioners authority to determine whether a particular place was a nuisance because of infection with scale, insects etc., was upheld as not violative of the Constitution. The opinion reviews many other similar ordinances, all involving the exercise of police power, and which place a certain degree of discretion in the hands of such officials as fire commissioners, viticultural commissioners, health officers, park commissioners, and quarantine officers. To this list might be added members of boards of medical examiners and dental examiners, and many others. The opinion last mentioned points out that although these ordinances allow and require the exercise of some discretion, which in a strict sense is judicial in its nature, still it is not judicial within the meaning of the inhibition of article 6, of the Constitution. Further, that such acts constitute a proper exercise of the police power within the meaning of section 1, article 19, of the Constitution. It is said that the efficiency of many police regulations depends upon their prompt and summary execution, which makes it necessary to place a certain discretion in the hands of officers who are making the regulations effective.

The discretion authorized by section 1b of the Water Commission Act to be exercised by the division of water rights in similar to that conferred upon the registrar of titles by an act involved in *People ex rel. Deneen v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175. It was there held that the act did not conflict with a provision of the Constitution similar to that contained in our own, which forbade the conferring of judicial powers upon nonjudicial officers. The court held that the registrar was required to determine certain facts quasi-judicially, but that this did not constitute an exercise of judicial power, strictly speaking, and as contemplated by the Constitution. It is said:

"The primary purpose is the issuing of the certificate, and the exercise of the judgment of the registrar is incidental. The prohibition in question 'has never been held to apply to those cases where judgment is exercised as incident to the execution of a ministerial power.' *Owners of Lands v. People*, supra." (113 Ill. 296.)

In the instant case the primary purpose of issuing the permit, and the exercise of the judgment of the division of water rights is incidental. Its judgment is exercised only as an incident to the execution of its ministerial powers. To review its acts in that behalf before a judicial tribunal whose only purpose and power is to affirm, modify, or reverse the order of the division of water rights, cannot be regarded as the exercise of a judicial function by the court. The sole object of the proceeding in the superior court is to determine the correctness of the act of the division of water rights.

The act construed in *People ex rel. Deneen v. Simon*, supra, provided that any person feeling himself aggrieved by the act of the registrar in any matter pertaining to the duties required of him might file a petition in equity in the proper court, making the registrar and other persons interested parties defendant, and that "the court may proceed therein as in other cases in equity." The statute involved in *Ricks v. Reed*, 19 Cal. 551, also provided for a proceeding before the county court under general rules of procedure and without special regulations as to the character of the decree to be rendered by the court. In this regard the difficulty with section 1b is that instead of authorizing an action by any one aggrieved by the order of the division of water rights, in conducting which the superior court would have jurisdiction to proceed as in other cases, the procedure provided allows the introduction and use of hearsay evidence; it requires the consideration of all of the records used by a ministerial officer, whether such evidence is admissible or not under the ordinary rules governing the production of evidence, the subject-matter of the action is merely the order of the division of water rights, and finally it limits the court to affirming, reversing, or modifying the order

of the board having ministerial and regulatory authority only.

Authorities from other states referred to in the briefs of those maintaining the constitutionality of the laws under construction are of little assistance, for various reasons. No judicial interpretation of a similar statute has been called to our attention rendered in a jurisdiction having the same constitutional provisions and the same doctrines concerning water rights as our own. It appears that in a number of the western states provisions quite similar to that before us exist and have been acted upon without question, apparently on the assumption of their validity. However, this furnishes but slight authority.

Section 1b is clearly severable from other provisions of the Water Commission Act, therefore no expressions of opinion upon the validity of any other sections of the act are here announced. Whatever may be the reasons for doubting their validity, it is expressly provided by section 46 of the act that—

"If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional." Stats. 1913, p. 1012.

[11] We think that well-recognized principles entitle the petitioner to the relief sought, notwithstanding the right of appeal would provide a remedy should the superior court proceed with the trial, for such right of appeal would not in this instance be adequate. The situation is similar in principle to that presented in *Davis v. Superior Court*, 184 Cal. 691, 195 P. 390, in which it was said:

"While the existence of the right of appeal at that time might have been a sufficient reason for that court to have then refused to entertain the petition (*Glougie v. Superior Court*, 169 Cal. 675 [147 P. 972]), yet, in view of the fact that the superior court was then, and ever since has been, without power or jurisdiction to proceed further in the action, as we have shown, but nevertheless proposes to do so, and that further proceedings of any kind, except to again dismiss the action, would be void, we are disposed to grant the writ, rather than put the parties to further vexation and useless expense by further attempts to prosecute it. The question is largely one of discretion, and we deem it the better policy to terminate the proceedings forthwith."

The petitioner herein would otherwise be put to the expense of a voluminous record, and of attending a protracted hearing in the superior court, as well as of making extensive preparations for the hearing.

Entertaining these views, which necessitate the granting of the petition, it is unnecessary

and unprofitable to consider the other ground urged by the petitioner, namely, the alleged insufficiency of the complaint filed in the superior court to state a cause of action, or to determine whether that ground is open in a proceeding like the present.

The peremptory writ of prohibition is granted.

THOMPSON, J. I concur.

WORKS P. J. I concur in the judgment, but not upon all the grounds stated in the foregoing opinion. I am in thorough accord with what is said upon the question of estoppel. I also assent to the views that section 1b of the Water Commission Act was not intended to confer jurisdiction to issue the writ of review, nor to confer a right of appeal, and I concur in the reasoning which is advanced in the opinion in support of those views. I agree, also, in the conclusion that section 1b is unconstitutional, but upon one only of the grounds advanced in the foregoing opinion in support of it. I think the section is a special law regulating the practice of courts of justice, for the reason that it attempts to empower—in truth, it directs—the superior court to consider evidence which would not be admissible in the ordinary civil action. Section 1a of the Water Commission Act (Stats. 1923, p. 161; Deering's Gen. Laws 1923, Act 9091) provides that in hearings before the commission upon applications for such permits as the one which is in question here, "technical rules of evidence need not be applied." It may be difficult to determine exactly what is meant by this very general language, but some effect must be given to it. Doubtless, at least, if the commission in some hearing should consider hearsay evidence or so-called evidence in the form of affidavits, it would not be held that it had acted improperly. Section 1b of the act provides that the superior court, in the proceeding sought to be authorized by the section, "shall review"—and this must mean shall consider—"all correspondence, maps, data and other records on file with the state water commission which pertain to said application and all evidence taken before said commission. * * *" As already observed, I think this language renders section 1b unconstitutional. I express no opinion upon the other grounds stated in the foregoing opinion as affecting the constitutionality of the enactment. Particularly, I am not prepared to say, and I find it unnecessary to say, whether the words found in the section to the effect that the superior court "shall then render judgment affirming reversing or modifying the action of the state water commission" are operative in such manner as to prevent the rendition of a final judgment like the "action" of the commission or either partially or wholly different from it.

I am in accord with everything in the fore-

going opinion which is not referred to or mentioned in this concurring opinion as beyond my desire now to decide.

83 Cal. App. 41

CHURCH OF CHRIST OF LONG BEACH et al. v. HARPER et al. (Civ. 5194.)

District Court of Appeal, First District, Division 1, California. May 12, 1927.

1. Religious societies ⇨25—Defendants will not be enjoined from interfering with plaintiffs' religious services, where only interference was act past and completed.

Defendants will not be enjoined from interfering with plaintiffs in conducting religious services in church edifice, where plaintiffs will not suffer great or irreparable injury if defendants are not enjoined, and defendants have not threatened to take possession of church and exclude plaintiffs therefrom, only interference being act past and completed.

2. Appeal and error ⇨1010(1)—Findings supported by evidence will not be disturbed.

Where there is evidence to sustain findings of trial court, they will not be disturbed.

3. Religious societies ⇨25—Interference with church services on one day held merely act of trespass not continuing, and not justifying injunction restraining further interference.

Defendant's interference with plaintiffs in continuing religious services in church edifice on one day, on which factions conducted separate services in building, held no more than act of trespass not continuing, so that it did not justify injunction restraining further interference.

4. Injunction ⇨46—Equity will not restrain trespasser simply because he is trespasser.

Court of equity will not interpose to restrain trespasser simply because he is trespasser, even if insolvent, unless evidence indicates that trespass will be repeated or continued.

5. Religious societies ⇨14—Only basis for court's interference in ecclesiastical controversy is that some property or civil right is involved.

Only basis for court's interference in ecclesiastical controversy is that some property or civil right is involved, since civil courts have no ecclesiastical jurisdiction, and cannot revise or question ordinary acts of church discipline.

6. Appeal and error ⇨1047(1)—In suit to enjoin interference with plaintiffs' religious services, admission and rejection of evidence as to dismissal of church members, not relating to defendant's interference, if error, held harmless.

In suit to enjoin defendants from interfering with plaintiffs in conducting religious services in church edifice, admission and rejection of evidence as to charges against church members and proceedings to dismiss them from membership, if error, held harmless, since such evidence did not touch transactions on day of defendants' interference.

7. Appeal and error  1047(1)—Admission or rejection of evidence is not prejudicial, where result would have been unchanged, had rulings been different.

Admission or rejection of evidence is not prejudicial, where issue would have been found for appellee, if all evidence objected to by appellants had been excluded, and all evidence sought by them to be introduced had been admitted.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Suit by the Church of Christ of Long Beach and others against A. E. Harper and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

F. A. Knight, of Long Beach, for appellants.

Doyle, Clark & Thomas, of Long Beach, for respondents.

CAMPBELL, Justice pro tem. In this action appellants pray that an injunction issue, enjoining and restraining respondents from interfering in any way with appellants in conducting their religious services in the church edifice of appellant corporation in the city of Long Beach. No other judgment or relief is asked. The complaint alleges that on Sunday, May 6, 1923, respondents, in violation of the authority of the Church of Christ, entered the church edifice and took possession thereof, and conducted religious services, and excluded and refused to allow appellants to conduct their services, and that respondents threaten to and will, unless restrained, continue to hold possession of the church property, and to conduct services in the church building, and will preach and teach doctrines which are opposed and foreign to the belief and teachings of the Church of Christ, and exclude appellants from conducting services, and cause appellants great and irreparable injury, and that appellants have no plain, speedy, or adequate remedy at law, etc.

Appellants complain, first, that there are many errors of law which occurred during the trial of the action; second, that the findings of fact and conclusions of law are in many respects not sustained by the evidence; third, that an injunction should have issued as prayed for in the plaintiffs' complaint to protect the orderly conduct of church services against these three evangelists, Harper, Roberts, and Burcher, as no church action had been taken, either legally or otherwise, to put others than the plaintiffs in possession of the church property or services. The trial court found against the contention of plaintiffs, and found that defendants did not on May 6, 1923, nor at any other time, in defiance of plaintiffs or the authority of the church, enter the church edifice or take possession of the same or exclude or refuse to allow plaintiffs to conduct their services; that while defend-

ants W. G. Roberts and W. A. Burcher conducted religious services in the church on such date, plaintiffs were not excluded therefrom and that at the conclusion of said service plaintiffs held a religious service; that it is not true that defendants will preach hatred or false doctrines in the church edifice, or doctrines or theories which are opposed or foreign to the belief or teachings of the Church of Christ, or will exclude plaintiffs from conducting services in the church edifice, or that the action on the part of defendants will cause great or irreparable or any injury to the plaintiffs.

[1, 2] If the appellants will not suffer great or irreparable injury if respondents are not enjoined, and respondents have not threatened to and do not intend to take possession of the church and exclude appellants therefrom, and the only interference shown is an act past and completed, the injunction should not issue. It is not necessary to a decision of the point discussed to quote from the testimony of the many witnesses sworn in the case, for, if there be evidence to sustain the findings, such findings will not be disturbed. Nelson v. McCarty, 5 Cal. App. 773, 91 P. 406; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157. From the testimony of W. P. Reedy, an appellant, Ernest Beam, and C. H. Cassell, there is reasonable certainty that the facts occurring on May 6, 1923, in the order of their sequence are as follows:

About 9:45 a. m., that being the regular hour for opening the Sunday morning services, appellant Rucker, an elder of the church, arose and began leading a song, and respondent Rehkop immediately arose, stood by Rucker, and sang the song in unison with him. At the close of the song, respondent Rehkop announced another song and began singing it, whereupon Rucker took his seat and remained silent during the rest of the service. Before the second song had ended, respondent Roberts mounted the stand and at the close of the song began reading a scripture lesson, at the end of which some member called upon him to lead in prayer. Following the prayer, respondent Roberts announced that respondents Harper, Burcher, and Beam would take charge of the classes previously taught by Taylor and appellants Rucker and Reedy. Whereupon appellant Rucker arose and asked all loyal members to occupy the north end of the hall, and about one-third of the members present heeded his call. Rucker, together with those who stood with him, then conducted their classes, while at the same time respondents, with those who stood with them, held their session; neither faction interfering with the other. At the conclusion of the classes, all parties repaired to the main church auditorium, wherein the preaching service was customarily conducted. One or two songs were sung,

appellant Rucker and respondent Rehkop, leading the same in unison. Elder Taylor announced and led another song, with no interference. Meanwhile respondent Roberts ascended to the pulpit, and after this song began to read a scripture lesson, and the elders Rucker and Taylor sat down. The respondents Roberts and Burcher conducted this service, which consisted of the communion and the sermon by Roberts, and there was no interference or protest on the part of appellants. At the close of this service appellants and their adherents immediately proceeded to conduct a preaching and communion service, without in any manner being interrupted or disturbed by respondents. A sermon by Evangelist Morris had been previously arranged for and announced publicly at church by appellant Rucker, and a preaching service to be conducted by Evangelist Roberts had been previously arranged for and announced at church by respondent Burcher. In other words, on this Sunday morning two persons desired to lead the singing; one arose and started the song, the other joined in unison, and the first subsequently quit and took his seat; two persons wished to teach the Sunday school classes; one took charge, the other called for those who wished to be taught by him, and those who did separated themselves from the others and were taught by him. Respondent Roberts preached the sermon; no one else attempted to preach, nor was Roberts requested by any one not to preach, nor was any objection interposed. Respondents never attempted to exclude appellants from the church, or to use force or menace.

Appellants fail to point out in their brief any evidence, nor have we been able to find any in the voluminous record before the court, indicating in any manner that respondents, or any of them, ever after the occurrence above enumerated interfered with or threatened to interfere with appellants' use of the church for religious services, or with their conduct of any religious or other services therein, or that the respondents ever at any time after May 6, 1923, conducted a religious service, or ever at any time threatened to conduct any religious service, or ever preached or threatened to preach heretical doctrines therein, or doctrines which are opposed and foreign to the belief and teachings of the Church of Christ, and it does not appear from the testimony, or from appellant's brief or otherwise, except by the allegations of the complaint, that such threats were ever made.

[3, 4] The acts of respondents, of which appellants complain, placing the construction upon them most favorable to appellants' contention, amount to no more than an act of trespass, not continuous, but completed on that day, and its continuance not being threatened, the finding of the trial court must be

sustained. A court of equity will not interpose to restrain a trespasser simply because he is a trespasser even though he be insolvent (*Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 P. 703), unless the evidence indicates that the trespass already committed will probably be repeated indefinitely or is of a continuing nature (*Standard Lumber Co. v. Madary's Planing Mill*, 54 Cal. App. 107, 201 P. 129).

[5] In the instant case there is no evidence upon which a finding could be based that the trespass—if it be a trespass—is of a continuing nature, or that it will be repeated. The only basis for the court's interference in an ecclesiastical controversy is that some property or civil right is involved. Civil courts in this country have no ecclesiastical jurisdiction. They cannot revise or question ordinary acts of church discipline (*White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136; *Ferraria v. Vasconcellos*, 31 Ill. 25), or properly interfere with that part of church management which concerns the spiritual welfare and discipline of the members, but only when rights of property are involved (*Prickett v. Wells*, 117 Mo. 502, 24 S. W. 52; *State [Livingston, Prosecutor] v. Trinity Church*, 45 N. J. Law, 230). The jurisdiction of a civil court to adjudge any ecclesiastical matter must result as a mere incident to the determination of some property right. *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801. In this state the same rule pertains. In *Wheelock v. First Presbyterian Church*, 119 Cal. 477, 51 P. 841, the court holds that the division and apportionment of the property of the church is a matter for the civil courts, and that an ecclesiastical decree upon that subject is not binding upon legal tribunals, but that the decree of the presbytery, dissolving the original church into two new and independent organizations, is conclusive on all parties, and must be so treated by the civil courts in determining the property rights of the parties.

[6, 7] The objection that errors of law occurred during the trial is directed to the admission and rejection of certain evidence going to the question of charges against members of the church and proceedings to dismiss them from membership, and does not in any manner prejudice appellants on the controlling issue for they do not touch the transactions which occurred on May 6, 1923, nor the circumstances connected therewith. Nor can these alleged errors prejudice appellants upon what they contend to be the issue, namely, the question whether Moss or Mars was director of the church on May 6, 1923; for, if all evidence objected to by appellants had been excluded, and all evidence sought by them to be introduced had been admitted, neither could aid appellants nor hinder respondents in establishing the withdrawal of fellowship from Mars, or the validity of the

election of Moss. The second objection, that the findings are not supported by the evidence, is directed to the findings that respondent E. E. Mars was at the time in question a director of the church, and that appellant J. C. Moss was not at the time in question a director of the church. There is sufficient evidence to support these findings. It is, however, unnecessary to quote the evidence, or to cite authority, as our attention is not directed to any evidence to the effect that the acts of respondents complained of and as forming the basis for the injunctive relief sought are of a continuing nature, that they will be repeated, that respondents ever threatened a repetition, nor have we found any such evidence in the record.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

83 Cal. App. 87

HINKEL v. CROWSON et al. (Civ. 3191.)*

District Court of Appeal, Third District, California. May 12, 1927.

Hearing Denied by Supreme Court July 11, 1927.

1. Pleading ⚡49—Allegations of complaint rather than its title determine character of action.

Character of action is not determined by title of complaint entitled "Complaint to Establish and Foreclose a Vendor's Lien," but by allegations thereof.

2. Pleading ⚡72—Vendor asking relief contrary to statute and such other relief as to the court may seem proper held entitled to judgment in accordance with statute (Code Civ. Proc. §§ 580, 1475).

Vendor seeking sale of lot, application of proceeds to discharge of vendor's lien, and deficiency judgment against estate of deceased purchaser, which would be contrary to Code Civ. Proc. § 1475, but asking for such other relief as to court may seem proper, held entitled to judgment in accordance with section 1475, in view of section 580.

3. Pleading ⚡403(3)—In vendor's action against purchaser's estate to recover unpaid balance, failure to allege existence of homestead in complaint held cured by answer.

In vendor's action against administrator of deceased purchaser's estate to recover unpaid balance, allegation as to homestead in answer held to cure defect in complaint, which did not allege existence of homestead.

4. Executors and administrators ⚡227(1)—Vendor's claim against purchaser's estate, erroneously assuming he could enforce lien on homestead lot before resorting to other property, held sufficient where stating facts necessary to justify allowance of claim.

Vendor's claim against estate of deceased purchaser, erroneously assuming he was entitled to enforce lien on homestead lot before resorting to other property, was not insufficient where

it stated all facts necessary to justify allowance of claim, since claim need not state facts in detail necessary in complaint and its sufficiency is not tested by rules of pleading.

5. Vendor and purchaser ⚡266(8)—Vendor's unexecuted agreement to accept security for payment of purchase price does not destroy lien (Civ. Code, § 3046).

Unexecuted agreement to accept security for payment of purchase price of land does not destroy vendor's lien, in view of Civ. Code, § 3046.

6. Bills and notes ⚡63—Purchaser's delivery of note to third person for vendor constituted delivery, where such person put note among vendor's papers in desk.

There was sufficient delivery of purchaser's note to vendor where she delivered it to third person for him, and such person placed it among vendor's papers in his desk during his absence.

7. Executors and administrators ⚡451(4)—Court, in finding that purchase-money note was executed to vendor, found that it was delivered; "executed" (Code Civ. Proc. § 1933).

Where complaint by vendor against purchaser's estate for unpaid balance of purchase price alleged that purchase-money note was "executed" by decedent to plaintiff, court, in finding such allegation to be true, found that there was delivery to plaintiff, since "executed" includes delivery, in view of Code Civ. Proc. § 1933.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Execute.]

8. Limitation of actions ⚡83(2)—Limitation does not run against installments on purchase price of land falling due after purchaser's death, until administrator is appointed.

Statute of limitations does not begin to run against installments on purchase price of land due after death of purchaser, until administrator is appointed; and vendor is not bound to cause administration to be had.

9. Limitation of actions ⚡51(2)—Vendor and purchaser ⚡95(3)—Notwithstanding election to declare whole sum due, vendor may subsequently waive purchaser's default, so that limitation against subsequent action would run only from maturity of installments.

Vendor, having elected on default in payment of installments to declare whole of principal of note due, under provision therein, may still waive default, so that as against subsequent action statute of limitation would run only from maturity of installments.

10. Adverse possession ⚡63(5)—Surviving husband cannot claim land of wife, set apart to him, by adverse possession as against vendor with vendor's lien (Code Civ. Proc. §§ 1474, 1723; Civ. Code, § 1241).

Homestead land set apart to surviving husband, under Code Civ. Proc. § 1723, was taken by him subject to vendor's lien, so that he could not claim by adverse possession against vendor, in view of Code Civ. Proc. § 1474 and Civ. Code, § 1241.

11. Election of remedies ⚡11—Vendor held not estopped to recover from funds of deceased purchaser's estate by waiving recourse against them in former action under mistaken theory of law (Code Civ. Proc. § 1500).

Vendor held not estopped to recover from funds of estate of deceased purchaser by waiving recourse against all property except property sold, in former action, under mistaken theory of law, in absence of prejudice to defendants, notwithstanding Code Civ. Proc. § 1500, since plaintiff undertaking to obtain remedy to which he is not entitled is not prevented from subsequently availing himself of one to which he is entitled.

12. Gifts ⚡49(4)—Evidence held to justify finding that plaintiff's conveyance to son's surviving wife was pursuant to sale, and was not gift.

Evidence held sufficient to justify finding that property was not given by plaintiff to son or to latter's surviving wife, but that conveyance to latter was made pursuant to sale thereof to her by plaintiff.

13. Executors and administrators ⚡437(7)—Three months' limitation for bringing action on rejected claim against estate is inapplicable, where administrator does not expressly reject claim (Code Civ. Proc. §§ 1496, 1498).

Where claim against estate of deceased was neither allowed nor expressly rejected by administrator, and claimant brought suit on theory that failure to allow claim was rejection, under Code Civ. Proc. § 1496, limitation of three months for bringing action, provided for in section 1498, is inapplicable.

14. Executors and administrators ⚡453(2)—In vendor's action against deceased purchaser's estate, judgment held not erroneous in directing sale of lot in event funds of estate were insufficient (Code Civ. Proc. § 1504).

In vendor's action against administrator of deceased purchaser's estate to recover unpaid balance on lot, judgment held not erroneous in directing sale of lot in event of deficiency after applying funds of estate toward satisfaction of judgment, notwithstanding Code Civ. Proc. § 1504.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action to recover the unpaid balance on the sale of real property by John Hinkel against E. A. Crowson, individually and as administrator of the estate of Florence G. Crowson (formerly Hinkel), deceased, in which Ada M. Hinkel, as executrix of the last will and testament of John Hinkel, deceased, was substituted as plaintiff. Judgment for plaintiff, and defendant appeals, individually and as administrator. Affirmed.

James F. Sheehan and Charles J. Heggerty, both of San Francisco, for appellants.

Richard B. Bell, of Berkeley (R. M. F. Soto, of San Francisco, of counsel), for respondent.

FINCH, P. J. Respondent, Ada M. Hinkel, as executrix, has been substituted for John M.

Hinkel, the original plaintiff herein. The latter will be referred to as the plaintiff. The complaint alleges that the plaintiff sold and conveyed a certain lot to Florence G. Hinkel November 27, 1914, for the agreed price of \$4,000; that she gave the plaintiff her promissory note, payable in monthly installments of \$30 each, for the full purchase price; that although the note recites that it is secured by a mortgage it is not so secured; that thereafter she and defendant Crowson intermarried; that she died in October, 1916; that she paid a total of \$510 on the note, and that no other payments have been made thereon; that Crowson was appointed administrator of her estate January 3, 1921; that on April 28, 1921, plaintiff filed his claim against said estate for the balance due upon the note, but that the administrator failed to allow the same; and that in said claim plaintiff asserted a vendor's lien upon the lot for the amount due upon the note. The prayer of the complaint is for judgment that there is due upon the note \$5,028.93, with interest thereon from April 4, 1921; that the plaintiff has a vendor's lien therefor upon the lot; that the lot be sold and the proceeds be applied in satisfaction of the judgment; that, if there be a deficiency, "judgment for such deficiency be entered and docketed against said E. A. Crowson, as administrator of said estate, to be paid in due course of administration"; and "for such other, further, or different relief as to the court may seem meet and proper." The aforesaid claim set out the note, and alleged that it was not secured by a mortgage or otherwise secured, "save and except the equitable right to a vendor's lien" upon the lot; that "said vendor's lien has been established by judgment and decree, now in full force and effect, but pending on appeal; * * * that in presenting this claim the plaintiff does not in any manner waive, or intend to waive, or relinquish, or abandon his right to a vendor's lien as claimed by him in said action and as established by said judgment and decree, but insists on said lien; and that this claim is presented solely with the intention that the personal obligation against the decedent may be established, and, if there is any deficiency left after said real property shall have been sold under the said judgment and decree, such deficiency may be paid in due course of administration out of the estate of said decedent." The answer is too long to be set out even in substance. Such parts thereof as are material to the questions presented by appellant will be stated in connection with the discussion of such questions.

The court found the allegations of the complaint to be true; that Florence G. Hinkel and defendant Crowson intermarried November 30, 1914, and thereafter the former filed a declaration of homestead on the lot; that all unpaid installments of said promissory note

which became due prior to the death of Florence G. Crowson are barred by the statute of limitations, but that the installments which became due after her death "are not barred by any statute of limitations."

The decree adjudges that there is due plaintiff on the promissory note the sum of \$6,503.60; that he has a vendor's lien on said lot for that sum; that the plaintiff "is entitled to have paid in due course of administration upon the amount of the judgment, the whole thereof, or so much thereof as may be available therefor, out of and from the funds of the estate"; that defendant Crowson, as administrator, "is hereby ordered, adjudged and directed to pay in due course of administration to the plaintiff out of the funds of the estate of said decedent the amount of said judgment, or such portion thereof as the said funds may be available for said purpose"; and that the vendor's lien be enforced against said lot for any deficiency remaining after the available funds of the estate shall have been applied in payment of the judgment. The defendant Crowson, individually and as administrator, has appealed from the judgment.

The judgment referred to in the claim against the estate of decedent was rendered in an action brought by the plaintiff herein against Crowson individually, as sole defendant, to foreclose the alleged vendor's lien involved in this action. The judgment was reversed on the ground that the plaintiff had not presented his claim to the administrator of the estate for allowance. *Hinkel v. Crowson*, 188 Cal. 378, 206 P. 58. This action was thereafter commenced, and during the trial thereof the former action was dismissed.

[1-4] The complaint is entitled "Complaint to Establish and Foreclose a Vendor's Lien," but it is not what the complaint is called that determines the character of the action, but the allegations thereof. The prayer is, among other things, for a sale of the lot in question and the application of the proceeds toward the discharge of the lien and judgment for the deficiency, if any, payable in due course of administration. A judgment to that effect would be in violation of the terms of section 1475 of the Code of Civil Procedure, which, in case of a claim against an estate secured by a lien on the homestead selected and recorded prior to the death of the decedent, provides:

"If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment."

But the plaintiff also prayed "for such other, further or different relief as to the court may seem meet and proper," and the judgment rendered by the court is in accord-

ance with the provisions of section 1475. The court had jurisdiction to grant "any relief consistent with the case made by the complaint and embraced within the issue." Code Civ. Proc. § 580. The existence of the homestead is not alleged in the complaint, but it is fully alleged in the answer. This allegation in the answer cures the defect in the complaint. 21 Cal. Jur. 277. In his claim against the estate, the plaintiff fell into the same error, as he did in his complaint, of assuming that he was entitled to enforce his lien on the lot before resorting to the other property of the estate. The claim, however, states all the facts necessary to justify its allowance and that it is presented "with the intention that the personal obligation against the decedent may be established." "The purpose of presenting such a demand is to advise the representative of the estate of its nature, and there is no requirement that it shall state the facts with all the detail necessary in a complaint nor is its sufficiency to be tested by the rules of pleading." *Doolittle v. McConnell*, 178 Cal. 697, 705, 174 P. 305, 308.

[5] The note recites:

"This note is secured by a mortgage bearing even date herewith."

The complaint alleges, however, and the plaintiff testified that the note was not secured. The plaintiff testified that the decedent agreed to secure the note by a trust deed, but that no such deed was ever executed. It has been held that a seller of real property waives his vendor's lien thereon for the selling price thereof by accepting security for the amount thereof. *Jones v. Allert*, 161 Cal. 234, 237, 118 P. 794. No case has been found, however, which holds that an unexecuted agreement to accept such security destroys the vendor's lien. Where the vendee has agreed to give but has not given security for the purchase price of real property, the price "remains * * * unsecured otherwise than by the personal obligation of the buyer," and the seller of the "property has a vendor's lien thereon" for the price thereof. Civ. Code, § 3046.

[6] The appellant contends that the promissory note was never delivered. The note is dated November 27, 1914. Plaintiff testified that he left his home in Alameda county for Chicago, November 29, 1914; that he did not have the note at that time; that he returned home about six weeks later; that on his return home he found the promissory note among his papers in his desk in his home; that he never knew how the note got there; that the signature to the note is in the handwriting of the decedent; and that the decedent made 17 monthly payments on the note of \$30 each. In answer to a question on cross-examination as to why he did not get the note before delivering the deed to decedent, the plaintiff replied:

"I had to go to Chicago on only one day's notice, and then I left it all to Rena to fix this thing, and he fixed it."

Rena Haunt testified:

"At the time I was chauffeur for Mr. Hinkel. One day he gave me instructions to take some papers to Mrs. Florence Hinkel. * * * I took those papers to Mrs. Florence Hinkel, as Mr. Hinkel told me to do. * * * I don't know exactly what they were. There was two or three papers together, in regard to the sale of a house where she was living. * * * I gave them to Mrs. Florence Hinkel. * * * I never saw them again. I was supposed to go and get them back about a week after, but I never did. * * * I told her that she have those signed and recorded and send them back to Mr. Hinkel. * * * I got them (the papers) on the morning before Mr. Hinkel left for Chicago, a day or two before. * * * I know that those papers were in regard to the sale of the house."

The placing, by some person, of the promissory note, signed by the decedent, in the plaintiff's desk and the fact that the decedent thereafter made 17 monthly payments in accordance with the terms of the instrument warrant the inference that the decedent intentionally delivered the note into the possession of the plaintiff, even though it was not delivered to him personally by her. It was sufficient if she delivered it to some person for him, and that such person placed it among plaintiff's papers in his desk.

[7] Appellant further contends that the court did not find that the note was delivered to plaintiff. The complaint alleges that the note was "executed by her (decedent) to the plaintiff." The court found this allegation to be true. The term "executed" includes delivery. Code Civ. Proc. § 1933; *Worthley v. Worthley*, 33 Cal. App. 473, 475, 165 P. 714; *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 579, 108 P. 42.

[8, 9] It is urged that plaintiff's cause of action was barred by the statute of limitations at the time the complaint herein was filed. The statute did not begin to run against installments falling due after the death of the decedent until an administrator was appointed, January 3, 1921. 11 Cal. Jur. 754; 16 Cal. Jur. 562; *In re Bullard*, 116 Cal. 355, 357, 48 P. 219. "A party having a cause of action against the estate of a deceased person is not bound to cause administration to be had." *Davis v. Hart*, 123 Cal. 384, 388, 55 P. 1060, 1062; *Churchill v. Woodworth*, 148 Cal. 669, 673, 84 P. 155, 113 Am. St. Rep. 324. The note provides that if any installment "is not paid within 90 days after the same becomes due," the whole of the unpaid principal and interest "shall forthwith become due and payable, at the election of the holder of this note." In the former action referred to herein, commenced August 23, 1917, the complaint alleged that, because of defaults in payments which had become due, "plaintiff * * * elected

and so declared the whole of said principal sum, together with all interest thereon, due and payable." Appellant contends that such election set the statute in motion and that, therefore, the whole of the promissory note became barred at the end of 4 years thereafter. Notwithstanding such election, it was still within the power of the plaintiff to waive the default, and, as against a subsequent action, the statute of limitations ran only from the maturity of installments as they fell due. *California Sav., etc., Soc. v. Culver*, 127 Cal. 107, 112, 59 P. 292; *Moore v. Russell*, 133 Cal. 297, 300, 65 P. 624, 85 Am. St. Rep. 166; *Keeler v. Baird*, 48 Cal. App. 29, 33, 191 P. 563. Further, as stated, the statute did not begin to run against any of such installments which fell due after the death of the decedent until the appointment of an administrator.

[10] By proceedings under section 1723 of the Code of Civil Procedure, the lot in question was, on May 7, 1917, set apart to Crowson, as the surviving husband of decedent. Crowson has been in possession of the property at all times since and has paid all taxes thereon. Appellant contends that he thereby acquired title, as against plaintiff, by adverse possession. Section 1474 of the Code of Civil Procedure provides that when such a homestead is so set apart:

"It is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code."

Section 1241 of the Civil Code provides:

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained: * * * On debts secured by * * * vendor's liens upon the premises."

It is clear that, under these Code sections, Crowson took the property subject to the vendor's lien. His possession was no more adverse to plaintiff's lien than was that of decedent. He invaded no right of the plaintiff by holding such possession, and therefore his possession was not adverse. *Sullivan v. Zeiner*, 98 Cal. 346, 350, 33 P. 209, 20 L. R. A. 730; 2 C. J. 50.

[11] Appellant contends that plaintiff is estopped to recover any sum out of the funds of the estate, because in the complaint in the former action he stated:

"Said plaintiff hereby expressly waives all recourse, claim, and demand, under and by virtue of said vendor's lien and said promissory note, against any and all property of the estate of the said Florence G. Crowson, deceased, * * * other than the real property described in the first paragraph of said complaint," the lot involved herein.

In that action the plaintiff proceeded upon the mistaken theory that the law permitted the foreclosure of his vendor's lien without first presenting the claim secured thereby for allowance and payment out of the other as-

sets of the estate. On appeal, it was held that this could not be done. *Hinkel v. Crowson*, supra. Since such a claim had not been presented before the complaint in that action was filed, plaintiff was put to the necessity of dismissing the action. The alleged waiver was an attempt to exercise the option given a lien claimant by section 1500 of the Code of Civil Procedure, which provides that a lien may be enforced against the property of an estate subject thereto, without presenting the claim for allowance, "where all recourse against any other property of the estate is expressly waived in the complaint," the plaintiff apparently overlooking the requirement of section 1475 to the effect that, if the lien be upon the homestead selected in the lifetime of the decedent, the claim "must be presented and allowed as other claims against the estate." It would hardly be contended that the plaintiff would have been bound by the alleged waiver if, prior to any action with relation thereto by the defendant to his prejudice, the plaintiff had filed an amended complaint omitting the waiver. It is not perceived that a different rule should be applied in case of a dismissal and the subsequent commencement of a new action. The defendants have not acted to their prejudice in any manner by reason of the alleged waiver, and, in the absence of such prejudice, they cannot claim an estoppel. 10 Cal. Jur. 611. "If a plaintiff is mistaken and undertakes to avail himself of a remedy to which he is not entitled, he is not prevented from subsequently availing himself of the one to which he is entitled under the facts of the case. The defendant is placed in no worse position by reason of the unsuccessful prosecution of the action and there is consequently no estoppel." 10 Cal. Jur. 5.

[12] The answer alleges that the decedent was the wife of Lewis Hinkel, the son of plaintiff, until the son's death on November 8, 1913; that the lot in question and other lots were purchased by the plaintiff and his son, as copartners, and the title thereto taken in the name of the plaintiff; that "plaintiff promised to give and convey the said lot of land described in the complaint to said Lewis and his wife, Florence, as and for their home, and thereupon said Lewis built a residence thereon for himself and his wife," and went into possession thereof, and resided therein until the death of Lewis; that thereafter Florence held exclusive possession thereof until the time of her death; and that the conveyance involved herein was intended as a gift. It is contended that the plaintiff made an oral gift of the lot to his son and, apparently, that the conveyance to decedent was made for the purpose of completing the gift. It would require convincing evidence to establish that contention in the face of decedent's execution of the promissory note and her payment of the installments as they fell due thereon for so many months. The plaintiff

testified that he purchased and paid for all the lots mentioned; that his son had charge of the building of houses thereon, under an agreement that the latter was to have half of the profits, if any, on the sale of the lots, but that no profits were realized therefrom; that the plaintiff paid all costs of construction of all the houses, including the one on the lot in controversy; and that the house on that lot was better constructed and more expensively finished than the others because it was the intention that the son and his wife should occupy it as their home. On cross-examination, he testified as follows:

"Q. And that was the understanding between you and your son, was it not, that when he had completed those eight buildings, including this house, that this house would be his? A. Yes.

"Q. But there was no consummation; you never carried out that understanding between you and your son during his lifetime, did you? A. No. * * *

"Q. Those houses were all finished by your son and yourself during the lifetime of your son, Mr. Hinkel? A. Yes, sir.

"Q. And, as I understand you to say—I may be wrong—upon completion of the buildings and the completion of the building on lot 13, the house in controversy here, your son and his wife moved in there, according to the arrangements between you and your son that he was to have that as his own; is that correct? A. No, not as his own."

The plaintiff further testified that he supported his son and the latter's wife during their married life. The evidence is certainly sufficient to justify the finding that the property was not given to the son or to his surviving wife, but that the conveyance to the latter was made pursuant to a sale thereof to her by the plaintiff.

[13] Section 1498 of the Code of Civil Procedure provides that, when a claim is rejected:

"Written notice of such rejection shall be given by the executor or administrator to the holder of such claim, * * * and the holder must bring suit in the proper court against the executor or administrator within three months after the date of service of such notice if the claim be then due."

Appellant contends that this action was not commenced within the time prescribed by that section. The claim upon which the suit is based was neither allowed nor expressly rejected by the administrator. Neither was any notice of rejection served upon the plaintiff. Under the provisions of section 1496 of the Code of Civil Procedure, the plaintiff elected to treat the failure of the administrator to allow the claim as a rejection thereof. The limitation prescribed by section 1498 has no application to such a case. *Bank of Ukiah v. Shoemaker*, 67 Cal. 147, 7 P. 420; *Cowgill v. Dinwiddie*, 98 Cal. 481, 483, 33 P. 439; *Gregory v. Clabrough's Executors*, 129 Cal. 475, 479, 62 P. 72.

[14] It is urged that the judgment against

the estate "only establishes the claim in the same manner as if it had been allowed by the administrator," and that he or any other heir of the deceased "can contest the claim even after a judgment and affirmance on appeal and have a jury trial" of the question of its validity, citing section 1504 of the Code of Civil Procedure and Estate of Hellier, 169 Cal. 77, 145 P. 1008, and that, therefore, the judgment is erroneous in directing a sale of the lot in the event of a deficiency, after applying available funds of the estate toward the satisfaction of the judgment. The latter provision in the judgment does not preclude a contest of the claim by any person who otherwise may have the right to contest it. No good reason appears for requiring the plaintiff to prosecute two actions for the collection of a single debt. The decree makes provision for further proceedings, in the event of a deficiency of assets of the estate, as follows:

"It is further ordered, adjudged, and decreed, that in the event that the funds of the said estate shall prove insufficient to pay the whole of the amount of this judgment, the plaintiff shall be at liberty to apply, at the foot of the judgment, for further directions."

In *Moore v. Russell*, 133 Cal. 297, 65 P. 624, 85 Am. St. Rep. 166, the claim of the plaintiff for the amount of a promissory note secured by a mortgage, executed by the decedent, was rejected by the administrator and suit was brought thereon. Judgment in favor of the plaintiff establishing the claim, foreclosing the mortgage, and providing for a recovery against the administrator for any deficiency after sale of the mortgaged premises, to be paid in due course of administration, was affirmed. No reason appears for applying a different rule here, and no authority is cited in support of appellants' contention. The same objections which are made here could have been made with equal force to the judgment in the case cited.

Appellants argue more than 40 alleged errors. It would require an opinion of undue length to discuss them all specifically. Most of them are substantially covered in the foregoing discussion. The remainder have been carefully considered and are deemed wholly without merit.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

83 Cal. App. 137

WELLS et ux v. ZENZ et al. (Civ. 5202.)

District Court of Appeal, First District, Division 1, California. May 17, 1927.

1. Fraud $\hookrightarrow$ 1—"Fraud" includes all unfair means by which another is deceived (Civ. Code, §§ 1572, 1710).

"Fraud" includes all means of surprise, trick, cunning, dissembling, and unfair means

by which another is deceived, including suppression of facts likely to mislead and other acts fitted to deceive, under Civ. Code, §§ 1572, 1710.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

2. Judgment $\hookrightarrow$ 443(1)—Presenting false affidavit for service by publication is "fraud" for which judgment will be set aside, where rights of innocent parties have not intervened.

Where false affidavit is presented to court for purpose of obtaining order for service of process by publication, fraud is committed upon court and party constructively served, and judgment based thereon will be set aside at instance of defendant constructively served, provided no rights of innocent parties are involved.

3. Judgment $\hookrightarrow$ 443(1)—Affidavit for service by publication stating affiant knew of no way to locate defendants held fraudulent, justifying vacation of judgment of adoption.

Affidavit for service by publication held fraudulent, justifying vacation of judgment of abandonment and adoption, where plaintiff, though she had been in telephone communication with defendant within month previous and knew person from whom she could obtain defendants' address, stated in affidavit that she knew of no means by which to locate defendants and failed to mail letter to their last known address.

4. Fraud $\hookrightarrow$ 16—Fraud may be committed by suppression of truth.

Fraud may be committed by suppression of that which one is under duty to declare, as well as by declaration of that which is false.

5. Judgment $\hookrightarrow$ 463—Finding of intent to defraud was unnecessary to set aside judgment where affidavit for publication was fraudulent.

Where affidavit, upon which order for publication was made, was fraudulent, court could set aside judgment of abandonment and adoption without finding that intent to defraud was present.

6. Appeal and error $\hookrightarrow$ 882(11)—Appellant could not complain that there was no evidence and no findings on issue, where evidence offered thereon was excluded as immaterial on his objection.

Where court, on defendants' objection to evidence as immaterial, excluded such evidence, defendants could not, on appeal, complain that there was no evidence and no findings on issues in support of which excluded evidence was offered.

7. Trial $\hookrightarrow$ 397(5)—Findings need not be made on immaterial issues.

It is not necessary for the court to make findings on immaterial issues.

8. Adoption $\hookrightarrow$ 1—"Adoption" is special statutory proceeding.

"Adoption" proceeding is special statutory proceeding and not an ordinary civil action,

power being conferred by statute and in derogation of common law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adoption—Adoption.]

9. Adoption —Adoption, to be valid, must comply strictly with statutory requirements.

One who claims valid adoption must show that every requirement of statute has been strictly complied with, adoption being statutory proceeding.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Suit by Charles E. Wells and wife against Frank Zenz and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

George A. Hooper, of Los Angeles, for appellants.

Walter J. Little and Helen M. Randall, both of Los Angeles, for respondents.

CAMPBELL, Justice pro tem. This is an appeal from a judgment setting aside the judgment of abandonment of the juvenile court and a judgment of adoption predicated thereon on the ground that the juvenile court was without jurisdiction in the premises for the reason that fraud was practiced on the juvenile court in that an order for the service of citation by publication in the abandonment proceedings was procured by means of a false affidavit of appellant Nina M. Zenz.

Respondents Charles E. Wells and Ada Wells are the parents of the minor child, Elvira Wells, and brought this suit in equity to set aside the judgments on the ground of fraud. The trial court found in favor of respondents and entered judgment accordingly.

Appellants urge in support of their appeal that there was no fraud, and the evidence does not sustain a finding of fraud; that a court of equity will not do an idle thing, and the findings do not support the judgment.

The court found that some of the facts set forth in the affidavit for publication made by appellant Nina M. Zenz, upon which the order for publication of the citation was made, were false and untrue in that she stated that she knew of no other way or means in which to locate the parents; that she called at the residence of respondents at 1132 North Evergreen street, Los Angeles, but found respondents had moved therefrom; that the father left a forwarding address at the post office, giving the address where he moved; that Nina M. Zenz did not send a letter to the last known address of respondents; that Nina M. Zenz made inquiries of one Mrs. La Liberty of the Juvenile Protective Association of Los Angeles as to the whereabouts of respondents and understood that Mrs. La Liberty knew the address, but that she did not feel that she could give her the new address, for personal reasons; that Nina M.

Zenz could have cited Mrs. La Liberty into court to inquire further as to whether she knew the whereabouts of the parents, but that she did not do so; that Nina M. Zenz did not set forth in her affidavit for publication of the citation the fact that she had communicated with Mrs. La Liberty concerning the whereabouts of respondents, and that Mrs. La Liberty would not give her the address for personal reasons; that Nina M. Zenz did not do all she could have done to locate respondents; that she could have written to their last address and the letter would have been forwarded to them. In other words, appellant Nina M. Zenz in her affidavit set forth certain facts that were false and untrue; that is, that she knew of no other means than those set forth in her affidavit by which to locate the parents of the minor child she sought to have adjudged an abandoned child for the purpose of predicated thereon an application for adoption, when, in fact, she had knowledge of the fact that Mrs. La Liberty knew the whereabouts of respondents, but refused to divulge their whereabouts to her because of personal reasons, and, further, that it was fraud knowing a somewhat recent address of respondents that she did not write them, as such letter would have been forwarded to them. These facts, which should have been made known to the court, were concealed from it.

[1] Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived. *Armstrong v. Wasson*, 93 Okl. 262, 220 P. 643. The statutes of California expressly provide that the suppression of a fact by one who gives information of other facts likely to mislead for want of communication of the fact concealed is deceit (Civ. Code, § 1710), and any other act fitted to deceive is actual fraud (Civ. Code, § 1572).

[2] Where a false affidavit is presented to the court for the purpose of obtaining an order for the service of process by publication, this of itself is an act of fraud both upon the court and upon the party constructively served, and any judgment based thereon will be set aside in an action by the defendant constructively served against the plaintiff claiming the benefit of the judgment, where no rights of innocent parties are involved. *Stern v. Judson*, 163 Cal. 726, 127 P. 38.

While the affidavit for publication of the citation is not contained in the record, the testimony shows, and it is not disputed, that appellant Nina M. Zenz did state in her affidavit that "she knew of no other means in

which to locate said parents," and that she made no mention in her affidavit that the address of the parents was known by Mrs. La Liberty, of whom she inquired and by whom she was told that the whereabouts of the parents would not be disclosed to her for personal reasons, and in that conversation appellant Nina M. Zenz admits that she did not tell Mrs. La Liberty the reason she desired to locate respondents.

The evidence is undisputed that Mrs. Zenz was in telephone communication with respondent Mrs. Wells within a month of the time of filing the affidavit in question. The court should have been informed of this fact as bearing on the question as to whether or not due diligence had been exercised in an effort to locate the parents.

[3, 4] The facts that Mrs. Zenz had this telephone communication with Mrs. Wells within a month of the filing of the affidavit; that Mrs. Zenz had knowledge that Mrs. La Liberty of the Juvenile Protective Association of Los Angeles knew the whereabouts of the parents—which facts are undisputed—and that she concealed these facts from the court, and instead of setting them forth in her affidavit stated in such affidavit that "she knew of no other way or means in which to locate said parents," together with the fact that no letter was mailed to the last known address, which if mailed would have been received by the parents, justified the trial court in finding that she set forth facts in her affidavit that were false and untrue, and that she practiced a fraud upon the court. As has been said, fraud may be committed by the suppression of the truth as well as by the suggestion of falsehood. It may consist in suppression of that which it is one's duty to declare as well as in the declaration of that which is false. 12 Cal Jur. 770. Had such facts known to appellant Nina M. Zenz and concealed by her been disclosed to the juvenile court, the court might well have concluded that it was not a proper case for constructive service, and that respondents by the exercise of due diligence could be personally served.

The facts in the case support the conclusion that appellant Nina M. Zenz practiced a fraud upon the court in withholding facts which should have been set forth in her affidavit. In *Dunlap v. Steere*, 92 Cal. 344, 28 P. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143, the court says:

"An affidavit of this character is always ex parte. The absent defendant is not present to impeach it, and if it is sufficient in form, the court cannot disregard it, but is compelled to accept its statements as true, and make the order which is demanded. Under such circumstances, a plaintiff who seeks to avail himself of the statutory mode for a constructive service of summons must exercise good faith in his representations to the court or judge. He must at least believe that the affidavit which he presents is true. The presentation of a willfully false affidavit for the purpose of obtaining an

order for service of the summons for publication is itself an act of fraud."

And in *Miller v. Higgins*, 14 Cal. App. 156, 111 P. 406, it is said:

"The fraud practiced upon the court making the order of adoption in this case was the concealment from the court of facts affecting its jurisdiction. * * * Such concealment of facts affords ground for relief in equity."

While in *Miller v. Higgins* the concealment was the fact that another court had already assumed jurisdiction, yet the principle involved is the same.

[5] Appellants contend that there is no fraud in a case of this kind without an intent to defraud; that there is no such finding; and that therefore the findings do not support the judgment. The court found that the affidavit upon which the order for publication of the citation was made, set forth facts which were false and untrue. This is fraud per se. Where a false affidavit is presented to the court to obtain an order for publication of a summons or citation, this of itself is a fraud perpetrated upon both the court and the party sought to be constructively served. *Stern v. Judson*, supra.

[6, 7] As to the point urged that a court of equity will not do an idle thing—that there is no evidence or finding that upon a subsequent hearing on the merits the child would not be declared an abandoned child—it is sufficient to say that the sole question upon which the case was tried was that of fraud. Respondents did attempt to introduce evidence upon the question of abandonment and support to establish the allegations of their complaint, which was duly verified, setting forth that in December, 1917, plaintiff Charles E. Wells was about to join the army, and fearing that he would not have sufficient means to care for and support his wife and minor child he placed such child in the custody of his father, Fred Wells, under a written agreement wherein his father agreed to care for such child until she attained the age of six years; that his father cared for such minor child until September, 1920, when the child was by him placed in the custody of defendants, his father agreeing to pay defendants \$5 per week for the care of the child. This evidence was objected to by appellants as incompetent, irrelevant, and immaterial and not within the issues of the case, that there is only one issue in the case, and that is fraud, and their objection was sustained. In sustaining the objection, the court said:

"I can't see any relation to the testimony of whether there was or was not an agreement. * * * I think I will sustain the objection on that point. I will permit any question that goes directly to the fact of the affidavit or the contents of it."

Appellants are, therefore, not now in a position to complain that there is no evidence

and no findings on these issues. If the evidence was immaterial as appellants contended, no finding thereon is required, as it is not necessary for the court to find on an immaterial issue.

The trial court proceeded only upon the question of fraud. Evidence upon all other questions, except in so far as it affected the question of fraud, under the objection of appellants was excluded as immaterial, and accordingly no evidence was given concerning them.

[8, 9] An adoption proceeding is not an ordinary civil action; it is a special statutory proceeding. The power of the court in adoption proceedings is a special power conferred by statute and is in derogation of the common law and repugnant to its principles, and one who claims a valid adoption must show that every requirement of the statute has been strictly complied with. *Estate of Sharon*, 179 Cal. 447, 177 P. 283.

We find no error in the record calling for a reversal of the judgment, and it is therefore affirmed.

We concur: KNIGHT, A. P. J.; CASHIN, J.

83 Cal. App. 1313

RAGOS v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.*
(Civ. 5493.)

District Court of Appeal, Second District, Division 2, California. May 23, 1927.

Hearing Denied by Supreme Court July 21, 1927.

1. Master and servant ☞405(2)—Evidence held to support finding of Industrial Commission that parties were joint employers of woman injured in cleaning apartment.

Evidence held to support finding of Industrial Accident Commission that defendants were engaged in a joint enterprise of renovating apartments and were jointly liable as employers of plaintiff injured in cleaning apartment.

2. Master and servant ☞417(7)—Decision of Industrial Accident Commission as to credibility and weight of testimony is conclusive.

In compensation proceeding, the credibility of the witnesses and the weight to be attached to their testimony is a matter for the Industrial Accident Commission, not to be reviewed on petition for review.

3. Master and servant ☞417(7)—Finding of Industrial Accident Commission on conflicting evidence is conclusive.

On petition to review an award of the Industrial Accident Commission, a finding of fact by the commission on conflicting evidence will not be set aside.

Proceeding under the Workmen's Compensation Act by Maria L. Schroeder, claimant,

opposed by Edward Ragos and Mrs. A. M. Allen. From an order of the Industrial Accident Commission, granting an award, Edward Ragos petitions for certiorari. Award affirmed.

Anderson & Anderson, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent commission.

JOHNSON, Justice pro tem. This is a proceeding on the petition of Edward Ragos for a review of an award against him by the Industrial Accident Commission in favor of Mrs. Maria L. Schroeder, for payment of \$184.19, together with the sum of \$14.82 per week from March 27, 1926, until termination of disability or the further order of the commission. The award is based upon a finding that Mrs. Schroeder was temporarily disabled by reason of an injury sustained on December 22, 1925, in the course of, and arising out of, her employment while employed both by the petitioner and Mrs. A. M. Allen, his mother-in-law, the award being not only against Ragos, but also against Mrs. Allen. The petition for review is, however, that of Ragos alone; and the sole question involved is whether there is sufficient evidence in the record to support the award against him. Neither Ragos nor Mrs. Allen carried compensation insurance.

The matter was first heard before Letus N. Crowell, referee, on April 20, 1926, and his decision in favor of Mrs. Schroeder, and against both Ragos and Mrs. Allen, was approved and award made by the commission on April 29th. Thereafter, on the petition of Ragos and Mrs. Allen, a rehearing was granted to consider further whether both were the employers or only one; and on July 26, 1926, the parties and their witnesses were examined at length before A. B. Harris, referee, after which the commission, on September 15, 1926, readopted the original findings and reaffirmed the award previously made against both Ragos and Mrs. Allen.

Ragos was the owner of an apartment house in Long Beach, containing 25 apartments and known as the Ward Apartments. The house and the furniture had been leased to a tenant named Morris, whose management, after a trial of a few weeks, proved unsuccessful, and before the injury to Mrs. Schroeder, Ragos had resumed possession and had made some business arrangement regarding the premises with his mother-in-law, Mrs. Allen. Mrs. Allen testified that she had bought the furniture from Ragos, while Ragos said he had leased the building with the furniture to Mrs. Allen; and there was introduced in evidence a lease bearing date December 12, 1925, which is, in terms, a lease for one year of the apartment house with its

furnishings and furniture at a rental of \$350 a month. Under previous tenants, the building had apparently been neglected to some extent and needed renovation; and when it came back into the possession of Ragos, he testified:

"I agreed with Mrs. Allen we would go in there and fix the rooms all up; tint them, repaper them, and do whatever they needed. I worked my help exclusively, and she hired hers."

Among other things, Ragos stated that some of the windows needed repairs, and it was while Mrs. Schroeder was cleaning one of the windows, which was smeared with putty, that she was injured. Ragos stated in his testimony that Morris surrendered possession to him on December 10, 1925, but Mrs. Allen said that she took over the apartments on December 9th. There was evidence of the night watchman, however, as well as of Mrs. Schroeder, that Ragos and Mrs. Allen had taken possession in the early part of November.

Mrs. Schroeder had been an occupant of one of the apartments for about 2 years, and earned her living by doing housework by the day at the rate of 50 cents per hour. She was directly hired by Mrs. Allen, and, according to Mrs. Schroeder's testimony, she had been continuously at work cleaning the various apartments for at least a week before the injury occurred. Her testimony is that while she was engaged in apartment No. 21, on December 22, 1925, cleaning a heavy window which had had new panes inserted, but the cords of which were either lacking or defective, the sash fell upon her right hand with such force that she fainted, and, as the award states, thereby suffered a contusion of the third and fourth metacarpal bones, followed by or resulting in traumatic neuritis and dermatitis. There is a further finding, that the injury caused temporary total disability of continuance still indefinite, and compensation was awarded in the amounts stated.

There is considerable conflict in the testimony, and so great is the variance on material points that there is reason to believe that the commissioners discredited the testimony of both Ragos and Mrs. Allen. Not only did both deny that Mrs. Schroeder had done work in apartment 21, but Mrs. Allen further denied that Mrs. Schroeder had been employed at all on December 22d, and insisted that she had been hurt while doing her own work in her own apartment.

[1] Doubt of the genuineness of the lease between Ragos and Mrs. Allen is expressed by the attorney for the commission; and it is to be noted that while the lease to Mrs.

Allen is dated December 12, 1925, and calls for payment of a rent of \$350 per month, there was no evidence, either at the original hearing in April, 1926, or at the later hearing in July, that any rent had ever been paid by Mrs. Allen. Whatever may be the true character of the lease, and whatever its true date, it is a fair inference from the evidence and the conduct in relations of the parties that Ragos and Mrs. Allen were engaged together in renovating the apartments; and though Mrs. Allen gave her individual attention to the cleaning while Ragos attended to the mechanical and structural repairs, still they were both engaged as principals in a joint enterprise to an extent which made them jointly liable as employers of the woman hired to do such cleaning as might be required in the common work of renovation.

The evidence shows that on the day following the injury Ragos suggested that Mrs. Schroeder consult Dr. Tollesen, and gave her his own card, on which he wrote the doctor's name and address. Upon this suggestion Mrs. Schroeder then placed herself under Dr. Tollesen's treatment, which continued for 21 days, and Dr. Tollesen in his testimony said that the Ward Apartments promised to pay his bill. Moreover, while Mrs. Allen ordinarily directed Mrs. Schroeder as to the work for each day, there is some evidence also that on one occasion, shortly before the injury, Ragos directed her to clean the kitchen floor in an apartment where he was about to lay linoleum.

[2, 3] It is not the function of the court in a proceeding of this character to determine the credibility of the witnesses or the weight to be attached to their testimony. Its jurisdiction is limited strictly to determining whether, with the inferences fairly deducible from the evidence, there is sufficient to support the findings and the award of the commission, and where either of two reasonable opposing inferences may be drawn, the commission is the final arbiter. *Walker v. Industrial Accident Commission*, 177 Cal. 737, 171 P. 954, L. R. A. 1918F, 212; *Eastman v. Industrial Accident Commission*, 186 Cal. 587, 200 P. 17; *Tartar v. Industrial Accident Commission*, 191 Cal. 703, 218 P. 39. After a careful reading of the record, we conclude that the rule applied in *Gray v. Industrial Accident Commission*, 34 Cal. App. 713, 714, 715, 168 P. 702, is applicable here, and that it must be said that the evidence as a whole is sufficient to support the decision that both Ragos and Mrs. Allen were jointly interested and are to be regarded as joint employers.

The award is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

83 Cal. App. 48

ELLIS et al. v. COLUMBINE CREAMERY CO. et al. (Civ. 4722.)

District Court of Appeal, Second District, Division 1, California. May 12, 1927.

1. Trial $\Rightarrow$ 396(7)—Finding that plaintiffs in action for unlawful detainer were owners as joint tenants held authorized, where such allegation was not denied (Code Civ. Proc. § 462).

Under Code Civ. Proc. § 462, finding in action for unlawful detainer that plaintiffs were owners as joint tenants of property described in complaint held authorized, where allegation of such ownership was not denied, and hence for purposes of action must be taken as true.

2. Landlord and tenant $\Rightarrow$ 86(2)—Tenant's notice to one joint owner of desire to renew lease held sufficient notice to both.

Tenant's notice to one joint owner of property of its desire to renew lease or execute a new one in accordance with option contained therein held sufficient notice to both owners.

3. Landlord and tenant $\Rightarrow$ 291(13)—Evidence held not to support finding that tenant was not entitled to possession in accordance with manifested intention to exercise renewal option.

In action for unlawful detainer, finding that tenants were not entitled to possession of premises, and that owners were entitled thereto, held not supported by evidence showing tenant's intention to avail itself of right to continuance of relation of landlord and tenant between parties, in accordance with agreement giving option of renewal.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by J. Harvey Ellis and another against the Columbine Creamery Company and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Chris. Wilson, of Long Beach, for appellants.

Swaffield, Swaffield & Pray, C. Douglass Smith, and Frank P. Farrell, all of Long Beach, for respondents.

HOUSER, J. This is an appeal by the defendants from a judgment in an action for unlawful detainer, wherein plaintiffs were awarded possession of the premises described in the complaint, as well as the sum of \$1,000 damages for unlawful detention.

Plaintiffs were the owners in joint tenancy of the property described in the complaint. The defendant Columbine Creamery Company was an original lessee, and the defendant Swift & Co. was a subtenant of Columbine Creamery Company. The original lease contained a provision by which the lessee was given "an option of renewing this lease at the expiration of the date as specified herein." About 16 months before the lease

expired, each of the then parties thereto signed the following agreement:

"Long Beach, California, March 15, 1922.

"By mutual agreement the terms of the within lease are this day changed to read and be as follows: At the expiration of the terms mentioned herein (July 31, 1923), the party of the second part is given an option to lease the premises at a monthly rental of seventy-five dollars per month for a term of three years."

Nearly three months preceding the date of the expiration of the lease, the tenant then in possession sent to J. Harvey Ellis, who was one of the joint owners of the leased premises, a registered letter, the body of which was as follows:

"Having been advised that you are now the owner of the premises known as 836 Pine avenue of this city, under the provisions of the lease which we hold on said premises, the terms and conditions of which you are familiar with, we hereby notify you in writing that we will exercise the option granted to us to lease the premises for the period of three (3) years from and after July 31, 1923, at a monthly rental of \$75 per month."

Approximately one month later the same tenant served on said J. Harvey Ellis a notice, of which the following is a copy:

"To J. Harvey Ellis, Owner of the Premises Described as Certain Storeroom Occupying Ground Floor of a Certain Building Known and Designated as No. 836 Pine Avenue in the City of Long Beach, County of Los Angeles, State of California, and to All Persons Claiming Any Interest Therein:

"You and each of you are hereby notified that Columbine Creamery Company desires and intends to exercise the option granted to it in a certain lease dated February 26, 1920, wherein the above-described premises, namely, a certain storeroom occupying ground floor of building No. 836 on Pine avenue in the city of Long Beach, county of Los Angeles, state of California, were leased to it, which said option grants to the said Columbine Creamery Company the right of renewing said lease at the expiration of the date as specified therein, namely July 31, 1923.

"You and each of you are hereby further notified that Columbine Creamery Company desires and intends to use, avail itself of, and exercise a certain option in said lease, which said option is set forth in said lease as follows:

"Long Beach, California, March 15, 1922.

"By mutual agreement the terms of the within lease are this day changed to read and be as follows: At the expiration of the terms mentioned herein (July 31, 1923) the party of the second part is given an option to lease the premises at a monthly rental of seventy-five dollars per month for a term of three years."

Thereafter, and before the date fixed in the lease for its expiration, plaintiff J. Harvey Ellis ordered the tenant in possession to vacate the leased premises on the termina-

tion of the original lease. At the same time, according to the testimony of one of the witnesses, the tenant, through its officers, stated to said plaintiff that it wished to re-lease the property for three years at the rate of \$75 per month, which suggestion was declined by Mr. Ellis. In other words, as was stated by the judge of the trial court:

"The testimony shows conclusively that the defendants took the position that they did not need a new lease, that they had a lease here which would be renewed, and the lease itself would go on, but that they did offer, if Mr. Ellis insisted on a new lease, to make it. Mr. Ellis did not insist on it, and said they were not entitled to anything, either the renewal or a new lease. * * *

Plaintiffs having refused either to renew the lease or to execute a new one (although on the 1st day of each and every month after the termination of the original lease and up to the date of trial of the action the tenant tendered to J. Harvey Ellis the sum of \$75 per month, which in each case the plaintiffs declined to accept), the present action was commenced, and which, as hereinbefore stated, resulted in a judgment in favor of plaintiffs for the restoration to them of the possession of the leased premises, together with the sum of \$1,000 damages for the unlawful detention thereof.

The gravamen of appellants' complaint is that the findings of fact are not supported by the evidence. The first of the specifications of error upon which reliance is placed arises from the fact that each of the several requests made by the defendants, whether oral or written, to the effect that either the original lease be renewed, or that a new lease be executed, was made to one of the plaintiffs only.

[1] The complaint alleges ownership in plaintiffs as joint tenants of the property in question, which allegation not being denied in the answer, "must, for the purposes of the action, be taken as true." Section 462, Code Civ. Proc. It follows that the finding that the plaintiffs "were the owners, as joint tenants," of the property described in the complaint was fully authorized.

But, assuming that the ownership by the plaintiffs was joint, the respondents question the sufficiency of the notice. In the case of *Hepburn v. McDowell*, 17 Serg. & R. (Pa.) 383, 17 Am. Dec. 677, it is held that notice to two or more persons engaged in a joint act is notice to all; and in *Holbrook v. Holbrook*, 15 Me. 9, the principle is announced that a notice given to one of two parties jointly liable is binding upon both. To the same effect, see the following authorities: *Knight v. Field*, 7 Cush. (Mass.) 263; *Watson v. Walker*, 23 N. H. 471. In the case of *Morse v. Aldrich*, 1 Metc. (Mass.) 544, the syllabus contains the following statement:

"Where the owner of land, by a covenant which binds his heirs and assigns, engages to

do a certain act when thereto requested, a written request to do such act, addressed to all the heirs or assigns, and seasonably delivered at the dwelling house of one of them, is sufficient. * * *

In the case of *Ellis v. Lull*, 45 N. H. 419, it is held (syllabus):

"Where two or more persons are subject to a joint duty or obligation upon notice, and where other special notice is not made necessary by statute or by contract, a notice addressed to all and served on one is notice to all. * * *

[2] As affecting the question of the sufficiency of the notice with reference to a renewal of the lease, or the execution of a new lease, given by the tenant to one of such joint owners only, the principle is laid down in 7 Ruling Case Law, p. 874, that such a notice is binding upon each and all of the joint owners. In discussing the difference in this regard between cotenants and joint tenants, it is said:

"* * * Nor is the relation of cotenancy of such a nature that notices served on one cotenant, as, for example, of defects of title in the common property purchased, bind the remaining cotenants; but where a grant is made to several persons jointly, a notice addressed to all of them, and served on one of them, is sufficient. In such case it is held that notice to one is notice to all. Where the relation is that of joint tenancy and not cotenancy, a different rule prevails. * * *" (Citing authorities.)

The following authorities are in point: *Detlor v. Holland*, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266; *Glenn v. Thompson*, 75 Pa. 389; *Wright v. Kaynor*, 150 Mich. 7, 113 N. W. 779; *Baker v. Kellogg*, 29 Ohio St. 663.

Without at this time having reference to, or in any manner considering, the form or the contents of the notice, it therefore appears that each of the several acts of the tenant, in notifying one of the plaintiffs of its desire to renew the lease or execute a new one, was a sufficient notice thereof to both of the plaintiffs.

The next finding to which appellants object includes the ultimate fact that, following the expiration of the original lease, the defendants were not entitled to the possession of the premises described in the complaint, but, to the contrary, the plaintiffs were entitled to such possession. It will be remembered that the lease as originally executed by the respective parties thereto contained a provision by which the lessee was given "the option of renewing the lease at the expiration of the date as specified herein," and that during the term of the lease the provision with reference to its renewal was modified by an agreement between the then owner and the lessee, by which on the expiration of the lease the latter was "given an option

to lease the premises at a monthly rental of \$75 per month for a term of three years."

The only substantial difference between the two options was that by the first the lessee was given the right of *renewing* the lease, without any price per month or term therefor being specified, while in the second option the lessee was given the right to *lease* the premises—the price per month and the term being fixed. By the terms of the registered letter sent to plaintiffs by the tenant nearly three months before the lease expired, plaintiffs were notified that the defendant wished to "exercise the option granted to us to *lease* the premises" in accordance with the terms of the agreement modifying the provision contained in the lease as originally executed. In the second notice by the tenant to the plaintiffs the intention of the tenant was made more specific (if possible), in that the tenant declared that it "desires and intends to use, avail itself of, and exercise a certain option in said lease, which said option is set forth in said lease as follows." Then follows a copy of the modified agreement by which the defendant was given the option to "lease" the premises.

Following such last written notice of the intention of the tenant with reference to its desire as affecting the renewal of the lease or the execution of a new lease, it appears from the testimony given by one of the witnesses that, in a conversation among the officers of the tenant and one of the plaintiffs, the tenant orally informed the plaintiffs that, while the tenant claimed that its then lease was "good for another three years," nevertheless it wished to re-lease the premises in accordance with the terms of the modified agreement with reference thereto. The testimony was as follows:

"* * * Of course we discussed pro and con as to whether that lease was good or not that I had. I claimed I had a lease, and it was good for another three years. Mr. Buck (manager of Swift & Co.) stated, 'Regardless of that, we want to re-lease. We would like to make a new lease with you for three years at \$75 a month.'"

[3] No evidence was introduced which tended to contradict the fact that the notices of intention on the part of the defendants to re-lease the property were given by the defendants to the plaintiffs. The only testimony which at all had a tendency to create a conflict in the evidence as affecting the desire of defendants to re-lease the property related entirely to the oral notice as expressed in the conversation which took place among the several parties to the controversy, and in that regard it appears that one of the plaintiffs testified:

"I simply made a statement to Mallonee that when that property was re-leased, or when he got a new lease, I was the person to state what

the conditions of that lease would be. * * * I had not been asked for a new lease. * * * He said he had all the lease he needed."

Resolving all doubts in favor of the judgment, it may be assumed as a conclusion from such testimony that no oral notice was ever given to the plaintiffs by the defendants of their intention to exercise the option to which reference has been had. But disregarding the technical question of whether the original lease was to be renewed, or a new lease executed, it is uncontroverted that by the written notices, by whatever form the proposed new tenancy was to be evidenced, the tenant wished to avail itself of the right created in it by the modified agreement relating to a continuance of the relation of landlord and tenant between the parties. The intention of the tenant was clearly made manifest in the premises. Its right to a re-lease of the property in accordance with the agreement of the parties should not be cut off because of any alleged failure on its part either to give oral notice, or in every instance to technically specify the exact nature of the instrument by which the tenant should remain in the possession and enjoyment of the premises.

It follows that the findings in question were not supported by the evidence, and as a consequence that the plaintiffs should have failed in their action.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 119

DAWSON v. DAWSON et al. (Civ. 4740.)

District Court of Appeal, Second District, Division 1, California. May 16, 1927.

Venue $\S$ 52(1)—Refusal to change venue to county of defendants' residence because of convenience of plaintiff's witnesses prior to joining issue held error (Code Civ. Proc. $\S\S$ 395, 397, subd. 3).

Refusal of defendants' motion to change place of trial of action to recover damages for alleged breach of lessor's agreement to permit removal of certain improvements made by lessee at termination of lease, which action was transitory in nature, to county of their residence, because of alleged convenience of plaintiff's witnesses, under Code Civ. Proc. $\S$ 397, subd. 3, held error, where no answer had been filed and no issue of fact joined, in view of section 395.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by Jay P. Dawson against Byron F. Dawson and another. From an order refusing to change the place of trial, defendants appeal. Reversed, with instructions.

Louis Lamy, of Los Angeles, for appellants.

Huber A. Collins, of El Centro, for respondent.

YORK, J. Before an issue of fact had been joined, defendants moved, under section 395 of the Code of Civil Procedure, to have the trial of the action transferred to the county of Los Angeles, on the undisputed fact that they were residents of the county of Los Angeles at the time of the commencement of the action, and were not at the time of the commencement of the action, or at the time of the hearing, residents of Imperial county. An objection was made by the plaintiff to the removal of the cause on account, of alleged convenience of witnesses, under subdivision 3 of section 397 of the Code of Civil Procedure.

The question is therefore presented whether or not such an objection would be well taken or could be considered before an issue of fact has been joined. No answer has yet been filed, and until the trial court could be properly informed of the facts to be established at the trial, or until it could be determined from all the pleadings of the case whether witnesses, and the evidence to be given by them, as set forth in affidavits presented to support such objection, would be even necessary or material, a transfer on account of convenience of witnesses could not be granted.

In the case of *Cook v. Pendergast*, 61 Cal. 72, particularly at page 80, the Supreme Court says:

"Independent of an express provision of statute, the superior court ought not to be called on before issues of fact have been joined to decide that the convenience of witnesses will be promoted by a change of the place of trial. * * * The Code of Civil Procedure does not require a decision which, in the nature of things, must ordinarily be premature."

See, also, *Wong Fung Hing v. S. F., etc.*, Funds, 15 Cal. App. 537, 538, 539, 115 P. 331, 332, where the court says:

"It clearly appears that defendant was a resident of San Francisco at the time of the commencement of the action, and, hence, upon demand duly made therefor, was, in the absence of a countershowing, entitled to an order changing the place of trial to the county of its residence. Code Civ. Proc. § 395. Assuming, then, that notwithstanding such right on the part of defendant, the court might, nevertheless, upon a proper showing that the convenience of witnesses would be subserved there-

by, retain the case for trial in Los Angeles county, the question presented for determination is whether the facts set forth in the affidavits presented by plaintiff justified the order made by the court. Subdivision 3 of section 397, Code of Civil Procedure, provides that the court may, on motion, change the place of trial, 'when the convenience of witnesses and the ends of justice would be promoted by the change.' Manifestly, until an answer is filed and issues of fact joined, it cannot be said a production of witnesses upon a trial will be required. Hence, a motion either to change the place of trial or to retain it for trial in a county other than the proper county, based upon the convenience of witnesses, will not be entertained where the defendant appears by demurrer only. *Cook v. Pendergast*, 61 Cal. 76; *Armstrong v. Superior Court*, 63 Cal. 411; *Sheffield v. Pickwick Stages*, 191 Cal. 9, 214 P. 852. In the former case it is said: 'But where no issue of fact has been raised, as where the motion to change the place of trial is made when defendant has appeared only by demurrer to the complaint, how can the court intelligently determine that it will be for the convenience of witnesses to change the place of trial, or to retain the action for trial in the county designated in the complaint?' Therefore, in passing upon motions for a change of place of trial, where an answer is filed, it is the duty of the court to disregard the proposed testimony of an alleged witness which is not material to some issue of fact made. *Miller & Lux v. Kern County Land Co.*, 140 Cal. 132, 73 P. 836; *Ennis-Brown Co. v. Long*, 7 Cal. App. 313, 94 P. 250. It is clear that plaintiff could not successfully resist defendant's motion unless it appeared from his affidavits that the testimony of the witnesses whose convenience was to be thereby subserved would be material and competent upon the trial of the issues involved. Applying this rule, it is apparent from an examination of the record herein that the facts did not justify the court in making the order from which defendant appeals."

The action is transitory in its nature; being an action to recover damages for the alleged breach of a lessor's agreement that the lessee, at the termination of his leasehold, should be "privileged to remove" any fences, buildings, and other improvements which he may have made on the land at his own expense.

The lower court having refused to change the place of trial from the county of Imperial to the county of residence of defendants, to wit, Los Angeles county, the order of the lower court is reversed, with instructions to the lower court to order the transfer of said cause to the superior court of Los Angeles county.

We concur: CONREY, P. J.; HOUSER, J.

83 Cal. App. 128

FISHEL v. F. M. BALL & CO., Inc.*
(Civ. 3197.)

District Court of Appeal, Third District, California. May 16, 1927.

Hearing Denied by Supreme Court July 13, 1927.

1. Master and servant $\S$ 80(10) — Evidence held to support finding that employee was to receive percentage of employer's net profits computed annually.

In action against employer for balance due for services as salesman, evidence held sufficient to support finding that plaintiff was to receive percentage of net profits of business in addition to salary, such profits to be computed annually on December 31st.

2. Master and servant $\S$ 80(10) — Evidence held to support finding that there had been no profit or loss on canned goods on hand at end of year of employer's business.

In action against employer for balance due for services as salesman, based in part on a percentage of net profits, evidence held sufficient to support finding in computing net profits that there had been no profit or loss on canned fruit bought three months before end of year and which was still on hand at that time.

3. Evidence $\S$ 113(8) — Price lists as evidence of value of goods are inadmissible without preliminary testimony showing qualification.

In computing net profits of employer's business at end of year, in employee's action for commission which was to be computed on such profits, price lists of canned goods bought three months before end of year and still on hand at that time should not be received in evidence without preliminary extrinsic evidence showing how they were made up, where information was obtained, and whether prices quoted were derived from actual sales.

4. Appeal and error $\S$ 206(1) — Preliminary proof relative to price list as evidence of value of goods held waived by failure to object.

In employee's action for commissions which were to be computed on net profits of employer's business at end of year, plaintiff waived preliminary proof relative to price list showing value of goods on hand at end of year by failure to object, and appellate court cannot presume that preliminary proof would not have been furnished in absence of such waiver.

5. Evidence $\S$ 571(7) — That expert in market values based testimony on price lists of little value does not entirely deprive testimony of credit.

Though price lists to extent that they represented mere asking price were of little weight in determining net profits of employer's business on which employee's commissions were computed, fact that plaintiff testifying as expert in market values based testimony to some extent on such list does not entirely deprive it of credit.

6. Evidence $\S$ 113(8) — Cost of goods held relevant on question of value in view of doubtful market.

Where there was doubt or uncertainty as to existence of market or of sufficient basis for

determining market value, in determining net profits of employer's business on which salesman's commissions were computed as affected by quantity of canned goods carried over end of year when profits were to be computed, cost of such goods was relevant in determining market value.

7. Evidence $\S$ 142(3) — Exclusion of evidence relating to sales at date different from that of price lists showing value of canned goods held proper.

In computing net profits of employer's business in employee's action for commissions to be computed thereon, where employer carried over end of year quantity of canned goods at which time profits were to be computed, rejection of evidence relating to sales and prices at other times than date of price lists showing value of such goods held not error.

8. Evidence $\S$ 547 — Market value cannot be established on direct examination by evidence of particular sales.

In computing net profits of employer's business in employee's action for commissions which were to be computed thereon, market value of goods carried over end of year at which time profits were to be computed, cannot be established on direct examination by evidence of particular sales.

9. Appeal and error $\S$ 1058(2) — Exclusion of evidence as to whether price list represented market price held not prejudicial error, where witness had already answered question.

In salesman's action against employer for commissions which were to be computed on net profits of employer's business, exclusion of testimony as to whether particular price list represented market price of goods carried over end of year, at which time profits were to be computed, held not prejudicial error, where witnesses had already testified that market price was lower than price set out in price list.

10. Evidence $\S$ 113(8) — Where price lists were introduced to aid in computing net profits on which salesman's commissions were computed, testimony as to how such lists were regarded by trade held admissible.

In employee's action for commissions which were to be computed on net profits, in which price lists were introduced to show value of goods carried over end of year, at which time profits were to be computed, testimony as to how such price lists were regarded by trade as establishing prices held proper, in absence of motion to strike for failure to produce further evidence on proper admissibility of lists.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Lester M. Fishel against F. M. Ball & Co., Inc., for balance due for services as salesman. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert B. Gaylord, of San Francisco, for appellant.

Arnold C. Lackenbach and Paul A. McCarthy, both of San Francisco, for respondent.

BUCK, Justice pro tem. [1] This is an action brought to recover a balance claimed to be due from defendant for services rendered by plaintiff as a salesman for defendant. Plaintiff recovered judgment in the sum of \$2,710, and defendant appeals. The case was tried before the court without a jury. There was no conflict in the evidence that plaintiff was in the employ of the defendant during the time in question, and that he was paid by defendant during the time of his employment the sum of \$200 per month. And the evidence also shows, without conflict, that there was some understanding between the parties to the effect that plaintiff was to receive under certain conditions a percentage upon the profits of the business. But there was a sharp conflict in the testimony as to whether the additional sum was to be paid by defendant as a bonus, or gratuity, at some indefinite time in the future, or whether it was to be paid as a fixed commission at the end of each year, in an amount equal to 25 per cent. of the net profits of the business earned during the year. The court found, in accordance with the contention of the plaintiff, that, in addition to his regular salary of \$200 per month, he was to receive "25 per cent. of the net profits of the business, such profits to be computed on the 31st day of December, 1922, and annually on each 31st day of December thereafter."

It does not appear that the evidence is insufficient to sustain the foregoing finding. It is supported by the testimony offered on behalf of the plaintiff and also, to some extent, by the testimony of the defendant to the effect that during the time of plaintiff's employment he paid him, in addition to his regular wages, the sum of \$1,050, which payment was afterwards entered by him upon his books as a payment on account of commissions earned, and was by him entered in his federal income tax return as a fixed expense of his business for the year.

[2] Counsel also contends that the evidence is insufficient to sustain the finding that the net profits of the business upon which plaintiff's commissions were to be computed amounted to the sum of \$15,043.46, and he also contends that the court erred in its ruling on the admission of evidence pertaining to this finding.

The defendant was engaged in a brokerage and commission business, and also in the business of buying and selling merchandise.

From the testimony of an expert accountant who examined the books of defendant, it appears that the aggregate gross profits of the business for the year 1922 amounted to \$50,475.42. But for the purpose of enabling the court to determine the actual net profits, it was conceded on both sides that there were

unquestioned net profits in the sum of \$3,173.41, and that the court should determine from the evidence whether the defendant, in arriving at the above amount of net profits, was justified in deducting from the gross profits, among other amounts, certain four items, it being conceded that all other deductions claimed by the defendant were properly made. The court made no express finding as regards each of these claimed deductions, but from a simple calculation it is plain that the court allowed two of the foregoing deductions claimed by the defendant, and disallowed the two other items of deduction claimed by defendant in the sums, respectively, of \$5,899.55 and \$5,967.50. These items were by the court accordingly added to the amount of net profits agreed upon as above. This sum gave the amount (less an apparent clerical error of \$3) of net profits found as above by the court.

Defendant's claim for the foregoing deductions was based upon his contention that he had purchased in September and October 19, 1920 cases of canned fruit, which he still had on hand at the end of the year, and which he claimed had at that time depreciated in market value in the above amounts as shown by his own inventory. It was agreed that the price of these goods at the time they were purchased was \$2.05 per dozen. But the court was required to determine the market value of the goods at the end of the year. The plaintiff, on the one hand, contended that the goods at the end of the year were worth about 30 cents per dozen above their cost, while the defendant contended that they were worth about that much less than their actual cost. But the court, as above indicated, found that there was neither a profit nor a loss in the goods at the end of the year, and that their value at that time was the amount of their original cost. On this issue a number of witnesses testified. Appellant's contention is that:

"Solely upon two loosely identified printed price lists of asking prices by two California fruit packers, and in contravention of the uncontradicted testimony of several witnesses as to current market price, the court based its findings that the current market price of \$1.70 reflected in the inventory was incorrect, and held that the plaintiff was entitled to recover upon the basis of price measured by the asking prices which appeared in these printed price lists. * * * That unidentified printed price lists of asking prices are not competent evidence to establish market value, and therefore that the court's finding upon this subject is not supported by the evidence. * * * And the court erred in its rulings as to the evidence which the defendant attempted to introduce to controvert that testimony."

[3, 4] As regards the "two loosely identified printed price lists," the record shows that these objectionable lists were offered and received in evidence, not only without any objection on the part of the defendant, but in

accordance with his express desire and wish. And it further appears that the trial judge, though they were so received, did not base his finding thereon. For these lists, if they had been received and accepted as conclusive evidence, would have shown a profit on the goods at the end of the year. Learned counsel is of course correct in his contention in this court that, before the foregoing price lists could regularly be received in evidence, there should have been introduced preliminarily extrinsic evidence showing how or in what manner the lists were made up, and where the information therein contained was obtained, or whether the quotations of prices made were derived from actual sales or otherwise, or were relied upon and consulted by the trade. *Vogt v. Cope*, 66 Cal. 31, 32, 4 P. 915. See full annotations on the subject, 43 A. L. R. 1192. Also, as stated in *Clemens Horst Co. v. Breidt*, 94 N. J. Law, 230, 109 A. 727:

"The weight of authority is to the effect that a price current list, published in a newspaper, is not competent evidence of market value without proof as to the source from which the information therein was obtained, or whether the quotations of prices were from actual sales or otherwise. The credit to be given the paper must depend upon some such extrinsic proof."

But, as already noted, this preliminary proof was waived by learned counsel at the trial, and, as held by our Supreme Court in a case involving life, this court cannot presume that the preliminary proof would not have been furnished in the absence of counsel's waiver.

As stated by our Supreme Court in *People v. Owens*, 123 Cal. 482, 56 P. 251, involving the admission of a dying statement of the deceased:

"The consensus of opinion, as illustrated by these cases and many others, is that where the proffered evidence is imperfect by the lack of preliminary proof which may or may not be supplied by the party offering the evidence, the objector must specifically point out the defect by his objection, and, if he fails to do so, it is waived."

Also, as stated in the case of *Yule v. Miller* (Cal. App.) 252 P. 733, at page 736:

"While some evidence was received that might have been subject to an objection, no objection was made, and it is well settled that incompetent evidence admitted without objection is to be regarded as sufficient to establish the fact. *Mercantile Trust Co. v. Sunset, etc., Co.*, 176 Cal. 466, 168 P. 1087. Evidence technically incompetent admitted without objection must be given as much weight in the reviewing court in reviewing the sufficiency of the evidence as if it were competent. *Parsons v. Easton*, 184 Cal. 769, 195 P. 419; *Janson v. Brooks*, 29 Cal. 223; *Curia v. Packard*, 29 Cal. 197; *McCloud v. O'Neill*, 76 Cal. 397; *Williams v. Hawley*, 144 Cal. 102, 17 P. 762."

[5] Though to the extent that these lists may have represented mere asking prices and

nothing else, they would be of little weight, and were evidently so considered by the trial judge. *Peters v. McPhadden*, 75 Wash. 525, 135 P. 26 [26 Ann. Cas. 1915C, 63]; *Houston Packing Co. v. Griffith* (Tex. Civ. App.) 164 S. W. 431; *Fountain v. Wabash R. R. Co.*, 114 Mo. App. 676, 90 S. W. 393; *Fairley v. Smith*, 87 N. C. 367 [42 Am. Rep. 522]; *Atlantic National Bank v. Korrick* (Ariz.) 242 P. 1009 [43 A. L. R. 1184, at page 1189].

The mere fact, however, that the plaintiff, while testifying as an expert in market values, bases his testimony to some extent on these lists, does not entirely deprive his testimony of credit. As stated by Holmes, C. J., now of the United States Supreme Court:

"An expert may testify to value although his knowledge of details is chiefly derived from inadmissible sources, because he gives the sanction of his general experience. But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible." *National Bank v. New Bedford*, 175 Mass. 257, 56 N. E. 288.

In the case at bar the objection was absolutely withdrawn, and learned counsel who represented defendant at the trial reserved the right to avail himself of similar hearsay and possibly incompetent evidence.

Further, as regards counsel's contention that the finding of the court was in contravention of the uncontradicted testimony of several witnesses as to the current market price, there is sufficient in the record to show that the trial judge exercised his own proper discretion in passing upon the weight that should be accorded the testimony of these witnesses. It appears that their testimony was, in effect, a mere ratification of the inventory price fixed as of the end of the year upon these goods by the defendant in his federal income tax return. One of the witnesses testified that, after looking at the inventory taken by his accounting department, he took it for granted that the market value was the same, and that the inventory price was not fixed "as the sale price in any event." And, furthermore, as to the market value at the end of the year, the witnesses testified, in substance, that at that time no one can fix the real market value derived during that period; that during that time there was no demand, and for that reason the witness was unable to fix any market value, and that when they inventoried at the end of the year, they inventoried it at "as low a price as they could consistently do so." And defendant's principal witness on market value testified that in the canned goods business, unlike the wheat or grain trade, there is no exchange or market where daily fluctuations in the market prices are established of record. The market value is whatever each broker or jobber interprets it for himself.

[6] It further appeared from the evidence that at about the time the goods were pur-

chased in September and October the market was confronted with "a pretty heavy carry-over on hand from the spring of 1922, and there were indications that the market price would not hold up, and everybody was uneasy as to what the eventual outcome would be," and that the dealers "were very hard-pressed at that time in being able to dispose of one hundred and fifty or two hundred thousand cases of their next year's pack." In view of this uncertainty we cannot say that the trial court was without justification in accepting the purchase price of these goods as potent evidence in determining the value of them under not dissimilar conditions three months later in the year. Where there is doubt or uncertainty as to the existence of a market, or of a sufficient basis for correctly determining the market value, the cost of personal property is held to be very relevant on the question of its value. *Yoakam v. Hogan*, 198 Cal. 16, 243 P. 21; *Angell v. Hopkins*, 79 Cal. 181, 21 P. 729; *Greenebaum v. Taylor*, 102 Cal. 624, 36 P. 957; *Union Hollywood Co. v. Los Angeles*, 184 Cal. 535, 538, 195 P. 55; *Travis Glass Co. v. Ibbetson*, 186 Cal. 724, 200 P. 595; *Wholesale Grocers' Corp. v. Richheimer Brokerage Co.*, 233 Ill. App. 64, at page 68.

[7] As regards the specific rulings of the court claimed to have been errors prejudicial to the defendant, it does not appear that the court was in error in sustaining plaintiff's objection to the question asked the witness Fishel as to whether or not in December, 1922, and January and February of 1923, the defendant had not sold goods at prices lower than the prices quoted in the price list above referred to. The court's ruling in disallowing the question was not erroneous for the reason that it included periods of time in January and February, and even in December, that were not covered by the price list in question, and hence did not tend to contradict it. And furthermore, as already indicated, the finding of the court shows that the trial judge did not accord full faith or credit to the price list in question.

[8] Also, the court did not err in not allowing the defendant, when testifying as an expert on direct examination, to testify as to particular sales of apricots and peaches subsequent to the 31st day of December, 1922. The question did not indicate how long subsequent, and market value cannot be established on direct examination by evidence of particular sales. *Central Pacific R. R. Co.*

v. Pearson, 35 Cal. 247; *City of Los Angeles v. Pedersen* (Cal. App.) 255 P. 889 (April 25, 1927).

[9] In regard to the questions asked witnesses Mel and Philpott in regard to the price lists which, as already indicated, had been received in evidence with the consent and at the request of the defendant, each of these witnesses had already testified, as experts, that the market price of the goods referred to in the price list was as much as 50 cents per dozen below the price set out in the price list. It was therefore not prejudicial error for the court to sustain the plaintiff's objection to the question asked the witnesses as to whether or not the price list in question "represented the market price." The question was merely argumentative, and, as one of the witnesses himself stated, he had already answered the question.

[10] The witness Fishel, when testifying as an expert on the question of market value, after the price lists referred to above had been already received in evidence without objection, was permitted to testify, over the objection of defendant, as to how these price lists were regarded by the trade as establishing prices. This was a proper question to ask in an attempt to lay at least a partial foundation for the introduction of these price lists, even if a proper objection had been interposed. 3 *Wigmore on Evidence*, par. 1704; *Jones v. Ortel*, 114 Md. 205, 78 A. 1030; *Mount Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 A. 702, 16 L. R. A. (N. S.) 758. Also, there was no motion to strike out this testimony for failure to produce further evidence on the proper admissibility of the list. In fact, the witness was allowed to testify, without further objection or motion to strike out on the part of the defendant, that the defendant and the witness and the defendant's salesman and jobbers generally looked to these prices in making sales.

Furthermore, defendant complains that the court refused to hear further testimony on the question of values, but the record does not show what, if any, testimony was offered, nor whether or not the testimony, if offered, would have been material.

For the foregoing reasons we do not believe that there is a sufficient showing of error in the record to warrant a reversal of this case, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

ing property on which to operate and maintain a hospital *held* within reasonable intendment of Treaty of Commerce and Navigation with Japan (37 Stat. 1504) art. 1, and not within prohibitions contained in Alien Land Law, as amended by St. 1923, p. 1020, since as a corporation they would not be authorized to exercise any right over property which they did not possess as individuals.

2. Citizens ⇐11—United States citizenship does not entitle citizen to rights and privileges of state citizenship.

Citizenship of the United States does not entitle citizen to privileges and immunities of citizen of state, since privileges and immunities of one are not the same as the other.

3. Treaties ⇐7—Words of treaty are to be taken in ordinary meaning, unless restriction impressed by local law is clearly intended.

Words of treaty are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed on them by local law, unless such restricted sense is clearly intended.

4. Treaties ⇐8—Treaty, conferring on subjects of one country residing in another privileges of native citizen, extended all rights enjoyed by native citizen, irrespective of source.

Treaty of Commerce and Navigation with Japan (37 Stat. 1504), conferring on subjects of one country residing in the other right to exercise certain privileges on same terms as native citizens, *held* to extend to foreign subjects all rights that the native citizen enjoyed, irrespective of source, and not to limit privileges and immunities of Japanese citizens to those accorded native citizens and subjects of the United States and not of the several states.

In Bank.

Application for mandamus by K. Tashiro, M. D., and others, prayed to be directed to Frank C. Jordan, Secretary of State, and another, to compel them to file certain articles of incorporation. Writ granted.

J. Marion Wright, of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondents.

CURTIS, J. This is an application for a writ of mandate to compel the respondents, as secretary of state and deputy secretary of state, respectively, to file certain articles of incorporation prepared and executed by petitioners and presented by them to respondents as such officers, for the purpose of filing in the office of secretary of state. The application also asks that the respondents be compelled to issue a certificate of incorporation and to certify and deliver to petitioners three copies of said articles of incorporation. It appears from said application that petitioners are residents of the state of California and county of Los Angeles, and are all Japanese

201 Cal. 236

K. TASHIRO et al. v. JORDAN, Secretary of State, et al. (S. F. 12346.)

Supreme Court of California. May 20, 1927.

1. Aliens ⇐12(4) — Japanese subjects may form corporation to lease property on which to operate and maintain hospital (Alien Land Law, as amended by St. 1923, p. 1020).

Right of Japanese subjects residing within state to form a corporation for purpose of leas-

subjects ineligible to become citizens of the United States or state of California; that they have voluntarily associated themselves together for the purpose of forming a corporation under the laws of the state of California to be known as the Japanese Hospital of Los Angeles; and that among the purposes for which this corporation is sought to be organized are those of maintaining a general hospital, to purchase the necessary equipment for the same, and to lease land upon which the buildings necessary for the maintenance of said hospital may be erected. Respondents refuse to file these articles of incorporation or to take any official action thereon for the reason, as contended by them, that the treaty between this government and the Japanese government confers no right upon Japanese subjects residing in this country to form a corporation under the laws of this or of any other state of this country. Without this right is given to petitioners by the terms of said treaty, the respondents contend, petitioners are prohibited by the laws of this state, and particularly by the provisions of the Alien Land Law, from forming any corporation, one of the purposes of which is to possess, use, or occupy real property situated in this state.

Section 1 of the Alien Land Law, as adopted by the electors of this state in 1920 and thereafter amended by the act of the Legislature approved June 20, 1923 (Stats. 1923, p. 1020), deals with the rights of aliens eligible to citizenship and in no way relates to any matter involved in the present proceeding. Sections 2 and 3 of this act are as follows:

"Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

"Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state,

in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

It will be observed from a reading of the foregoing sections of the Alien Land Law that by the provisions of section 2 thereof the rights of aliens ineligible to citizenship to possess, use, or occupy real property in this state are limited to such rights as are prescribed by the treaty between the country of which said aliens are subjects and this country. By section 3 of said act the rights of any corporation organized in this or any other state, of which a majority of the members thereof are aliens ineligible to citizenship, to possess, use, or occupy real property situated in this state, are likewise limited and governed by the terms of the treaty existing between this government and the government of which such aliens are citizens or subjects. In other words, it was undoubtedly the object and purpose of the Alien Land Law of this state to accord to aliens ineligible to citizenship, either individually or as members of a corporation, in which a majority of the members thereof are ineligible to citizenship, the right to acquire and possess real property in this state "in the manner and to the extent and for the purposes prescribed by any treaty," and to deny to such aliens any and all other rights or privileges in or to the real property of this state. It is apparent, therefore, that the measure of petitioners' rights as asserted in this proceeding is to be determined by the terms and provisions of the treaty or treaties now in force between this government and the empire of Japan. Article 1 of the Treaty of Commerce and Navigation between this government and the empire of Japan, proclaimed April 5, 1911 (37 U. S. Stats. at Large, p. 1504), in so far as it is material to any question arising herein, provides that:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It will be observed that, by the terms of this article of said treaty, subjects of Japan are accorded the right, among others, to carry on trade, to lease land for commercial purposes, and "generally to do anything incident to or necessary for trade upon the same terms as native citizens" of this country or state. In the case of *State of California v. Tagami*, 195 Cal. 522, 234 P. 102, it was held that a lease of land to a subject of Japan, for the

purpose of using and occupying the same as a health resort or sanatorium, is for a "commercial purpose" within the terms of said treaty. It is not seriously contended by respondents that the use of land for the purpose of erecting and maintaining thereon a hospital is not a use for commercial purposes as the term is used in said treaty, nor is it contended that a subject of Japan or any number of them, either in their capacity as individuals or as members of a partnership, cannot under the terms of said treaty lease real property in this state for the purpose of maintaining thereon a hospital. The sole claim of respondents is that the treaty does not expressly or by reasonable inference confer upon Japanese subjects residing in this state the right to form a corporation, if one of the purposes thereof is to lease for commercial purposes real property situated in this state.

In the case of *California v. Tagami*, supra, this court quoted with approval from the following language from the case of *De Geofroy v. Riggs*, 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642:

"It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred."

The principle thus enunciated appears to be accepted by the courts generally, and in 38 *Ency. of Law and Procedure* (Cyc.) 970, it is stated as follows:

"Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred."

In support of this text the following authorities are cited: In *re Wyman*, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; In *re Stixrud's Estate*, 58 Wash. 339, 109 P. 343, 33 L. R. A. (N. S.) 632, Ann. Cas. 1912A, 850; *The Disconto Gesellschaft v. Umbreit*, 208 U. S. 570, 28 S. Ct. 337, 52 L. Ed. 625; *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182; *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 454; and *De Geofroy v. Riggs*, 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642.

As we have already seen, article 1 of the treaty of 1911 provides that subjects of Japan residing in this state shall have the right to carry on trade, wholesale and retail, to lease land for commercial purposes and generally

do anything incident to or necessary for trade upon the same terms as native citizens or subjects. It is apparent from the reading of this section of the treaty that it was the intention of the high contracting parties thereto to give to the subjects of either country residing in the territory of the other the right to carry on trade therein upon the same terms as native subjects or citizens of the latter country. Yet this right to carry on trade is limited to such subjects and purposes as are enumerated in the treaty itself. Subjects of Japan residing in this country and subjects of our own country residing in Japan have only such rights in the country of their domicile as are expressly or by reasonable implication given to them by the treaty. The right to possess real property for agricultural purposes is not mentioned or referred to in the treaty; in fact, the treaty is silent upon this subject. Accordingly it has been held that no right to possess real property for agricultural purposes is given to subjects of Japan residing in this country, and therefore a statute prohibiting Japanese subjects residing in this state from possessing real property for agricultural purposes is valid and constitutional. *Porterfield v. Webb*, 195 Cal. 71, 231 P. 554; *Porterfield v. Webb*, 263 U. S. 225, 44 S. Ct. 21, 68 L. Ed. 278; *Webb v. O'Brien*, 263 U. S. 313, 44 S. Ct. 112, 68 L. Ed. 318. It was further held that the right "to carry on trade" given by the treaty does not give to Japanese subjects residing in this state the privilege of acquiring stock in a corporation owning farm or agricultural land situated in this state. *Frick v. Webb*, 263 U. S. 326, 44 S. Ct. 115, 68 L. Ed. 323. In this case the court said:

"The provisions of the act [Alien Land Law of California] were framed and intended for general application and to limit the privileges of all ineligible aliens in respect of agricultural lands to those prescribed by treaty between the United States and the nation or country of which such alien is a citizen or subject. The state has power, and the act evidences its purpose, to deny to ineligible aliens permission to own, lease, use, or have the benefit of lands within its borders for agricultural purposes. * * * It may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens. The right 'to carry on trade' given by the treaty does not give the privilege to acquire the stock above described. To read the treaty to permit ineligible aliens to acquire such stock would be inconsistent with the intention and purpose of the parties."

[1] By the right "to carry on trade" in the specific lines of business mentioned in the treaty, such as conducting manufactories, warehouses, and shops and leasing land for commercial purposes, is from the very terms of said treaty as extensive and complete as that employed by native citizens or subjects. It would be difficult to frame language much more comprehensive than that found in the following provision of article 1 of the treaty:

"And generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects."

This language follows the provision enumerating the different classes of trade or business in which resident aliens are authorized to engage and must be read in connection with such provision, and as so read it gives to such aliens an equal standing with native citizens or subjects in the conduct of those enumerated classes of business which may be carried on by such aliens. If, then, Japanese subjects residing in this state are authorized to engage in certain lines of business, including that of leasing real property for commercial purposes, and under the terms of the treaty they are further authorized to do anything incident or necessary in the conduct of such business upon the same terms as native citizens or subjects, are they thereby empowered to form a corporation as one of the necessary incidents of transacting such business? The statutes of this state provide the terms under which native citizens of this country may enter into corporate relations, and it is not questioned by respondents that petitioners have complied with the requirements of all such statutes, provided they are eligible to form a corporation under the terms of the treaty. It is hardly necessary to call attention to the extent to which corporations are formed and used by the citizens of this state, as well as by those of all other civilized countries, in the transaction of the various lines of trade carried on therein. There is scarcely a class of business of any consequence carried on in this state in which corporate interests do not play, if not a leading, at least an important part in its transaction. The extensive and widespread use of this means of carrying on trade or transacting business is convincing proof of the advantages to be derived therefrom. Why, then, should this method of carrying on trade as to the classes of business enumerated in the treaty be denied subjects of Japan residing in this state in the face of the plain provisions of the treaty conferring upon them as to such classes of business the right to do anything incident to such business upon the same terms as native citizens? A corporation, or the members thereof, in conducting any certain business do not thereby exercise any more extensive or different right or control over the property of said business than they would exercise over said property if they carried on the business as individuals. Should the petitioners as individuals decide to lease land and erect thereon and equip a hospital and maintain and operate the same, they could do so in the same manner and to the same extent as a corporation organized by them might do the same identical acts. As a corporation they would not be authorized to exercise any right over property which they do not now possess as individuals nor to transact any business nor engage in any line

of trade which they could not transact or engage in as individuals. The corporation is simply the instrumentality through which the members thereof engage to carry on the business in which they have a common interest. It is simply incidental to the business just as an agreement of copartnership would be if a partnership were formed to perform the same acts. In view of these considerations, and mindful of the rule already referred to, requiring courts to give to treaties a liberal construction, we are of the opinion that the right of Japanese subjects residing in this state to form a corporation for the purpose of leasing real property upon which to operate and maintain a hospital is within the reasonable intentment of the treaty of 1911. Such right is therefore not within the prohibitions contained in the Alien Land Law of this state, but is expressly recognized by the terms thereof.

Respondents have directed our attention to the provisions of article 7 of the treaty of 1911, which was designed to confer certain rights upon corporations (therein referred to as limited liability companies or associations) "organized in accordance with the laws of either high contracting party and domiciled in the territories of such party." Following the granting of such rights said article of the treaty provides that:

"The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof."

It is insisted by respondents that this provision argues most strongly against petitioners' contention, in that it evinces no desire on the part of either party to the treaty of securing freedom of action in the territories of the other for corporations of its own creation. "Therefore," say respondents, "how much less must it have been concerned in the creation by that other of corporations which were to act in this country of their creation?" We are not able to perceive the force of respondents' argument. The parties to the treaty evidently were not prepared to definitely bind themselves as to the rights of a corporation organized in one country and domiciled therein to transact and carry on business in the other. Hence they left the question unaffected by the treaty and subject to be regulated by the respective countries. They were, however, prepared to definitely fix and determine the rights of citizens and subjects of one country domiciled in the other, and to this end they set forth these rights distinctly and comprehensively in article 1 of the treaty, the terms of which we have already considered and attempted to construe. Article 11 of the treaty also refers to corporations, but clearly

this reference has no bearing upon the question to be considered in this proceeding.

[2-4] Finally, respondents contend that the words "native citizens" as used in the treaty in article 1 thereof, whereby it is sought to confer upon subjects of one country residing within the territory of the other the right "generally to do anything incident to or necessary for trade upon the same terms as native citizens" are employed in a restrictive sense, and that this provision of the treaty deals only with native citizens and subjects of the United States and their privileges and immunities as such and not with the privileges and immunities of the citizens and subjects of the several states. That there is a citizenship of the United States and a citizenship of a state, and the privileges and immunities of one are not the same as the other is well established by the decisions of the courts of this country. The leading cases upon the subjects are those decided by the Supreme Court of the United States and reported in 16 Wall. 36, 21 L. Ed. 394, and known as the Slaughter House Cases. However, to adopt the construction of the words "native citizens," as contended for by respondents, would be contrary not only to the spirit but to the express language of the rule applicable to the interpretation of treaties which we have already considered. We refer to the rule quoted with approval by this court in *State of California v. Tagami*, supra, and particularly to the following portion thereof:

"Words [of a treaty] are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."

There is nothing in the language of the treaty to indicate that the words "native citizens" used therein were employed in any restricted sense. On the other hand, we think it is plainly obvious from the terms of the treaty that the intent of the parties thereto in conferring upon the subjects of one country residing in the other the right to exercise certain privileges "upon the same terms as native citizens" was to extend to such foreign subjects all the rights that the native citizen

enjoyed irrespective of the source of such rights.

It may be that the right to form a corporation such as that which petitioners desire to organize is governed by the local laws of each particular state, and that such right may not be conferred upon alien residents in this state, or, for that matter, upon any class of persons whatsoever, by treaty or by any other act of the federal government. If this is so, then the state might disregard the treaty or any statute enacted by Congress which would infringe upon its exclusive jurisdiction in this particular and enact such laws in that regard as may meet the approval of the Legislature or of the people of the state, irrespective of any treaty or federal statute. But in the enactment of the Alien Land Law the state of California has not attempted to run counter to the treaty of 1911, or to any other treaty between this country and a foreign country. On the other hand, the provisions thereof relative to the right of aliens ineligible to citizenship to acquire and possess real property in this state expressly recognize such acquisition and possession "in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject." The provision found in section 3 of said act relative to corporations, a majority of whom are aliens not eligible to citizenship, acquiring or possessing real property in this state, contains a like reference to and recognition of the terms of any treaty between this government and any foreign nation. The fact, therefore, that the right to provide for and control the organization of corporations in this state may be within the exclusive jurisdiction of the state and not the national government is not decisive of any question arising in this proceeding for the reason that the action taken by the state in reference to such matters by the enactment of the Alien Land Law expressly limits the terms and provisions of said law to such rights as are not prescribed by any treaty.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; PRES-
TON, J.

201 Cal. 231

EL DORA OIL CO. v. GIBSON et al.
(L. A. 8551.)

Supreme Court of California. May 17, 1927.

1. Appeal and error $\Rightarrow$ 1244—Corporation held proper plaintiff to sue on bond to stay execution of appointment of receiver, though not respondent named in the bond (Code Civ. Proc. § 367).

Where respondents named in bond to stay execution of order appointing receiver acted for and in behalf of corporation for which receiver was sought, since, under Code Civ. Proc. § 367, real party in interest was required to bring action, corporation was proper party for plaintiff in suit on bond, though not named as respondent therein.

2. Appeal and error $\Rightarrow$ 469—Bond to stay execution of order appointing receiver held enforceable against defendants, though providing that appellant would pay all damages respondent sustained (Civ. Code, §§ 1636, 1641, 1649, 2837).

Though bond to stay execution of order appointing receiver for a corporation properly described joint appeal of several defendants, and recited that they desired to stay execution, and provided that, if judgment was adverse, named appellant would pay all damages which respondent might sustain, it was not unenforceable, in view of Civ. Code, §§ 1636, 1641, 1649, 2837, because it could not be ascertained from the language of the condition to or against whom the bond inured.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the El Dora Oil Company against G. R. Gibson and others. From a judgment for plaintiff, defendant R. McDonald appeals. Affirmed.

Chas. A. Barnhart and Leo V. Silverstein, both of Los Angeles, for appellant.

Alfred H. McAdoo and A. H. Swallow, both of Los Angeles, for respondents.

LANGDON, J. Defendant McDonald appeals from a judgment against him upon a bond made and executed by him, jointly with the other defendants, to stay the execution of an order of the superior court appointing a receiver of the El Dora Oil Company pending an appeal from said order, which appeal has been dismissed.

The circumstances connected with the execution of this bond are disclosed by the findings of the trial court, from which we recite the following facts:

In a certain action, wherein T. B. Fredendall, G. A. Lathrop, T. J. Green, L. C. Merideth, Monroe Thurman and N. L. Hall were plaintiffs and El Dora Oil Company, John Shrader, E. S. Good, Trusten Clark, D. W. Staten, Herman Friedman, and J. L. Campbell, Henry M. Jackson, and John Schrader, copartners doing business under the firm

name and style of Ohio Valley Construction Company, a corporation, were defendants, then pending in the superior court of the state of California, in and for the county of Los Angeles, said superior court on the 17th day of January, 1914, made and entered an order appointing J. A. Kibele receiver of said El Dora Oil Company and authorizing, empowering, and ordering the said Kibele to take possession and control of all of the property and assets of the said El Dora Oil Company, and to conduct, operate, and manage its business and to conserve the assets thereof. Said action was instituted, prosecuted, and maintained by the plaintiffs therein named in the interest and on behalf of the said El Dora Oil Company and all of its stockholders in like situation as the plaintiffs, and in the supplemental and amended complaint in said action it was alleged by the plaintiffs, and the facts were and are, that said E. S. Good, Trusten Clark, D. W. Staten, Herman Friedman, and John Shrader were the directors of the said El Dora Oil Company, and that at the time said action was instituted, and for a long time prior thereto, the defendants therein named, E. S. Good and John Shrader, absolutely and entirely controlled the actions, conduct, and management of the board of directors of said company, and that the defendants therein named, D. W. Staten, Trusten Clark, and Herman Friedman, were, as directors of said El Dora Oil Company, absolutely and entirely subservient to the will, control, and direction of the said Good and Shrader, and cast their votes on all matters connected with the conduct, management, and affairs of the said El Dora Oil Company, as instructed and directed to do by the defendants Good and Shrader. The defendants E. S. Good, John Shrader, J. L. Campbell, and Henry M. Jackson were, at the time of the commencement of said action, handling and treating the funds and moneys of the said El Dora Oil Company as if same were their own, and were disbursing the same without any regard for the rights of the said El Dora Oil Company or its stockholders, and that they threatened and would continue to do so unless said receiver for said company were appointed.

In said action the plaintiffs prayed, among other things, that the defendants therein named be required to account for and pay over to the defendant therein named, El Dora Oil Company, all moneys and property theretofore or which thereafter might be taken and converted to their own use by the defendants E. S. Good and John Shrader.

After the making and entry in said action of the order appointing a receiver for the said El Dora Oil Company, certain of the defendants therein named, to wit: E. L. Foster, J. W. McGrath, G. R. Gibson, Charles A. Barnhart, and the Ohio Valley Construction Company, appealed from such order and

for the purpose of procuring a stay of the execution of said order caused to be filed in said action an undertaking on appeal to stay said order, which undertaking was subscribed and executed by the defendants in the present action.

In April, 1921, the Supreme Court of the state of California made and entered an order dismissing the appeal from the said order appointing the receiver. Thereupon the present action was brought, in which it was found that, by reason of the stay of execution of said order appointing a receiver for the property of the El Dora Oil Company, the plaintiff in this action has been damaged in the sum of \$35,000, for which sum judgment was given.

[1] Appellant urges two grounds of appeal. The first is that the plaintiff in the present action was not the respondent named in the undertaking on which this action is based and therefore cannot sue upon it. From the facts herein recited, it appears that the respondents named in the undertaking were acting for and in behalf of the El Dora Oil Company, the present plaintiff, and any recovery which might be had by them upon the undertaking would inure to the benefit of said company. Under such circumstances section 367, Code of Civil Procedure, would require that the real party in interest bring the action. We see no merit in this objection to the judgment.

[2] The other objection is predicated upon the fact that, although the undertaking properly describes the joint appeal of Foster, McGrath, Gibson, Barnhart, and Ohio Valley Construction Company, and recites that these appellants desire to stay the execution of the order appealed from, it then provides that the sureties named promise and undertake "on the part of the above named appellant that, if the order appealed from, or any part thereof, be affirmed or the appeal dismissed, the appellant will pay all damages which the respondent may sustain," etc. It is contended that the bond is not enforceable by or against the parties to this appeal because it cannot be ascertained from the language of the condition to or against whom it inures. The cases relied upon are *Zane v. De Onativia*, 135 Cal. 440, 67 P. 685, and *Title Ins. Co. v. Cal. Dev. Co.*, 168 Cal. 397, 143 P. 723. Neither of these cases involve an undertaking such as we are considering here. Both have to do with cost bonds upon appeal, the filing of which was jurisdictional. The filing of the bond in the instant case had nothing to do with the jurisdiction of the appeal.

In interpreting the terms of a contract of suretyship in this state, the same rules are to be observed as in the case of other contracts. Civ. Code, § 2837. A contract must be interpreted so as to give effect to the mutual intention of the parties, and the whole

of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. Civ. Code, §§ 1636, 1641. If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it. Civ. Code, § 1649. The cases of *Roberts v. Security T. & S. Bank*, 196 Cal. 557, 238 P. 673, and *Sather Banking Co. v. Briggs Co.*, 138 Cal. 724, 72 P. 352, hold that a contract of suretyship is to be fairly construed with a view to effecting the object for which it was given and to accomplish the purpose for which it was designed, and that the old rule of *strictissimi juris* applies only to the extent that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that the contract shall not be reasonably interpreted as other contracts are.

We find no merit in the appeal, and the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.

83 Cal. App. 111

JOHNSON v. HULSE et al. (Civ. 4277.)

District Court of Appeal, Second District, Division 2, California. May 13, 1927.

1. Corporations ☞78—Promise to repay subscribers' money is implied where corporation contemplated is abandoned.

Promise to repay money subscribed prior to organization is implied by law, where corporation contemplated is never formed.

2. Corporations ☞30(2)—Preorganization agreement stating tentative plan for incorporation did not of itself render signers liable for repayment of subscriptions, on abandonment of project.

Preorganization agreement, by which tentative plan was arranged for formation of corporation on obtaining requisite amount of money through subscriptions, did not of itself render signers liable for repayment of money subscribed, on abandonment of plan for incorporation.

3. Principal and agent ☞92(2)—Money paid promoters' agent may be considered as money paid promoters.

Money paid agent of promoters of corporation for stock subscriptions may be treated as money paid to promoters themselves.

4. Corporations ☞30(2)—Promoters, who failed to receive subscription money collected by their agent, held nevertheless liable to subscribers on abandonment of scheme for incorporation.

Promoters planning organization of corporation, who selected agent and set him to work

to procure subscriptions and collect money from subscribers, *held* liable to subscribers, on abandonment of project, for money paid agent, though money was not received by promoters.

5. Corporations $\S$ 30(2)—One who signed preorganization agreement without actively participating in promotion or selection of agent was not liable to subscribers for monies paid agent which promoters never received.

Subscriber of stock in proposed corporation, who signed preorganization agreement, *held* not liable to refund subscription money for which promoters' agent allegedly failed to account, where such subscriber had not taken part in plan of operation or selection of agent.

6. Appeal and error $\S$ 1050(1)—Testimony of subscriber under original partnership scheme *held* not prejudicial, in action against promoters for refund of subscription money on abandonment of incorporation scheme.

In action by subscriber against promoters to recover subscription money on abandonment of incorporation scheme, testimony of subscriber under original partnership scheme *held* not prejudicial.

7. Corporations $\S$ 30(2)—Testimony of promoter as to option on oil lease *held* not erroneously admitted, in action to recover subscription, where there was evidence that lease was to be transferred corporation.

In action against promoters to recover amount of subscription on abandonment of incorporation scheme, admitting testimony of promoter as to option secured on certain oil lease *held* not error, where there was some evidence that lease was to be transferred to corporation on its organization.

8. Witnesses $\S$ 268(1)—Permitting cross-examination of promoter as to whether he sought to set aside newspaper statement published by alleged agent *held* not error, in action to recover subscription money which agent collected.

In action against promoters of corporation to recover amount of subscriptions collected by alleged agent, admitting cross-examination of promoter as to whether he sought to set aside facts which might be stated in newspaper advertisement published by alleged agent *held* not error, where question was apparently asked to prove agency.

9. Appeal and error $\S$ 880(3)—Promoters sued could not complain on appeal that judgment against them failed to include codefendant promoter.

On appeal by promoters from judgment in favor of subscriber of stock, promoters could not complain that no judgment had been entered against codefendant promoter; liability of promoters being joint and several.

10. Corporations $\S$ 30(1)—Promoters' liability is joint and several.

Liability of promoters is joint and several, and judgment in action against promoters is not invalidated because entered against some only instead of against all.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by D. K. Johnson against Ben Hulse, C. S. Abbott, Lee Little, and others, operating as an association under the name of Big Four Oil Association. Judgment for plaintiff, and defendants named appeal. Affirmed as to the two defendants first named, and reversed as to the last-named defendant.

M. C. Atchison and Leslie Reed, both of Calexico, for appellants.

JOHNSON, Justice pro tem. This is an appeal by defendants Hulse, Abbott, and Little from a judgment rendered against them in favor of plaintiff. The legal question involved is that of the obligation of promoters of a projected corporation to repay, upon an abandonment of the scheme, money received from subscribers for shares to be issued upon organization of the corporation. We have not had the benefit of any brief from respondent, and must therefore deal with the points advanced by the appellants in our own way.

The complaint is in three counts: The first, to recover on a subscription made by plaintiff himself; the second, on a subscription made by D. L. Zinn, who assigned his claim to plaintiff; the third, on a subscription made by P. P. Stavron, whose claim was likewise assigned to plaintiff. Only part of Zinn's subscription having been paid in money, and that having been returned to him, the trial court found in favor of the defendants on the second count, and therefore no further reference will be made thereto.

The facts in the case are simple. The defendants Hulse, Abbott, and Dye had been interested together in certain oil ventures, and in February, 1919, Hulse secured certain options for oil leases in Texas, in which he associated with himself, Abbott and Dye. All three lived in California, but during the period involved in the transactions in question Hulse and Dye spent most of their time in Texas. After the options had been acquired, an arrangement was made by Hulse and his two associates with Martin C. Brumbly with a view to raising money in California for prospecting work on the Texas lands. The first plan was to have Brumbly raise not less than \$40,000, in exchange for which there was to be transferred to him an interest in the options. The method first tried for providing funds through Brumbly was that of uniting subscribers in a copartnership divided into "units," for which each member was to pay \$500. Certain subscriptions under this plan were obtained by Brumbly, the proposed partnership being designated as Imperial Valley-Texas Oil & Gas

Association. A question having arisen, however, as to the legality of this procedure in view of the Corporate Securities Act (St. 1917, p. 673), as amended the use of the instrumentality of a copartnership was abandoned, and in its stead a scheme was devised for taking subscriptions for shares in a corporation to be thereafter formed. Pursuant to this plan an instrument called "Preincorporation Agreement" was prepared. It is dated May 1, 1919, and is an agreement by which the subscribers agree to form a corporation, to be known as "Big Four Oil Association," with an authorized capital of \$200,000, divided into shares of a par value of \$500 each, for the purpose, among other things, of prospecting and drilling upon certain described lands in Texas, called the Merkel lease and the Petrolia lease, as well as any other lands that might be acquired. The agreement provided for five trustees to act without compensation pending the organization of the corporation, and named as trustees Abbott, Hulse, Dye, Little, and Brumbly. It authorized the appointment of a general manager, fixed his duties, gave the trustees power to buy and sell oil leases and take title in their names, also, to take subscriptions and receive payments; and stated that the two leases named had been transferred to the trustees in consideration of a subscription of \$60,000. It further stated that the trustees were authorized to accept subscriptions for \$140,000, and that of such sum no part was to be expended until at least \$25,000 had been subscribed, which sum, it was estimated, would be more than sufficient for drilling the first well. The only persons who ever signed this particular instrument were Abbott, Little, and Brumbly, and neither the leases named nor any assets were ever transferred to any of the trustees to be held for the benefit of the proposed corporation. Abbott testified that the agreement was not to be effective "until after the deal had been completed," and that was why Hulse and Dye did not sign. Dye testified that he and Hulse did not sign because Brumbly had not done his part.

After this preincorporation agreement had been prepared, Brumbly obtained from plaintiff and his assignors the subscriptions giving rise to this action. Johnson and Stavron subscribed each for a half unit, and each paid Brumbly therefore the sum of \$250. Brumbly testified that the total subscriptions obtained aggregated between \$14,000 and \$17,000; that an unspecified part of the money he received was retained by him for commissions, and the rest he transmitted to Abbott. Whatever money Abbott received from Brumbly was deposited by him in a bank at Calxico, in an account carried in the name of Big Four Oil Association, Abbott signing checks as trustee. Brumbly having failed to raise sufficient money within the time

necessary to fulfill the requirements of the options, Hulse directed the abandonment of the enterprise and the return of the money received from the subscribers. None of the money paid by the plaintiff Johnson or his assignor Stavron had been paid over to Abbott by Brumbly; and the demands of Johnson and Stavron for repayment were therefore refused by Abbott, with the result that this action was instituted for recovery of the amounts claimed.

[1] In taking subscriptions from subscribers Brumbly used an application blank with which he had been provided, and which was in the following form:

"I * * * hereby make this application which is to be attached and become a part of the original preorganization agreement of the Big Four Oil Association for * * * units in the association, at \$500 per whole unit; it is understood and agreed that I am to receive a certificate for my investment when the association is incorporated."

The receipts given were signed either by M. G. Brumbly, Trustee, or simply M. G. Brumbly. Plaintiff and Stavron testified that when they subscribed they were told by Brumbly that if the corporation should not be formed, their money would be returned, but even if such promise had not been expressly made, it would have been implied by law.

The complaint alleges that the defendants Hulse, Dye, Abbott, and Little, and one fictitiously named as John Doe, were operating under the name of Big Four Oil Association, and that plaintiff and his assignors had paid them the amounts sued for, in return for which defendants agreed to organize the corporation and to issue certificates of stock, or, in the event that the corporation was not organized, to return to the subscribers the amounts paid. The action was later dismissed as to the fictitious defendant John Doe. Defendant Little answered separately, and the defendants Hulse, Abbott, and Dye jointly, but the answers are all in the same general form. All the defendants denied any contract with plaintiff or his assignors, and, while admitting that none of the defendants had incorporated the company referred to, they denied that any agreement for that purpose was made, and denied, also, that they received any money from plaintiff or his assignors. The court found in favor of plaintiff on the first and third counts, but only against the defendants Hulse, Abbott, and Little, giving judgment against them for \$500 and interest. The appellants contend that the court erred in denying the motions of defendants for a nonsuit and in admitting certain evidence to which they objected, and erred also in finding that there was a contract between any of the defendants and either plaintiff or his assignor Stavron. Error is alleged further in the fail-

ure of the court to make Dye share the burden of the judgment with the other defendants charged.

[2-4] As we read the record, the liability to plaintiff and his assignors was not created by the preorganization agreement. That is not an agreement of promoters, as such, nor did the defendants treat it as anything more than a statement of a tentative plan, without binding force on the holders of the options until the requisite amount of money had been raised through subscriptions. It was designed to be an agreement between those who became subscribers for shares, and contemplated a temporary operating arrangement in the interests of the subscribers during the preparatory period preceding the actual incorporation of the proposed company. The real promoters were the coadventurers who devised the scheme and set Brumbly at work to raise enough money to carry their plan into execution.

Money paid to an agent of the promoters is as if paid to the promoters themselves, and, in so far as the promoters or their agents received money from subscribers for shares in the projected corporate enterprise which was afterwards abandoned, they are jointly and severally liable for the return of money paid on a consideration which has failed. The rule is thus expressed in section 162 of Alger on the Law of Promoters and the Promotion of Corporations:

"When a subscriber for shares in a projected corporation has paid money thereon in advance to the promoters, and the scheme proves abortive, he may recover back his money. This right rests on the failure of the consideration on which the money was paid. But the scheme is not to be deemed abortive until the formation of the corporation has been abandoned or has become impracticable, or a reasonable time for the formation has elapsed. It is reasonable, in the absence of agreement to the contrary, that the expense of exploiting the proposed undertaking should, in case it collapses, fall upon the original projectors, and not on those who advanced their money on the faith of the ability of the projectors to do that which they undertook to do."

See, also, 14 C. J. 276, § 322.

Without reciting the evidence in detail, it is sufficient to say that there is abundant evidence to the effect that at least Hulse and Abbott were promoters of the enterprise, and that Brumbly was selected as the agent of the promoters and was by them set to work to procure subscriptions and collect money from subscribers. Under such circumstances, the promoters became liable for the return of the money of the subscribers, whether it was actually transmitted by Brumbly to Abbott or not. Accordingly, so far as Hulse and Abbott are concerned, the court did not err in denying their motion for a nonsuit, or in making the findings to which they take exception.

[5] As to the defendant Little, the situation is not the same. Little had no interest in the Merkel or Petrolia options, and had had nothing to do with arranging the plan of operation or setting Brumbly at work. Before the plaintiff rested, and Little made his separate motion for nonsuit, the only evidence connecting him with the transaction was his signature to the preorganization agreement and the testimony of Brumbly that the "Big Four" were Little, Dye, Abbott, and Hulse. At the same time Brumbly went on to say that he had had no conversation with Little, but that Abbott had stated, without Little being present, that:

"If we get Lee Little in the corporation we can sell to every one in Calxico with his name in to help."

Brumbly said also that later Abbott had sold a unit to Little. After the court had denied the motions of all the defendants for a nonsuit, some further evidence was given concerning Little's connection with the scheme. He himself testified that at Brumbly's request he subscribed for a unit and gave Brumbly a check for \$500, and Abbott testified that Little's name was in his book as one of those who had paid their subscriptions. Little testified also that he was asked if they could use his name as a director in a company that was being formed, and that he expressed a willingness, "if it would help the cause any," and that accordingly he signed the preorganization agreement and Brumbly signed it at the same time. Little stated that he had never attended any meetings and knew nothing further about what was being done. Abbott corroborated this, and said further that Little was not present at any time when they had any conversation regarding the matter of the Big Four Oil Association.

Such is the nature of the evidence upon which the liability of Little is predicated. And instead of showing Little to have been one of the promoters, it shows him to have been a subscriber, just as were plaintiff and his assignors; and Little's signature to the preorganization agreement put him in a position corresponding to that of plaintiff and his assignors by their signatures to the separate application blanks, each of which stated that it was to be attached to and become part of the original preorganization agreement. Whether or not the court was correct in its ruling on Little's motion for a nonsuit, we do not think the evidence as a whole justifies the finding that there was a contract between Little and either plaintiff or his assignor Stavron.

[6] In the specifications of error in the admission of evidence, appellants first direct attention to testimony given by Dr. Rankin, who was called out of order as a witness for his accommodation. At that time the

trial judge could not well determine the relation of his testimony to the case at large. Dr. Rankin had been a subscriber under the original partnership scheme, and testified to certain statements then made to him by Brumbly. This evidence was not competent under the issues in this case, but it is without prejudice to the defendants.

[7] When defendant Abbott was on the stand he was asked whether he, Little, Dye, and Hulse had ever secured any lease of a company or association known as Silver Lake Oil Company, and he answered that he understood that there had been an option on the lease, but Hulse was "handling all that stuff." This was not one of the leases referred to in the preorganization agreement, but there is some evidence that if the corporation should be organized, Hulse intended to transfer that lease to the corporation. The ruling was not erroneous.

[8] Abbott was also asked whether he ever sought "to set aside any fact which might be stated" in a certain newspaper advertisement published by Brumbly, a portion of which was read to the witness. Abbott stated that he had never seen the advertisement, and the inquiry was not pursued further. The question was no doubt asked in an endeavor to elicit additional proof of Brumbly's agency, and there was no error in allowing the witness to answer the question.

[9, 10] The appellants contend, in addition, that they are entitled to a reversal because there is no judgment against their codefendant Dye. The omission to include Dye in the judgment is, however, not a grievance of which these appellants may complain. The liability of promoters is a joint and several liability, and the judgment is not invalidated because its sting is felt by some only instead of all.

The judgment is affirmed as to the defendants Hulse and Abbott, and reversed as to the defendant Little.

We concur: WORKS, P. J.; CRAIG, J.

83 Cal. App. 179

JONES v. BULLARD et al.

KENDRICK v. SAME.

(Civ. 5669.)

District Court of Appeal, First District, Division 2, California. May 18, 1927.

I. Appeal and error §1061(3)—Plaintiffs were not prejudiced because court granted nonsuit instead of adverse judgment on merits called for by evidence and findings.

Where evidence and findings thereon called for judgment on merits for one of defendants, plaintiffs were not injured because trial court

entered judgment of dismissal in favor of such defendant.

2. Master and servant §330(3).—Finding automobile repairer in driving automobile to loosen bearings was not owner's agent held sustained by evidence.

Evidence held to warrant finding that automobile repairer in driving automobile on streets to loosen bearings was not acting as agent or employee of owner, who left automobile with him for repairs, so as to make owner liable for his negligence resulting in collision of automobile with automobiles belonging to plaintiffs.

Appeals from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Actions by Leon B. Jones and by Charles H. Kendrick against E. D. Bullard and others, consolidated and tried together. From a judgment in favor of defendant Marie S. Bullard, plaintiffs appeal. Affirmed.

George E. Sandford, of San Francisco, for appellants.

James M. Wallace, of San Francisco, for respondents E. D. Bullard and Marie S. Bullard.

C. A. Henning, of San Francisco, for respondent Carrigan.

STURTEVANT, J. Mrs. Marie S. Bullard was the owner of a Cadillac automobile. She allowed her son-in-law and daughter, James W. Towne and wife, to keep the custody of it and to have the use of it. In November, 1922, the car was in need of repairs. Mr. Towne so informed Mrs. Bullard, and she told him to deliver the car into the possession of Joseph Carrigan, one of the defendants. After the car had been delivered Mrs. Bullard called on Carrigan and was informed as to the nature of the defects and the repairs necessary, and made an agreement with him to make the repairs and fixed the amount of his compensation. The repairs to be made included, among other things, the tightening of the bearings. The labor was to be done by Carrigan in his garage at his convenience. When the car had been repaired the bearings were so stiff that the car would not respond to the starter. Therefore Carrigan blocked the car up and allowed the engine to run, and, carrying out the same purpose, he drove the car outside of the shop and drove it around to different places. While doing so, on one occasion, he stopped the car on a side hill in front of his own house, which is located on Pierce street between Vallejo and Green streets in San Francisco. At that place the hill is quite steep. After Carrigan stopped the car he got out and was entering his house when he saw the car start down the hill. The car continued to move on down the grade until it collided with the car of the plaintiff Kendrick, and that collision caused the Kendrick car to collide with the car of the plaintiff Jones. The owners of

the latter cars severally sued Marie S. Bullard, her son E. D. Bullard, and Joseph Carrigan. The defendants answered, and the cases were consolidated and tried together before the trial court sitting without a jury. The trial court made findings against Joseph Carrigan and in favor of all of the other parties. The plaintiffs have appealed from the judgment in favor of Marie S. Bullard.

As to the defendant E. D. Bullard the trial court by consent entered a motion of nonsuit.

[1] At the end of the case made by the plaintiffs, the defendant Marie S. Bullard made a motion for a nonsuit. The motion was ordered submitted. Thereafter the defendant Marie S. Bullard proceeded to introduce her evidence both oral and documentary. The defendant Joseph Carrigan did the same thing. When the evidence was all in an order was made submitting the actions on briefs. Neither before that order was made nor at any other time was the trial court called upon to rule on the motion for a nonsuit, except as will presently be noticed. After the trial court had received briefs and after it had reached its conclusions it signed a set of findings in which all of the material issues were found against the defendant Carrigan and in favor of each plaintiff and in favor of Marie S. Bullard. The findings contained conclusions of law, among others that Marie S. Bullard's motion for a nonsuit should be granted. A formal judgment was entered in each case which ordered: (1) A judgment in favor of the plaintiff against the defendant Carrigan; (2) that the action be dismissed as to E. D. Bullard; and (3) that Marie S. Bullard's motion for a nonsuit should be granted and that as to her the action should be dismissed. If it be conceded that it was erroneous, in the instant case, to grant Marie S. Bullard's motion at the time it was granted, nevertheless the order was without prejudice. If we were to reverse the judgment because of the supposed error our ruling would be so made merely for the purpose of directing that the trial court make a formal order as at the end of the defendants' case overruling the motion for a nonsuit and further directing the trial court to enter a judgment on the merits in favor of Marie S. Bullard based on the findings of fact which the trial court had already made. That course of procedure, however, is not necessary, as will presently appear. The findings made by the trial court are sustained by the evidence and such findings called for a judgment on the merits in favor of Marie S. Bullard. It follows that the appellants were

not injured because the trial court entered a judgment of dismissal instead of a judgment on the merits in favor of Marie S. Bullard.

[2] The appellants claim that the finding to the effect that Joseph Carrigan was not the agent or employee of Marie S. Bullard is not supported by the evidence. The claim may not be sustained. There was an abundance of evidence to support the finding. In making this claim appellants assert that when Carrigan took the car out onto the street for the purpose of loosening the bearings, that he did so pursuant to directions given him by James W. Towne. However, Mr. Towne distinctly testified that he gave no such directions. The appellants also assert that at the same time Carrigan had finished his work on the car, that the matter of loosening the bearings was "a task which was supposed to be done by Mr. Towne," and that all acts of Carrigan from the time he drove the car out of the garage were acts on his part in the capacity of a servant for the owners. These assertions are not supported by the record. In her deposition Marie S. Bullard testified that Carrigan was "to put it in good condition." James W. Towne repeatedly testified that in talking to Carrigan over the phone on each occasion he stated to Carrigan that he did not want the car "until it was in order." The uncontradicted evidence is that the car was not "in order" nor "in good condition" at any moment prior to the accident. In other words, Carrigan's assumed task was not completed.

What we have just said on the point last discussed applies also to the contention that the finding that Joseph Carrigan was not at the time of the accident engaged in the performance of any mission or business for Marie S. Bullard is not supported by the evidence.

In the next place the appellants assert that Marie S. Bullard ratified Carrigan's acts. The record shows that Mrs. Bullard's son visited the scene of the accident, ascertained certain facts, and held certain conversations. However, the evidence does not disclose that he had any authority from Marie S. Bullard to do any of those things, nor does it disclose that he did in any manner ratify the act of Carrigan.

The record discloses that there were irregularities in the proceedings below, but it also discloses that there was no miscarriage of justice.

The judgments are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

82 Cal. App. 728

RUSSELL v. RILEY & PETERSON et al.
(Civ. 4625.)

District Court of Appeal, Second District, Division 1, California. May 5, 1927.

- 1. Appeal and error** ⇨1011(1)—Appellate court will not disturb trial court's findings, when there is conflict of evidence on material point and evidence to support findings.

An appellate court will not disturb trial court's findings, when there is substantial conflict of evidence on material points and evidence to support findings.

- 2. Reformation of instruments** ⇨45(9)—Evidence held to sustain finding that there was no mutual mistake in drafting agreement to use land for quarry and maintenance of camp (Civ. Code, § 1625).

Where plaintiff claimed defendants agreed, after using her land for quarry purposes and for a camp, to leave land in same condition it was found, to remove all debris, blast foundation for rock crusher, replot roads, and fill cesspools, evidence held to sustain finding that there was no mutual mistake in drafting contract which omitted such matters, contract as written, under Civ. Code, § 1625, superseded oral negotiations therefor.

- 3. Compromise and settlement** ⇨23(3)—Evidence held to sustain finding that plaintiff accepted defendants' check in full settlement of claims for damage to her land.

Where plaintiff permitted defendants to use her land for quarry purposes and for maintenance of a camp, evidence held to sustain finding that plaintiff accepted defendants' check in full settlement for claim for defendants' alleged breach of agreement to remove debris, blast foundations for rock crusher, replot roads, and fill cesspools.

- 4. Compromise and settlement** ⇨17(1)—In absence of evidence of fraud or mistake, plaintiff is bound by what she accepts, signs, and indorses.

Where plaintiff could read check given her, in absence of satisfactory evidence as to fraud or mistake, she was bound by what she accepted, signed, and indorsed.

- 5. Accord and satisfaction** ⇨25(4)—Generally one relying on accord and satisfaction must plead and prove both.

Generally he who relies on an accord and satisfaction must plead and prove both.

- 6. Accord and satisfaction** ⇨25(4)—If plaintiff proves payment under circumstance amounting to accord and satisfaction, defendant may rely thereon, though not pleading it in answer.

Rule that accord and satisfaction, to be available as a defense, must be pleaded and proved, is subject to exception that, if plaintiff, as part of case, proves payment and circumstances tending to show accord and satisfaction, defendant may rely on facts thus shown as accord and satisfaction, though not pleaded as such in answer.

- 7. Accord and satisfaction** ⇨19—Compromise and settlement ⇨6(2)—Agreement to accept lesser sum in payment of amount in dispute, when carried out, extinguishes original obligation.

Where agreement to accept in full payment a sum less than the amount in dispute is executed by payment and acceptance of the lesser sum, the original obligation is extinguished.

- 8. Accord and satisfaction** ⇨4—Compromise and settlement ⇨5(3)—Acceptance of check as agreement of accord and satisfaction of disputed debt need not be in writing (Civ. Code, § 1524).

Acceptance of a check as agreement of accord and satisfaction of disputed debt under Civ. Code, § 1524, is not required to be in writing.

- 9. Trial** ⇨397(5)—Where findings of fact of accord and satisfaction control judgment for defendant, failure to find on issue of negligence in setting fires held not error.

Where evidence sustained finding of accord and satisfaction for any damage to plaintiff's land by defendants, failure of court to find as to alleged negligence of defendant in building fires on plaintiff's land and destroying fences held not error.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Ida May Russell against Riley & Peterson, copartners, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

L. E. Dadmun, of Los Angeles, for appellant.

George H. Stone, of San Diego, for respondents.

McLUCAS, Justice pro tem. Plaintiff's first amended complaint sets forth two causes of action; the first being for the reformation of an agreement between the parties and to recover damages for the alleged breach thereof, and the second being an action for damages by reason of alleged negligence of the defendants in building a fire on the land of plaintiff and permitting the same to get beyond their control and to burn down plaintiff's fence. The answer denies the material allegations in both causes of action, and pleads as a further defense thereto payment to the plaintiff on April 12, 1921, of the sum of \$213.60 as "settlement in full for all claims to damage of property, real estate and personal, to date." Plaintiff appeals from the judgment rendered for defendants.

[1, 2] The evidence in this case is in sharp conflict. The rule is established by a host of decisions that an appellate court will not disturb findings of the trial court when there is a substantial conflict of evidence on material points and when there is some evidence to support the findings. 2 Cal. Jur. § 543, p. 921. It remains, therefore, to be de-

terminated whether the record shows there was some evidence to support the findings. Appellant contends that the findings herein-after quoted were not sustained by the evidence:

"(4) That said agreement Exhibit A was the contract and contained the terms of agreement as contemplated by the parties prior to its execution.

"(5) That there was no specific agreement between the parties that defendants should put the land back in the same condition it was at the time they went onto it, nor that they would plow up all the roads they might make on or across plaintiff's land, or that they would refill any holes or excavations made, or that they would haul away the debris; that no agreements as to damages were made other than those contained in the contract, viz.: To in no way injure or damage the buildings or farm land or farm property of plaintiff.

"(6) That there was no mutual mistake of the parties in the terms of the agreement.

"(7) That such damage as plaintiff may have sustained to her farm land and buildings by reason of debris, excavations, roads, or fire, was settled in full by agreement between plaintiff and defendants and paid in full by defendants.

"(8) That, pursuant to such agreement of settlement, defendants on April 12, 1921, gave plaintiff voucher check for \$213.60, which recited therein that it was in 'settlement in full for all claims to damage of property, real and personal, to date.'

"(9) That said check was received by plaintiff as, in settlement in full of her damage as therein set forth, was knowingly indorsed by her under the printed words: 'Payee's indorsement hereon constitutes receipt in full of within account. Indorsement must be made in ink and only by person having authority.'

"(10) That the fire which injured plaintiff's fence was not built on plaintiff's land by defendants, and was not negligently or carelessly permitted by defendants to get away or from under their control, and did not injure or damage plaintiff's buildings or farm property."

Appellant, in support of her attack on findings 4, 5, and 6, which relate to the terms of the agreement, quotes liberally from the testimony of the plaintiff. Plaintiff testified that she orally agreed with defendant Riley for the use of her land for quarry purposes and for the maintenance of a camp thereon, for a consideration of \$200; that defendant agreed to leave her land in the same condition he found it, with the exception of the quarries, remove all debris, blast foundations of rock crusher, replot the roads, and fill up the cesspools; that defendant Riley thereupon prepared a written agreement, and the plaintiff signed the agreement without reading it, upon the assurances made by defendant Riley that the agreement contained all the terms and conditions agreed upon. Plaintiff admitted that she noticed that her daughter's name had been placed in the instrument, instead of plaintiff's name, and that she saw defendant Riley write in her name, the

amount of the consideration, and the description of the land, before she signed the agreement; that the first time plaintiff realized that certain conditions had been left out of the agreement was when she read the same in the presence of her daughter some three or four weeks after it had been signed, and that in the presence of her daughter she spoke to defendant Riley regarding the fact that the agreement did not contain all the terms and conditions as to plowing the roads, removing debris, etc., and that defendant Riley stated to her:

"Oh, that doesn't amount to anything. I am an honorable man; I always do all those things. Well, that don't amount to anything; that will be all right."

This statement was corroborated by the testimony of plaintiff's daughter. The written contract contained no provision as to removing debris, blasting foundations, filling cesspools, or replotting roads; but it did contain the provision wherein the defendants agreed "to maintain all roads which they use on her said property for taking out said material, and agree to keep the property about their camp in a clean, sanitary condition and that the said rock and sand removed and the removal thereof, shall in no way injure or damage the buildings or farm land of said first party."

On the other hand, defendant Riley testified that he held a conversation with the plaintiff as to the use of her land for quarry and camp purposes for a consideration of \$200 and walling up a well; that plaintiff told him to get everything in writing; that he prepared a contract and returned with it a week later; that plaintiff read it aloud and discussed it before she signed it; and that plaintiff objected only as to the consideration, and said nothing about cesspools, nothing about damages for roads, and nothing about damages to her property, except from blasting. The defendant denied the subsequent conversation, as testified by plaintiff. Defendant denied that he told plaintiff he would plow up the roads and put the land back in the same condition, even though that had been left out of the agreement.

The witness McLean testified that the agreement was signed in his presence, after plaintiff looked at it and discussed it with defendant Riley. He could not say whether plaintiff read the contract. It thus appearing that the testimony is in direct conflict as to the substance of the conversation preceding the execution of the contract and as to the circumstances surrounding the signing of the agreement, if plaintiff read the contract, the court would be justified in concluding there was no mistake of fact as to its contents, and plaintiff is bound thereby. The substance of the testimony of the defendant Riley is that the written contract contained

the whole and actual agreement of the parties. Applying the rule heretofore stated, we find there is some evidence to support the finding, and that therefore there is no ground for reformation of the agreement. In *Burt v. Los Angeles Olive Growers Association*, 175 Cal. 668, at page 675, 166 P. 993, 996, it is said:

"Where so solemn an instrument as a written contract is sought to be reformed for mistake, 'evidence of the mistake must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt.' *Lestrade v. Barth*, 19 Cal. 675. Every presumption in equity favors the view that such a contract as this, thus deliberately entered into, expresses the true intent and meaning of the parties. The burden of showing the contrary is upon the party seeking to avoid its plain terms. Under this evidence it cannot be successfully contended that the mistake was mutual or that it was induced by plaintiff by the suppression of any term in the contract, or even that it was known to plaintiff, or suspected by plaintiff, that defendant did not understand its terms. Nothing in the writings of defendant to plaintiff after the execution of the contract so establishes, and plaintiff's own testimony is to the contrary. This testimony is aided by the legal duty imposed upon a party to read such a contract before executing it. *Hawkins v. Hawkins*, 50 Cal. 558; *Metropolitan Loan Ass'n v. Esche*, 75 Cal. 513, 17 P. 675; *Pope v. Armsby Co.*, 111 Cal. 159, 43 P. 589."

The written contract superseded all oral negotiations which preceded the execution of the contract. Civ. Code, § 1625.

[3] Appellant insists that the defendants failed to establish payment by a preponderance of the evidence. The findings of the court on the subject of payment appear in paragraphs 7, 8, and 9 of the findings hereinbefore quoted. Plaintiff and the witness McNett testified that at the time of the settlement plaintiff presented to defendant Riley a statement of her claims, which was examined by said defendant, and that Riley agreed, in addition to paying plaintiff \$213.60, to plow up all roads, fill all cesspools and excavations, furnish 17 fence posts, and haul away all debris. Defendant Riley testified that at the time of settlement the plaintiff presented an itemized statement of her claims for various articles used or destroyed, fixing up roads, removing sand and stone at the quarry; that he told her the contract did not require him to fix the roads; that he was not responsible for the damage to the fence and would not furnish the fence posts or build the fence; that the cesspools were all filled up at the time of the settlement; that nothing was said about removing concrete foundations; that he did not set any fire or order any one to set a fire on the land; that plaintiff afterward ordered defendant to remove the rock at the quarry; that he told her the state highway would take the rock and the sand at the crusher, and he would

allow her for it whatever the state would permit; that he told plaintiff he absolutely refused to pay for the roads, and that he would go to court before he would do that; that he was willing to pay for all he should pay for, and would not pay for anything he did not owe; that plaintiff said she would rather settle the matter out of court, that she felt she had been injured and was willing to adjust the matter; that he gave her his personal check for \$213.60 as payment in full. Subsequently, on April 12, 1921, the firm check of Riley & Peterson for \$213.60 was substituted for Riley's personal check and delivered to plaintiff by defendants' bookkeeper, Vallin, who testified that he filled out a portion of the check in plaintiff's presence, with her pen and ink, and told her what he was writing. The witness testified as follows:

"Q. What part of it was written out in her presence with her pen and ink? Read the words. A. 'April 12, 21, Mrs. I. M. Russell. \$213.60,' in figures; then written out, and on the reverse side, 'April 12, settlement in full for all claims to damage for property, real estate and personal, to date,' with the amount in dollars and cents."

The check also contained the words, "being in full payment of within account." The plaintiff testified that after Vallin had given her the check, he asked her to return it, saying, "I want to make a memorandum of what that is for;" that she handed him the check, and that he wrote something on it and handed it back to her; that she did not read it. On April 22, 1921, plaintiff cashed the above check, indorsed in the following words appearing on the reverse side of the check: "The payee's indorsement hereon constitutes receipt in full of within account." Plaintiff received the check on April 12, 1921, but made no demand for additional settlement until January, 1922. Plaintiff was able to read.

[4] An examination of the record discloses that the trial court was justified in concluding that the plaintiff was capable of looking after her own affairs, and having received the check in this unusual form, having kept it for eleven days, and then having indorsed the check as a receipt in full, that the plaintiff could not possibly have overlooked the fact that the check was given as payment in full. Plaintiff must read, since she could, and, in the absence of satisfactory evidence as to fraud or mistake, plaintiff is bound by what she accepts, signs and indorses. *Burt v. Los Angeles Olive Growers Ass'n*, supra; *Smith v. Occidental, etc., Steamship Co.*, 99 Cal. 462, 470, 34 P. 84. We believe payment was shown by the defendants by a preponderance of the evidence. We find no error in the finding of the trial court that payment in full was made by defendants.

[5, 6] Appellant argues that the position advanced by defendants as a matter of law

is accord and satisfaction, and not payment in full; that accord and satisfaction was not pleaded, and therefore could not be proved. The general rule is that he who relies upon an accord and satisfaction must plead and prove both. *Berger v. Lane*, 190 Cal. 443, 213 P. 45. In the instant case the answer alleged as follows:

"As a further and separate defense the defendants allege that on April 12, 1921, they paid to the plaintiff the sum of \$213.60 which sum was paid to plaintiff and received by her and receipted for by her in 'settlement in full for all claims to damage of property real estate and personal to date'; that no work of any kind was done upon said property by defendants subsequent to said date, no rock crushed, no roads made, no excavations dug."

In *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 P. 624, where in the amended answer it was specifically pleaded that plaintiff's assignor had accepted a certain sum of money in full settlement and extinction of the obligation sued upon, the court said:

"Upon principle, the defense of accord and satisfaction at the very best requires nothing more to be pleaded than the payment and acceptance, upon a mutual agreement express or implied, of a certain sum of money or other thing of value in full settlement and satisfaction of a pre-existing and previously disputed obligation."

Conceding, without deciding, that the pleading in the present case does not fully meet these requirements, yet the rule requiring an accord and satisfaction to be specifically pleaded before it can be availed of as a defense is subject to the exception that if the plaintiff, as a part of his case, proves the payment and the circumstances under which it was made, tending to show an accord and satisfaction, the defendant may rely upon the facts thus shown as an accord and satisfaction, though not pleaded as such in the answer. *B. & W. Engineering Co. v. Beam*, supra. In *Looby v. Village of West Troy*, 24 Hun, 78, it is said:

"The objection taken by the plaintiff that the settlement of accord and satisfaction had not been pleaded cannot prevail, because the plaintiff himself chose to prove the fact of payment in aid of his own case. This opened the subject. Indeed the plaintiff, under defendant's objection, also proved the conversation between himself and the president before the warrant had been given in evidence. He has no right to object that all the facts connected with the payment were shown."

[7, 8] In the case at bar plaintiff chose to prove the fact of payment in aid of her own case; also the conversation between herself and defendant Riley before the check had been given in evidence. Accordingly, plaintiff has no right to object that all of the facts connected with the payment were shown. The check accepted by the plaintiff contains

the words, "being in full payment of within account;" and "settlement in full for all claims to damage for property real estate and personal to date," and, above plaintiff's indorsement, the words, "payee's indorsement hereon constitutes receipt in full of within account." If the transaction be considered as one of accord and satisfaction, then the rule is well settled that, where an agreement to accept in full payment a sum less than the amount in dispute is shown to have been fully executed by the payment and acceptance of the lesser sum, the original obligation is thereby extinguished. *B. & W. Engineering Co. v. Beam*, supra. It is insisted that the acceptance of the check for \$213.60 could not constitute satisfaction unless expressly so accepted in writing. In support of this contention we are cited to section 1524 of the Civil Code, which reads:

"Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation."

This question was raised in *B. & W. Engineering Co. v. Beam*, supra, and was decided adversely to appellant's contention. The court said:

"* * * It is certain that section 1524 of the Civil Code has reference only to agreements of release and satisfaction made in cases where the obligation is neither doubtful nor disputed, and has no application to an executed agreement of accord and satisfaction founded upon the settlement and extinction of a disputed debt. *Simmons v. Hamilton*, 56 Cal. 493; *Rued v. Cooper*, 119 Cal. 463, 51 P. 704; *Flaningham v. Hogue*, 59 Ill. App. 315; *Reynolds v. Silvers*, 17 N. J. Law, 275; *Farmers' Bank*, etc., v. Blair, 44 Barb. (N. Y.) 641."

In *Berger v. Lane*, 190 Cal. 443, page 447, 213 P. 45, 47, the court says:

"The general rule, which is but an amplification of our Code sections (Civ. Code, §§ 1521, 1523) defining satisfaction and accord, is 'that, where the amount due is in dispute and a check less than that claimed is sent to the creditor with a statement that it is sent in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that if the check is accepted at all it is accepted in full satisfaction of the disputed claim, and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction even though the creditor states at the time that the amount tendered is not accepted in full satisfaction.' *Lapp-Gifford Co. v. Muscocy Water Co.*, 166 Cal. 25, 134 P. 989; *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 P. 624."

The fact that plaintiff made further demands from defendants eight months after she had accepted the money as payment in full does not make the transaction a part

performance of the obligation. Plaintiff was bound by her settlement in full in accepting the check. The decisions cited by appellant to the effect that the giving of a check for an antecedent debt is not absolute payment in the absence of express agreement are beside the point. Here the check was not only accepted, but also cashed. In this case the question does not arise as to whether the check itself, as distinguished from the cash represented by the check is to be taken as absolute payment.

[9] Appellant states that no findings were made by the court upon the second cause of action, and that therefore plaintiff is entitled to a reversal. Appellant says that the second cause of action did not directly arise out of the contract, and that plaintiff seeks to recover in the second cause of action for damages sustained by reason of the unlawful and negligent way in which the defendants permitted a fire to burn and destroy her fence and trees. However, the second cause of action contains no allegation as to damage to trees. It does incorporate paragraphs 1, 2, 3, and 4 of the first cause of action, in which the contract and the mutual mistake of the parties are alleged, and then alleges:

"That the above-named defendants after making and entering said agreement, herein alleged and set forth and referred to, and in pursuance thereof, entered upon the land of said plaintiffs and while said defendants were upon said land of said plaintiff, pursuant to said contract and agreement, and without any authority, permission, or consent of said plaintiff, did build a fire upon the land of said plaintiff, and negligently and carelessly permitted said fire to get away and from under their control, and said fire did burn down, consume, and destroy, a quarter of a mile of fence, to the plaintiff's damage in the sum of \$300."

While it does not specifically appear from the findings that plaintiff's fence was not destroyed, yet it does appear that the fire was not built on plaintiff's land by defendants and was not negligently permitted to get away from under their control, and did not injure plaintiff's buildings or farm property. The court found:

"That such damage as plaintiff may have sustained to her farm land and buildings by reason of debris, excavations, roads, or fire, was settled in full by agreement between plaintiff and defendants and paid in full by defendants."

The contract between the parties provided that the removal of rock and sand "shall in no way injure or damage the buildings or farm land of said first party." Where the findings of fact necessarily control the judgment, failure to find on other issues is not error. The facts found show that plaintiff is not entitled to judgment, and render any finding on the other issues immaterial and unnecessary. *Fogg v. Perris Irrigation Co.*,

154 Cal. 209, 219, 97 P. 316; *Sharp v. Pitman*, 166 Cal. 501, 505, 137 P. 234.

There being no prejudicial error, it is ordered that the judgment be affirmed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 62
PEOPLE v. POWELL. (Cr. 1469.)

District Court of Appeal, Second District, Division 2, California. May 12, 1927.

1. Criminal law ⇨186(4)—Failure to impose sentence within time prescribed held error of procedure not resulting in miscarriage of justice (Pen. Code, §§ 1191, 1202; Const. art. 6, § 4½).

Failure to impose sentence within time prescribed by Pen. Code §§ 1191, 1202, held error of procedure not resulting in miscarriage of justice, in prosecution for robbery, hence not ground for reversal under Const. art. 6, § 4½.

2. Criminal law ⇨829(7)—Refusal of instruction that proof of alibi sufficient to create reasonable doubt would require acquittal held not error, where instructions required proof of crime beyond reasonable doubt.

In robbery prosecution refusal to instruct that defendant should be acquitted if evidence of alibi was sufficient to create reasonable doubt held not error, where instructions fully covered subject of presumption of innocence and requirement to prove guilt beyond reasonable doubt.

3. Criminal law ⇨777½—Court need not direct jury's attention to particular line of testimony.

Trial court need not call attention of jury to any particular line of testimony, whether offered by prosecution or defense.

4. Criminal law ⇨814(16)—Instruction that facts admitted should be deemed proved against party making admission held not abstract in robbery prosecution, where date of defendant's leaving hotel was stipulated.

In robbery prosecution, instruction that admission of fact or facts material to case should be deemed proof as against party making admission held not erroneous as abstract, where defendant stipulated date at which he had checked out of hotel.

5. Criminal law ⇨811(6)—Instruction that neither prosecution nor defense need call all persons present as witnesses held not prejudicial as discriminating against defendant.

Instruction that neither prosecution nor defense was required to call all persons present or knowing of matters on trial as witnesses nor to produce all objects or documents referred to held not prejudicial as throwing suspicion on defendant's testimony.

6. Robbery ⇨24(1)—Evidence held to sustain conviction of robbery.

In prosecution for robbery of bank in which two of bank's employees identified defendant

as person committing robbery, evidence held sufficient to sustain conviction.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Charles J. Powell was convicted of robbery, and he appeals. Affirmed.

Benjamin W. Shipman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., and John D. Richer, for the People.

MURPHEY, Justice pro tem. The defendant and appellant was accused by an information filed by the district attorney of the county of Los Angeles, state of California, of the crime of robbery, a felony. He was tried by a jury and found guilty as charged. From the judgment and order denying his motion for a new trial the defendant appeals. The jury, on November 15, 1926, found the defendant guilty of the crime as charged; sentence was not pronounced until December 6, 1926, following the hearing on the motion for a new trial, and after the time limit for the imposition of sentence prescribed by sections 1191 and 1202 of the Penal Code of the state of California.

The defendant in his opening brief stresses three points as grounds for the reversal of the judgment. First, error of the trial court in refusing motion for a new trial and in pronouncing sentence after the lapse of the statutory time; second, refusal of the court to give certain instructions proposed by him; and, third, the giving by the court of confusing and erroneous instructions. In his final brief, and for the first time, the defendant raised the point that the verdict was not sustained by the evidence and quotes rather copiously from the testimony in support of this contention.

[1] Taken in the order of their assignment the defendant in support of his first contention cites many cases decided by the Supreme and appellate courts before the Supreme Court had finally passed upon the applicability of section 4½ of article 6 of the Constitution to cases of this character. The law is now definitely settled that a failure to impose sentence within the time prescribed by sections 1191 and 1202 of the Penal Code is an error of procedure fully amenable to the provisions of the above quoted section of the Constitution.

In the case of *People v. Zuvela*, 191 Cal. 223, at page 224, 215 P. 907, the Supreme Court of this state said in referring to this matter:

"The failure to impose the sentence within the time specified by section 1191 of the Penal Code is clearly an 'error' of 'procedure.' * * * We see no good reason for excepting this particular error from the general provisions of section 4½ of article 6 of the Constitution. After an examination of the entire cause, including the evidence, we are satisfied

that the error complained of in the instant case did not result in a miscarriage of justice. It will not, therefore, suffice to warrant a reversal of the judgment for the purpose of having a new trial."

—quoting the language of the District Court of Appeal in the case of *People v. Barr*, 55 Cal. App. 321, 203 P. 827, which is as follows:

"Indeed, if we may concede that its language is broad enough to apply to proceedings taken after verdict, to extend it to cover the error herein as contended for by respondent would be to nullify completely the effect of said sections 1191 and 1202. We must attribute no such purpose to the people in adopting the amendment."

Counsel for appellant calls attention to the fact that the Supreme Court in the *Zuvela* Case did not take up and consider the language in the *Barr* Case, and had it been considered counsel suggests that a different conclusion may have been reached. With this suggestion we cannot agree. The question of the application of section 4½ of article 6 of the Constitution to the matter of sentences imposed after the time prescribed by these sections was the very matter before the court, and the very matter upon which they were called upon to decide, and the conclusion is inevitable that the court intended to decide exactly what it did decide. This view is confirmed in the recent case of *People v. Haines*, 64 Cal. App. 628, at page 630, 222 P. 183, where the court quotes the *Zuvela* Case as the settled law on this subject, and with which conclusion we are in entire accord. In the case of *People v. Haines*, supra, at page 630, 222 P. 184, where sentence was pronounced three days later than the maximum time allowed by section 1191 of the Penal Code the court said:

"It is urged that because of this delay the defendant was entitled to a new trial and that the judgment should be reversed. This contention is met by the recent case of *People v. Zuvela*, 191 Cal. 223, 215 P. 907, wherein it was held that the failure to impose sentence within the time specified by section 1191 of the Penal Code is clearly an error of procedure within the meaning of section 4½ of article 6 of the Constitution and that a new trial would not be granted because of such error unless an examination of the entire record disclosed that the error complained of had resulted in a miscarriage of justice. As pointed out by the respondent, the error complained of occurred after the verdict of the jury and could not have changed the verdict in any way."

In the instant case, in view of the law as above stated, there is nothing to indicate or evidence in the slightest degree any suggestion of a miscarriage of justice.

[2, 3] The second point raised by appellant is the refusal of the court to give the following instruction:

"You are instructed that where evidence has been offered by the defendant for the proposed

purpose of proving an alibi—that is to say, that the defendant was in another place at the time of the alleged crime, and was far distant from the scene of the crime at the time, and therefore, could not have participated in it—if, from the whole case and a consideration of all the testimony, the evidence in his behalf produced belief sufficient to create a reasonable doubt as to whether the defendant was present at the time and place of the alleged crime, he must be acquitted.”

In view of the instructions that were given by the trial court, we are of the opinion that the above instruction was entirely unnecessary. In the case of *People v. Perrin*, 67 Cal. App. 612, at page 617, 227 P. 924, 926, the court said:

“The appellant requested the trial court to give certain instructions regarding the evidence which the appellant had introduced in his attempt to prove an alibi. The trial court did not give any one of those instructions and the appellant assigns its refusal as error. However, the trial court did instruct the jury as follows: ‘The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that in the county of Fresno, at or about the time mentioned in the information, the defendant knowingly and designedly. * * *’ The trial court also carefully and fully instructed the jury to the effect that the prosecution must prove the allegations of the information beyond a reasonable doubt. The nature of the defense interposed was to the effect that the defendant did not commit the alleged offense on the date charged at Fresno, because on that date he was at Tijuana, Mexico. It is patent that if the jury found that he did commit the act on the date alleged at Fresno, that he was not on that date at Tijuana, and the converse is equally true. * * * We find no prejudicial error in the record.”

In the instant case the trial court’s instructions to the jury were as follows:

“A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to an acquittal. * * * The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If, upon such proof, there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true, than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.” “The court instructs the jury that if the evidence in this case is equally susceptible of two interpretations, one interpretation pointing to the innocence of the defendant and the other interpretation pointing to the guilt of the defendant, then it is your sworn duty under the law to give the defendant the

benefit of the interpretation which points to his innocence and acquit him.”

[4] As will be observed, the instructions in this case cover the ground more thoroughly than in the *Perrin* Case, supra, and we see no good reason why a trial court should call attention to any particular line of testimony whether offered by the prosecution or the defense. Objection is made to the following instruction given by the court to the jury, “If either party has during the trial admitted any fact or facts material to the matters involved in this case, such admission is to be deemed by you as proven against the party making such admission,” upon the ground that it was not applicable to any fact or circumstance connected with the trial of the case, it being the contention of the appellant that there were no agreed or stipulated facts in the record. The objection is without merit and is in direct conflict with the record.

The question as to the date when the defendant Powell checked out of the La Tosca Hotel was involved, and the record was as follows:

“Mr. Hahn: If you will show me what it is I will stipulate with you.

“Mr. Isaac: Just to show that Powell checked out on the 25th of March.

“Mr. Hahn: That is true; we will stipulate to that; he left on the morning of the 25th of March, checked out of the hotel. I will stipulate with you that that is correct.”

[5] Counsel objects to the following instruction given by the court:

“The court instructs the jury that neither the prosecution nor the defense is required to call as its own witnesses all persons who are shown to be present, or who may appear to have some knowledge of the matters here on trial, nor is the prosecution or the defense required to produce as exhibits all objects or documents which have been referred to or the existence of which may have been suggested by the testimony in the case.”

Counsel insists that this instruction in connection with the one set out immediately preceding this one is confusing, and that the effect of the instruction charges the jury to view with prejudice, suspicion and disbelief the testimony of the defendant. We do not believe the instructions are fairly susceptible of the criticism directed against them. They are not discriminating, and the possible effect is magnified beyond any reasonable construction to be placed on the language. Such an instruction as the last quoted may well be omitted unless the circumstances of the case require its submission, but, as given in this case, we do not believe it influenced the jury in the slightest degree.

[6] And finally the appellant in his closing brief for the first time contends that the evidence is insufficient to justify the verdict. The evidence shows that on the 24th day of March, 1926, appellant Powell entered the

Thirty-Third and Main street branch of the Pacific-Southwest Trust & Savings Bank at about 3 o'clock, just as the bank manager, H. M. Ostrom, was closing the bank for the afternoon. At the point of a revolver the appellant covered Ostrom and two other employees of the bank and required them to turn over to him money in the sum of about \$2,400. Two of the employees of the bank, Ostrom, the manager, and Miss Taylor, a stenographer, testified that they had ample opportunity to observe the defendant and his characteristics and that they and each of them positively identified the defendant Powell as the man who robbed the bank. In view of this positive identification there is no merit in the point that the evidence is insufficient to justify the verdict, and in fact a careful reading of the entire record would warrant us in saying that the jury would not have been justified in arriving at any other conclusion.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

83 Cal. App. 122

GABEL et al. v. INDUSTRIAL ACCIDENT COMMISSION of STATE OF CALIFORNIA et al. (Civ. 3312.)

District Court of Appeal, Third District, California. May 16, 1927.

1. Master and servant §361—Express or implied contract of employment must exist to create liability under Workmen's Compensation Act (Civ. Code, §§ 1965, 2009).

To create liability for injuries compensable under the Workmen's Compensation Act (St. 1917, p. 831, as amended), as being within section 1965 defining employment and section 2009 defining a servant, a contract of employment, express or implied, must exist.

2. Master and servant §361—Contract of employment within Workmen's Compensation Act may provide compensation for services in any valuable property or services (Civ. Code, §§ 1965, 2009).

Contract of employment, to create liability for injuries compensable under Workmen's Compensation Act (St. 1917, p. 831, as amended), as being within Civ. Code, § 1965, defining employment, and section 2009, defining a servant, may provide compensation for the services by means of any property of value or by return of services.

3. Master and servant §361—Agreement to exchange farm labor for indefinite term may be employment contract within Workmen's Compensation Act (Civ. Code, §§ 1965, 2009).

Contract of employment to create liability under Workmen's Compensation Act (St. 1917, p. 831, as amended), as being within Civ. Code, §§ 1965 and 2009, defining employment and serv-

ant may be general agreement between neighbors to exchange farm labor of any and all character for an indefinite term.

4. Master and servant §405(2)—Industrial Accident Commission's findings that farmer assisting neighbor to fight fire was "employee" held sustained by evidence.

Finding of Industrial Accident Commission, that farmer who while assisting in fighting grass fire was instructed by his neighbor with whom he habitually exchanged work to "take the truck and go down there and save my buildings" was employee while acting pursuant to these directions, held sustained by evidence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee.]

5. Master and servant §361—Farmer helping neighbor to fight fire would not necessarily be acting solely to protect own property and not as neighbor's employee (Workmen's Compensation Act; Civ. Code, §§ 1965, 2009).

Farmer in fighting mile-wide grass fire at neighbor's buildings under his directions would not necessarily be acting from sole motive of protecting his own adjoining farm a mile distant so as to preclude recovery under Workmen's Compensation Act (St. 1917, p. 831, as amended), as an employee of his neighbor at the time, with whom he had a general agreement for exchange of labor, within Civ. Code, §§ 1965, 2009, defining employment and servant.

6. Master and servant §375(1)—Fighting fire held within neighbors' contract for exchange of farm labor making injury compensable.

Finding of Industrial Accident Commission that services in fighting grass fire were within general contract between neighboring farmers formerly partners, to exchange any and all kinds of service necessary for operation, maintenance, or preservation of their respective farms, so that personal injuries thereby sustained were compensable, held proper.

7. Master and servant §361—Friendship would not preclude recovery under Workmen's Compensation Act, though circumstance would be considered in determining whether employment contract existed.

Fact that neighboring farmers were friends would not preclude recovery under Workmen's Compensation Act (St. 1917, p. 831, as amended), for injuries sustained by one while fighting fire on the other's premises under his directions, where they had general contract for exchange of services, though fact would be considered in determining whether contract of employment existed.

Certiorari to review order of Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by W. G. Bach, claimant, to recover for personal injuries, opposed by William Gabel, employer, to review an order of the Industrial Accident Commission granting an award. The employer and the State Compensation Insurance Fund apply for certiorari. Award affirmed.

Frank J. Creede, of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

THOMPSON, Justice pro tem. This is a writ of review to annul an award made by the Industrial Accident Commission against petitioner Gabel for injuries sustained by respondent Bach while fighting a grass fire on petitioner's premises under his direction and alleged employment.

The petitioner Gabel and the respondent Bach were farmers, friends, and neighbors, who owned and operated adjoining stock ranches in the vicinity of Oakdale, Cal. For 15 years they were partners in a farming enterprise. Some 3 or 4 years prior to the accident they dissolved partnership, but retained a specific agreement, continuing on down through the years to the time of the accident, to exchange farm labor, serving each other in this capacity upon request and whenever required. There was no monetary compensation for services, but it was mutually agreed that they would equalize their service as nearly as possible, the assistance of one balancing the services of the other. The nature of this exchange work included everything which arose in the operation of their respective farms, including the repairing of buildings and fences, caring for the stock, and general farm work. Each of these neighbors relied almost solely upon the other for farm assistance and rarely ever employed any other help. Both of them by mutual agreement carried compensation insurance, largely for the protection of each other. Mr. Bach testified:

"I took out the insurance policy to protect Mr. Gabel, and any other hired help I had. These policies were taken out to protect one another; that is the biggest work we have; we do most of the work for each other."

Mr. Gabel virtually corroborated this statement. Besides owning adjoining farms, the petitioner and respondent were next-door neighbors in Oakdale. On July 5, 1926, while petitioner and respondent were at their respective homes in Oakdale, a fire alarm was heard, and upon inquiry at the fire department it was learned that a dangerous grass fire was burning a few miles distant, near Knight's Ferry and about a mile northerly from their ranches. The rural fire truck immediately started for the fire. Petitioner and respondent rode out together in another car. They found the fire burning fiercely and spreading rapidly in a southerly direction toward their ranches. Both ranches were in the course of the fire, but respondent's ranch was situated about a mile beyond petitioner's farm. In spite of the efforts of the fire fighters, consisting of half a dozen men with the aid of the rural fire engine, the fire jumped the highway and spread until it covered a

front of approximately a mile in extent. Becoming alarmed for the safety of his buildings, the petitioner Gabel went to respondent Bach and said: "Go on the truck, and go over to my place and try to save my buildings and feed there." Bach left the position where he was then engaged in fighting the fire, and went over to the Gabel ranch in the neighborhood of the house and was engaged in trying to control the flames by the use of a hose. The fire apparatus became disabled; the pump stopped working and the water ceased flowing. The other men ran away, but Bach was surrounded by dense smoke and flames, and in attempting to make his escape was compelled to pass through the burning grass and flames. His face, hands, neck, head and feet were badly burned. He was taken to a hospital for treatment and was completely incapacitated for several weeks.

Upon application the Industrial Accident Commission made an award of \$4 per day wages during the period of disability, and found that Bach sustained his injuries in the course of his employment for Gabel as a ranch hand. This finding and award is challenged by petitioners on the theory that the relation of master and servant did not exist between the parties with respect to the services which were being performed at the particular time the injuries were sustained, and, on the contrary, assert that respondent was burned while he was engaged in the performance of voluntary services.

The only question presented upon this writ is whether the facts above recited constituted an employment of respondent Bach so as to make petitioners liable under the Workmen's Compensation Act (St. 1917, p. 831, as amended).

[1-3] In order to create a liability, the facts must bring the relationship of the parties within the provisions of section 1965 and 2009 of the Civil Code. A contract of employment, either express or implied, must exist. Services voluntarily and gratuitously performed create no liability. 27 Cal. Jur. 278, § 19. But a pecuniary consideration for services is not necessary. One may compensate for services by means of any property of value, or even by a return of services pursuant to agreement. *Tucker v. Cooper*, 172 Cal. 663, 158 P. 181; *Rector v. Stumpff*, 11 I. A. C. 155; *Smith v. Jones*, 102 Conn. 471, 129 A. 50, 43 A. L. R. 952. In the case of *Tucker v. Cooper* there was an agreement between farmers, who were cousins, to exchange service in baling hay for the respective parties for a particular season. In *Rector v. Stumpff*, above cited, two draymen agreed to assist each other whenever it was necessary in the moving of pianos. In *Smith v. Jones*, supra, there was a continuing mutual agreement between adjoining dairy farmers to assist each other in cutting ensilage and filling their

silos, which were used to store food for stock. In these cases it was held that the agreement to exchange services was a sufficient consideration to bind the owner of the property as an employer, while the one performing the service was considered, at that particular time, the employee. Such agreements may be made to exchange labor of a similar character for a definite, specific employment, such as filling the silos referred to, or they may contemplate an exchange of work for a particular season, as in the hay-baling case above cited. But there appears no good reason to distinguish such limited employment from a more general contract to exchange farm labor of any and all character, even though the term of employment may extend indefinitely, provided the evidence satisfactorily establishes the intent of the parties to create such a contract.

[4, 5] In the instant case the Industrial Accident Commission has found that the contract was made, and that the respondent Bach was injured in the course of his employment. "Where the findings are supported by substantial testimony, even though there may be a conflict of evidence, the findings will be upheld." 27 Cal. Jur. 578, § 218; *White v. Industrial Accident Com.*, 192 Cal. 16, 218 P. 414. There was, however, no substantial conflict of evidence in this case. Both parties agree as to the terms of their contract to exchange labor, as to their purpose in taking out insurance to protect each other, and as to the circumstances of the particular employment which resulted in the injuries sustained. As it was said in the case of *Tucker v. Cooper*, above cited, the facts warrant the conclusion that Gabel not only definitely directed the respondent Bach what to do, but that both parties assumed that this particular service was pursuant to the specific directions and under the control of petitioner Gabel. "Take the truck and go down there and save my buildings," he instructed the respondent. These specific directions refute the theory of a voluntary service. *County of Monterey v. Industrial Accident Commission*, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359. It cannot be fairly said that Bach volunteered this service merely as a friend and neighbor. Nor can it be said that he did this specific thing with the sole selfish motive of protecting his own property. His property was situated a mile beyond the Gabel property; the fire was burning along a line more than a mile in extent, and, as the evidence proves, Bach could have worked for the protection of his own property alone, with equal beneficial results anywhere along the line of fire. It is apparent that he left his general work of fighting the

fire, at the urgent request of Gabel, and went over to protect his buildings. Both parties testify that they assumed these services were to be performed pursuant to their general contract of an exchange of labor.

[6] A more serious question may be whether this special emergency service came within the terms of their agreement to exchange work about their respective farms. Of course, fighting fire is not what would be termed farm work. But it must be recalled that these neighbors had been friends and partners, but were now operating their respective stock ranches independently, although they still retained a mutual interest in the welfare of each other. Under such circumstances they agreed to exchange work about their farms whenever it was required. The terms of the contract were not limited to "farm work." It was testified that the agreement included "any general work; any kind of work that comes up." Among other classes of work specified was "remodeling and repairing buildings, fences, corrals, grading, dehorning, and delivering cattle at the railway station, and marketing of stock."

It seems evident that the contract of employment was quite general and included almost any service for the operation, maintenance, or preservation of their respective farms and the improvements which they contained. If a regular hired man, or handy man about a farm, should be injured in fighting a fire which started in his employer's dwelling house or barn upon the premises where he was engaged to work, it seems entirely reasonable to hold that such injuries would be sustained in the course of his employment.

[7] Nor should the friendship of the parties preclude a recovery. Relationship and friendship are circumstances to be considered in determining whether a contract of employment in fact existed. The relationship of husband and wife, or parent and minor child, might raise a presumption against an alleged contract of employment, but it would be a violent, harsh, and unnatural construction to even presume that the friendship of parties would be in conflict with the theory of an employment. In truth, friendship is often an inducing motive for employment. 27 Cal. Jur. 281, § 20.

We are of the opinion that there is substantial evidence to support the finding that the respondent was injured in the course of his employment.

The award is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

83 Cal. App. 100

BARRINGTON v. PACIFIC ELECTRIC RY. CO. et al. (Civ. 5198.)

District Court of Appeal, First District, Division 1, California. May 13, 1927.

1. Appeal and error $\Leftrightarrow$ 699(2)—**Error in giving or refusing isolated instructions cannot be reviewed where instructions are not incorporated in record.**

Alleged record, predicated on giving or refusing to give to jury certain isolated instructions, is not reviewable on appeal where instructions are not incorporated in record.

2. Evidence $\Leftrightarrow$ 368(8)—**Failure to require motorman to produce written report of accident made to employer, materiality of which was not shown, held not error, in action for injuries** (Code Civ. Proc. § 1000).

In action against electric railway and motorman for injuries, failure of court to require motorman to produce written report of accident made to company *held* not error where materiality of report did not appear; right to production not being shown, under Code Civ. Proc. § 1000.

3. Evidence $\Leftrightarrow$ 368(8)—**Court may not order production of records by one party for opponent's use without substantial showing of their materiality.**

Court has no power to order production of books or papers by one party to be used as evidence for his opponent, without substantial showing that records sought contain evidence material to cause of action or defense.

4. Street railroads $\Leftrightarrow$ 68—**Motorman held not required to state whether persons whose names he took at accident were subpoenaed and appeared as witnesses** (Pen. Code, § 367c).

In action against motorman and electric railroad for injuries, refusal to require motorman to answer question as to whether all persons whose names he took were subpoenaed and appeared as witnesses *held* not error; Pen. Code, § 367c, not being applicable to interurban cars.

5. Street railroads $\Leftrightarrow$ 68—**Interurban car held not "other motor vehicle" within statute requiring driver to give names of passengers on occurrence of collision** (Pen. Code, § 367c).

Interurban electric car *held* not "other motor vehicle," within terms of Pen. Code, § 367c, requiring drivers of automobiles, motorcycles, motor vehicles, or any vehicle to give to occupants of vehicle struck names of passengers at time of collision.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

6. Trial $\Leftrightarrow$ 33—**Statute requiring driver of motor vehicle to give occupants' names on occurrence of collision, if applicable to electric trains, does not authorize court to require furnishing of names** (Pen. Code, § 367c).

Pen. Code, § 367c, requiring driver of motor vehicle to give names of occupants on occurrence of collision, if applicable to electric trains, does not authorize court to require mo-

torman to furnish names of such parties; statute being penal.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by P. R. Barrington against the Pacific Electric Railway Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Bertrand J. Wellman and John C. Miles, both of Los Angeles, for appellant.

Frank Karr and E. E. Morris, both of Los Angeles, for respondents.

CAMPBELL, Justice pro tem. This appeal is from a judgment on the verdict of the jury in favor of respondents in an action for personal injuries suffered by appellant in a collision between an automobile driven by appellant and an interurban car of respondent corporation.

Appellant specifies six assignments of error, which he urges as grounds for a reversal of the judgment. The first four have to do with the giving and refusing of certain instructions. The fifth assignment of error is that the court erred in not requiring the defendant Sharpe, when upon the witness stand, to produce his written report of the accident made at the time to the railway company; and the sixth assignment of error is that the court erred in not requiring the defendant Sharpe to answer the question whether all of the persons whose names he took at the time were subpoenaed and did appear as witnesses at the trial.

The accident occurred in the city of Los Angeles, at the point where Manchester avenue crosses the tracks of the respondent's railway line running between Los Angeles and Long Beach, the west track being used for local cars between Los Angeles and Watts going southerly, and the east track for such cars going northerly. The two tracks between the east and west tracks are used by the company's fast interurban cars between Los Angeles and Long Beach. The accident happened on the south-bound interurban track, at about 10:40 o'clock on the morning of February 28, 1922. The appellant was going east at the time and the interurban car was going south. There is an automatic flagman or wigwag at the southwest corner of Manchester avenue and the right of way of respondent railway company. Appellant could not get a view of the track from the direction the interurban car approached until he was within a few feet of the west track on account of the building located on the northwest corner of the intersection. The automatic flagman or wigwag was working and giving warning of the car's approach before and at the time the appellant attempted to cross. At the time the collision the interurban car was traveling 18 to 20 miles an hour.

Appellant drove his automobile upon the car tracks, and when on the track of the interurban his motor stopped and his automobile was stalled on the car track. Up to this point there is no dispute as to the facts.

Respondent F. R. Sharpe, the motorman on the interurban, testified that he first saw the automobile driven by appellant when his car was about 150 or 175 feet from the crossing; that the automobile was approaching the crossing; that appellant drove his automobile slowly—3 or 4 miles an hour; that he was rolling very slowly; that he sounded his crossing signal—two long and two short blasts of the whistle; that as the car approached the crossing appellant started his automobile forward again at a fairly good clip, and when the car was about 30 or 40 feet from the crossing appellant stopped his automobile right in front of the car; that he applied his emergency brakes and reversed his motors, which was all he could do; that after the collision he stopped his car, and when at a standstill the rear end was on the property line on the edge of the crossing. According to the testimony of Sharpe, the collision was unavoidable. There is a conflict in the evidence as to how far the car was from the crossing when appellant's automobile stalled on the car track, appellant testifying that he could not see the interurban car when he drove upon the tracks, and the witness Mrs. Mattice stating that when appellant's automobile stalled the electric car was up at the next station away north, the other witnesses varying in their estimate of the distance the interurban car was away when appellant's automobile stopped on the track, placing it all the way from 40 to 135 feet.

[1] Appellant does not raise the point that the evidence is not sufficient to support the verdict but claims that the question of contributory negligence should not have been submitted to the jury, and that the court erred in not giving the instruction on this question proposed by him, as well as the giving and refusing of other instructions. In discussing the giving and the refusing of the instructions complained of, it is sufficient to say that the instructions of the court are not included in the transcript; neither are the instructions requested and refused. The only instructions called to the attention of the court are those the giving of which, and the refusal to give, are made the subject of the claim of error and set forth in appellant's brief. Alleged error predicated upon giving or refusing to give to the jury certain isolated instructions cannot be reviewed on appeal where the instructions given are not incorporated in the record. *Foster v. Young*, 172 Cal. 317, 156 P. 476; *Goldman et al. v. Dahlberg* (Cal. App.) 249 P. 536; *Harris v. Barnhart*, 97 Cal. 546, 32 P. 589; *Churchill v. More*, 4 Cal. App. 219, 88 P. 290; *O'Brien v. New Method Co-operative Laundry Co.*, 38 Cal. App. 532, 176 P. 879.

[2, 3] There is no merit in the contention that the court erred in not requiring defendant Sharpe, when on the witness stand, to produce his written report of the accident made at the time to the company. Appellant bases his right to have the report produced on section 1000 of the Code of Civil Procedure and authorities which hold that an injured plaintiff who has brought a suit for damages for his injuries is required to submit himself to a physical examination, and that the court may order a defendant to allow plaintiff's expert to examine machinery alleged to have caused damage. We cannot see any similarity of analogy between requiring an injured plaintiff who has brought a suit for compensation for his injury to submit himself to an examination or ordering a defendant to allow an inspection of machinery and requiring a defendant to produce private papers relating to an accident. Appellant fails to show by the record that he brought himself within the provision of the section cited, but if he has, the penalty for failure to produce such instrument is provided in the section. The penalty is that the court may exclude the paper from being given in evidence by the defendant, or, if wanted as evidence by the plaintiff, may direct the jury to presume it to be such as he alleges it to be. While the section referred to is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness, the evidence here is that the witness had turned the report over to the company and it was not in his possession or under his control. Defendant did not offer the report in evidence, nor so far as the record discloses ask the court to instruct the jury to be as he alleged—in fact, plaintiff did not make any claim as to what the report contained. It is not claimed that it conflicted with the testimony given by Sharpe or any other witness. The court has no power to order the production of books or papers by one party to be used as evidence for the other party without an affirmative and substantial showing, by affidavit, or otherwise, that they contain evidence material to the cause of action or defense of the party requiring them. *Ex parte Clarke*, 126 Cal. 235, 58 P. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176. There was no such showing made here.

[4, 5] In support of appellant's sixth assignment, that the court erred in not requiring defendant Sharpe to answer whether all of the persons whose names he took at the time were subpoenaed and did appear as witnesses at the trial, he cites us to section 367c of the Penal Code as authority in support of his contention. We are not in accord with the construction placed upon the section by appellant, that the interurban car of respondent company is such a vehicle as comes within the mandate of the section requiring the driver or person having or assuming authori-

ty over such driver of an automobile, motorcycle, or other motor vehicle, or other vehicle, to give to the occupants of the vehicle or person struck the names of the passengers, not exceeding five, in such automobile, motorcycle, or other motor vehicle, or other vehicle at the time of such striking or collision.

[6] This section is penal, and, even if applicable to electric trains, only makes the motorman or person having authority over him liable to prosecution for failure to comply with its provisions. It nowhere authorizes the court to require a party to furnish these names.

This disposes of the points urged by appellant, and from what has been said it follows that there is no merit in the appeal.

The judgment is affirmed.

We concur: KNIGHT, A. P. J.; CASHIN, J.



83 Cal. App. 236

PEOPLE v. BROWN. (Cr. 1361.)

District Court of Appeal, First District, Division 2, California. May 20, 1927.

1. Criminal law $\S$ 662(8)—Defendant's attorney held authorized to waive formal showing of endeavor to locate absent witness and stipulate that his testimony at preliminary examination might be read (Pen. Code, $\S$ 686, subd. 3).

Defendant, whose attorney stipulated that prosecuting witness' testimony at preliminary examination might be read without formal showing of endeavor to locate witness and bring him into court, waived such showing, as against contentions that attorney had no right to do so, and that defendant's fundamental right, under Pen. Code, $\S$ 686, subd. 3, to be confronted with witnesses against her, may not be waived.

2. Criminal law $\S$ 1144(13)—Appellate court must assume from verdict of guilty that jury found supporting testimony not inherently improbable, unreasonable, and unbelievable.

Appellate court must assume from verdict of guilty that jury found that testimony in support thereof was not inherently improbable, unreasonable, and unbelievable.

3. Larceny $\S$ 65—Evidence held to support conviction of grand larceny.

Evidence held sufficient to support conviction of grand larceny.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Hazel Brown was convicted of grand larceny, and she appeals. Affirmed.

Myron Harris, L. A. Sullivan, and H. L. Richardson, all of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted of grand larceny; she made a motion for a new trial; the motion was denied; and she has appealed from the order denying the motion and from the judgment of conviction.

According to the testimony of Raymond Smith, the complaining witness, he was, on the evening of June 12, A. D. 1926, in the employ of the police department of the city of Oakland as an operative; that at about 9 o'clock on that evening he met the appellant, Hazel Brown, at the corner of Third and Lewis streets in the city of Oakland; that she smiled at him as he passed, and shortly thereafter he met her for the second time, whereupon she spoke to him; that they walked together from that point to an old building near the corner of Third and Center streets in the city of Oakland, where, according to the story of Smith, the appellant asked him if he had \$2 for the purpose of intercourse; that he gave her the \$2, but had no intention or desire of accomplishing such an act, but was merely performing his duty as a police operative; that he and the appellant stood there in or near the deserted building for several minutes; that during that time the appellant had one of her hands upon his left hip and the other upon his person; that, after a few minutes had elapsed, he suggested that they get a bottle of wine and go to a room, which was approved by appellant, but, as they started to walk away, they were accosted by police officers and separated; the police officers having taken the complaining witness Smith to that vicinity a short time before in their automobile. Both Smith and appellant were taken to police headquarters by the officers, appellant riding on the back seat of the car, Smith riding on the front seat with one of the officers. The appellant was searched, and the search revealed that she had on her person the \$2 in silver which Smith had given her, and which was marked money given to Smith by the officers. One of the officers testified that on the back cushion of the automobile in which appellant had ridden to the police station he found \$17 in currency. Smith, the complaining witness, testified that earlier in the evening of that same day he had changed a \$20 bill, and had put \$17 in currency in a leather wallet, and placed the same in his left hip pocket, and that, so far as he knew, the wallet had remained there all the evening. He did not miss any money until his attention was called by the officer to the fact that he (the officer) had found the \$17 in currency in the automobile. There is also some testimony to the effect that there was a piece of newspaper in the wallet after the appellant and Smith had been taken to the police station, and that the wallet was at that time ripped or torn. Smith testified that the paper was not in there earlier in the evening

before he met appellant, and that the wallet was not at that time ripped or torn. Smith also testified that he did not see or feel the appellant remove anything from his pocket; that he knew his wallet was there all the time because he could feel its presence; that, if appellant removed anything from his pocket or from the wallet, he did not know when or how she did so. But Smith, the complaining witness, did not testify that the \$17 in currency was in the wallet in his pocket at the time he was with appellant at the building.

[1] The first point made on the appeal is that the trial court erred in allowing the district attorney to read to the jury the testimony given by Raymond Smith in the police court on the preliminary examination. After the jury had been selected, and after the deputy district attorney had made his opening statement, as the first testimony introduced, Mr. Chamberlain arose in court, and stated that the witness Smith could not be located, and that the defense would stipulate that his testimony taken at the preliminary examination might be read. Mr. Richardson, the attorney for the defendant, replied that the statement was correct. The trial court then inquired if it was stipulated that the deposition might be read and considered as evidence the same as if Mr. Smith was present, and the defendant's attorney answered in the affirmative. The direct examination of the witness was read by the district attorney and the cross-examination was read by the defendant's attorney. The defendant now contends that Mr. Richardson, as an attorney, did not have the right in behalf of his client to waive the duty resting on the prosecution to make a formal showing of its endeavor to locate and bring into court the prosecuting witness. In this behalf the appellant contends that she was entitled "to be confronted with the witnesses against her" (Pen. Code, § 686, subd. 3), and that a fundamental right may not be waived. In making this contention the appellant cites no authority that directly sustains her contention. So far as we know, the exact point has not been decided. However, the case of *People v. Clark*, 151 Cal. 200, 90 P. 549, is very nearly in point. In that case the deposition of a witness taken on the preliminary examination was offered in evidence. The defendant made the objection that it was immaterial, irrelevant, and incompetent. Later he urged other objections. After stating the facts and the contention made by the appellant, on page 205 (90 P. 551), the court said: "Under these circumstances, the defendant must be held to have waived this objection." There are numerous cases involving other statutory rights, in which it was held that the defendant waived the right by failing to object in the trial court. *People v. Suesser*, 142 Cal. 354,

75 P. 1093; *People v. Rodley*, 131 Cal. 240, 251, 252, 63 P. 351. We think the point is not well taken.

[2, 3] The second point made by the appellant is to the effect that the evidence was not sufficient to support the verdict. In this connection she claims that the testimony "is inherently improbable, unreasonable, and unbelievable." That argument, no doubt, was presented to the jury. By reason of the verdict, we must assume that the jury found to the contrary. Under the particular facts of this case we think the verdict should not be disturbed. *People v. Troutman*, 187 Cal. 313, 315, 201 P. 928.

We find no error in the record. The order and judgment are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

83 Cal. App. 307

SHERMAN v. KIRKPATRICK. (Civ. 4342.)

District Court of Appeal, Second District, Division 2, California. May 23, 1927.

1. Sales $\S$ 195—If engine was not installed as agreed, buyer on receiving seller's letter claiming workmanlike installation could treat contract as breached.

If engine which buyer ordered was not installed as agreed, buyer, on receiving seller's letter written after inspection stating that engine had been installed in workmanlike manner and requesting payment, was justified in considering contract as breached.

2. Sales $\S$ 182(1)—Issue whether seller breached contract in failing to make proper installation of oil engine held for jury.

In action to recover purchase price of oil engine, issue whether seller had breached contract by failing to install engine in workmanlike manner held for jury, where buyer promptly elected to consider contract as violated.

3. Sales $\S$ 195—Seller's breach of contract before purchase price became due released buyer, though covenant to pay may have been independent.

Though payment required to be made for installation of engine may have been constituted independent covenant, buyer was under no obligation to make payment, where seller actually breached contract prior to date purchase price became due.

4. Appeal and error $\S$ 999(1)—Appellate court need not investigate facts to determine correctness of verdict.

Appellate court is under no duty to make investigation of facts in case to determine correctness of jury's verdict.

5. Sales $\S$ 183—Installation was necessary before recovery of price for oil engine, where seller's agent agreed price should cover installation.

Seller of oil engine was bound to install plant before price could be recovered, where

agent in making sale figured price on basis of plant's installation.

6. Trial $\Rightarrow$ 255(1)—Court is not required of its own motion to give special instructions not requested.

Court need not of its own motion give special instructions, in absence of request therefor by counsel.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by W. H. A. Sherman against C. A. Kirkpatrick. Judgment for defendant, and plaintiff appeals. Affirmed.

Stutsman & Stutsman, of Los Angeles, for appellant.

S. N. Bachtell, of Los Angeles, and Paul B. Bachtell and N. B. Bachtell, both of Lancaster, for respondent.

MURPHEY, Justice pro tem. This is an action brought by the plaintiff as assignee of Fairbanks, Morse & Co. to recover the purchase price of an oil engine with standard appliances and equipment sold to the defendant. The company will be hereafter designated as plaintiff in this opinion. Under the terms of the written contract between the parties the seller was to install the engine in a workmanlike manner on the defendant's ranch to be there used for the purpose of pumping water for irrigation purposes. The purchaser was to pay therefor 30 days after the date of the contract the sum of \$1,611. The engine was to be set up by an engineer-erector to be supplied by the plaintiff. The adequacy of the installation was questioned by the defendant and this controversy resulted. There is no dispute as between the parties but that the plaintiff did furnish and deliver on the premises of the defendant the exact equipment called for by the written contract, but it is the contention of the defendant and respondent that the engine was not installed in an efficient and workmanlike manner, and he refused to pay the purchase price therefor, basing his refusal on that ground. Judgment went for defendant, and plaintiff appeals.

The plaintiff relies upon: (1) Errors of law committed as he alleges by the trial court in refusing to give certain instructions to the jury and in giving others; (2) insufficiency of the evidence to justify the verdict. His contention is that the contract entered into between the parties was unequivocal and free from ambiguity; that there is a covenant of defendant as buyer to pay the purchase price, which covenant is direct, positive, and unequivocal, and which required the buyer to pay at a fixed and definite time; there is also a covenant of plaintiff as seller to install the machinery in question; the contract is silent as to the time within which such installation

was to be made or completed. The plaintiff's contention is that the covenant to pay is and was an independent promise of the buyer, performance of which could be enforced at all events if the purchase price was not paid when due.

Many cases are cited to sustain this position relative to dependent and independent covenants, which, conceding their correctness as abstract principles of law, have in our opinion no application to the facts of this case as made out by the plaintiff himself.

After the engine had been installed by the plaintiff's erector a discussion arose concerning a missing pump coupling and installation work ceased. It may be fairly deduced from the record that it was the understanding at this time between all of the parties connected with the job that further work was necessary to complete the installation. However that may be, nothing further was done, and defendant testified that he called up Forbes, the general manager of plaintiff, and told him that he absolutely would not accept the plant in the condition in which it was in and asked Forbes to come to Lancaster, where the equipment was to have been installed, and stated to him that if he did not agree with him he would pay the expenses up and back. Further negotiations and discussion was had in which the defendant, the corporation erector, engineer, and credit manager participated, with the result that on the 26th day of April, 1922, the due date of the payment of the purchase price, the corporation addressed a letter to the defendant, the substantial and material part of which is as follows:

"Referring to the contract between us dated March 25, 1922, also to the conversation had yesterday between yourself, our shop foreman, Mr. Reuland, our engine erector, Mr. Case, and the writer. We have reported the result of our interview with you to Mr. F. F. Forbes, our Pacific Coast manager, and after a very careful review of the situation and the circumstances surrounding the same, we cannot but feel that we have thoroughly complied with our obligations; that the engine is properly installed and in a workmanlike manner, and that your fears concerning damage to the engine are not well founded. * * * Our Mr. Forbes has read this letter and it has his approval. We respectfully ask that check for \$1,611, which was due yesterday, according to the terms of sale, be mailed to us."

To which letter the defendant immediately and on the same date addressed a letter to the plaintiff as follows:

"In accord with our phone conversation of the 25th inst., you sent your representatives to inspect the installation of the engine you installed under the contract between us. Your workman who installed the engine was also present at the time of the inspection; while they made a thorough inspection, nevertheless it was very evident that the inspection was for the purpose of justifying and approving the installa-

tion as it had been made. It is so evident that the installation of the engine was unworkmanlike, inefficient and would result in the destruction of the engine or at least great damage to it, under operation, and that it has already been damaged to a greater or less extent in the short time it has been operated, that it is unnecessary for an expert to discover that fact. I told your representative that I would not accept your engine in its present condition, under its present installation; and I now give you formal notice that the installation is not according to the contract and that I shall not accept the engine, and it is at your disposal, and I ask you to remove the same from my premises at your own cost and expense. * * * I will ask you to make no delay in removing the engine from the premises, as I must install another engine in order to take care of my crops."

[1-4] The plaintiff's letter discloses the fact that so far as it was concerned negotiations were at an end and the installation complete. There are no reservations, and there is no suggestion of further performance of any character. The terms of the contract so far as it was concerned had been fully complied with. It is apparent from the context of this letter that this conclusion was reached after an inspection and report made by the experts of the plaintiff. If any further service was contemplated or the corporation harbored any thought that further performance was contingent upon any act to be performed by the defendant, such facts and mental reservations should have been clearly disclosed in this ultimatum. If the installation had not in fact been completed in a workmanlike manner when the communication was dispatched by the plaintiff, upon its receipt the defendant was justified in declaring that the contract had been breached by the corporation and he was fully warranted in abiding the status of the situation as it then existed and as made by the corporation's declaration. The defendant having promptly elected to declare the contract breached, it was the duty of the trial court to submit this crucial issue to the jury under proper instructions, and it was the duty of the jury to determine the issue in accordance with the evidence submitted for their consideration. The verdict of the jury was adverse to the plaintiff and in effect determined that the contract had been breached by the corporation prior to the due date of the payment of the purchase price, as provided in the contract. This necessarily eliminates from the discussion the question of dependent and independent covenants. No one, we assume, would question the proposition of law that if the plaintiff had actually breached the contract prior to the due date of the purchase price, even though that may have been an independent covenant, defendant would be under no obligation to make that payment. It is not incumbent upon this court to make any investigation of the facts in the case to determine the correctness of the judgment of the jury.

Expert evidence was submitted by both sides to the controversy. On conflicting testimony and evidence the jury resolved the facts in favor of the defendant and determined that the installation had not been made in a workmanlike manner, which finding on the entire record we have no disposition to question.

[5] There is some contention on the part of the plaintiff that under the terms of the contract it was not incumbent on plaintiff to install the plant. The language of the contract itself on this aspect of the case we deem sufficient to require this. Nevertheless, if there be any doubt about it the following citation from the record will make the matter entirely clear. Mr. McLaren, the man who sold the engine to the defendant, testified in substance:

"Mr. Kirkpatrick told me he wanted a price on the engine installed. That was absolutely the basis upon which I figured him the price.

"Q. He told you at the time, didn't he, Mr. McLaren, that he did not know anything about erecting engines himself, and he thought you people did, and he wanted you to do it? A. Absolutely."

[6] In our judgment the issues were squarely and correctly submitted to the jury by the trial court. Indeed the court at the suggestion of the plaintiff submitted this instruction to the jury:

"The contract entered into between defendant and plaintiff's assignor only required Fairbanks, Morse & Co. to furnish, deliver, and install the engine and equipment in question in a good and workmanlike manner. * * * If you find, however, that the installation of the engine could not have been completed until the pump was permanently placed and that the pump had not been permanently placed up to the time this action was commenced, because of acts or conduct of defendant, not attributable to plaintiff's fault, then your verdict must be for plaintiff if you find from a preponderance of the evidence that the engine and equipment were installed in a good and workmanlike manner."

This instruction was given in response to certain evidence adduced at the trial which in our opinion under timely objection should have and probably would have been excluded by the court as not being within the issues. No other special instructions were asked by the plaintiff, and the law does not require the court of its own motion to perform this duty for counsel. There are suggestions that certain instructions given by the court should have been amended by inserting: "Unless you find from the evidence that the defendant by his conduct prevented plaintiff from changing the foundation so that the engine could be made to line up with the pump." No instruction was submitted to or offered by the plaintiff containing this or similar language, and even had such a request been made it no doubt would have been refused by the court, and properly so.

We find no error in the record, and accordingly the judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

33 Cal. App. 105

BARRIOS v. FOLEY. (Civ. 5790.)

District Court of Appeal, First District, Division 2, California. May 13, 1927.

1. Brokers ⚡8(3)—Agent held shown not to have required authority in writing to sign contract for sale of goods for more than \$200 (Civ. Code, §§ 1624, 2309).

That one signing, as agent of buyer, contract for sale of goods at price exceeding \$200 had no authority in writing to do so, as required by Civ. Code, §§ 1624, 2309, *held* shown by evidence.

2. Brokers ⚡19—It is broker's duty to act in highest good faith towards principal.

Relation between broker and his principal is of a confidential nature and imposes on broker duty of acting in highest good faith towards his principal.

3. Brokers ⚡8(1), 84(1)—To recover commissions, broker must show he was duly authorized and performed services according to contract.

For broker to recover commissions on sale made by him, he must show that he was duly authorized to perform the services for which he seeks commissions, and that he performed them according to the terms of his contract of employment.

4. Brokers ⚡52—Broker has no right to commissions till he brings minds of parties to agreement for sale and the terms thereof.

Broker's right to commissions does not accrue till he has brought the minds of buyer and seller to an agreement for a sale and the price and terms on which it is to be made.

5. Brokers ⚡53—Broker must be procuring source of transaction.

Broker, to be entitled to commissions, must be procuring source of transaction.

6. Brokers ⚡48—To be entitled to commissions, broker must prove finding of buyer able and willing and obtaining of binding contract or bringing parties together.

To be adjudged entitled to commissions, broker must prove that he found a buyer ready, willing, and able to buy the property on the terms fixed, and procured from him a valid contract binding him to purchase the property on those terms, or that he brought the seller and buyer together so that seller might have secured such contract if he desired.

7. Brokers ⚡86(5)—That buyer procured by broker was not able, ready, or willing held shown by evidence.

Finding in broker's action for commission for negotiating sale that his customer was not able, ready, or willing to buy *held* supported by the evidence.

8. Brokers ⚡64(2)—Contract held conditional because of clause, "Buyers' inspection final."

A contract for sale because of clause, "Buyers' inspection final," is conditional, as respects broker's right to commission.

9. Brokers ⚡64(2)—Broker is not entitled to contract conditional on buyer's approval, not given.

Where contract of sale is conditional on buyer's approval on inspection, and samples thereafter offered are not accepted, broker is not entitled to commissions.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Alberto Barrios against E. Y. Foley. Judgment for defendant, and plaintiff appeals. Affirmed.

Goldman & Altman, of San Francisco, for appellant.

Harris & Hayhurst and Rue C. Gibson, all of Fresno, for respondent.

BARTLETT, Justice pro tem. Plaintiff seeks a judgment against defendant for \$3,450 for services as a merchandise broker, alleged to have been rendered in negotiating a sale of 600,000 pounds of dried grapes for the sum of \$138,000 at an agreed compensation of 2½ per cent. of the purchase price. Defendant denied the indebtedness and set up as a special defense that the buyer, one T. Miwa Company, was at the time of the alleged sale financially irresponsible and without means, property or credit to pay for the goods agreed to be sold.

The court found that about November 15, 1920, defendant employed plaintiff as a broker to sell 10 carloads of dried black Zinfandel grapes, containing 600,000 pounds, at 23 cents per pound, and agreed to pay plaintiff as commissions 2½ per cent. of the selling price when plaintiff secured a valid and enforceable contract or a purchaser ready, able, and willing to buy the grapes on defendant's terms; that on November 17, 1920, plaintiff notified defendant he had sold the grapes and mailed defendant a paper termed a confirmation, executed by one R. H. Newman, as agent for the T. Miwa Company. That defendant executed a written contract and sent it to plaintiff, who presented it to R. H. Newman, who signed the name of T. Miwa Company thereto, by R. H. Newman. That R. H. Newman had no authority from T. Miwa Company to sign the confirmation or contract, and that no contract binding on T. Miwa Company was ever procured by plaintiff. That the T. Miwa Company was not at any time mentioned in the complaint ready, able, or willing to buy the grapes, and that defendant at all times was ready, able, and willing to furnish the grapes in accordance with his contract. Judgment was award-

ed defendant, and this appeal is taken from the judgment on a bill of exceptions.

Plaintiff contends for a reversal of the judgment on three grounds: First, that the finding that R. H. Newman had no authority from T. Miwa Company to execute the confirmation and contract is not supported by the evidence; second, that the finding that T. Miwa Company was not able, willing, and ready to buy the grapes is not supported by the evidence; and, third, that the finding that plaintiff was to receive his brokerage when he had received a valid and enforceable contract is not strictly in accordance with the contract of employment.

The dealings between the parties began with the sending of a postal card some time prior to November 15, 1920, by plaintiff to defendant seeking a purchase of 10 cars of dried grapes. Plaintiff was a resident of San Francisco, Cal., and defendant resided at Fresno, Cal. Several telegrams and letters passed between the parties, which finally resulted on November 20, 1920, in the execution of the contract sued upon, which, like the confirmation, was signed, T. Miwa Company, by R. H. Newman. At the request of plaintiff, after defendant had signed and mailed the contract, there was inserted in the same with the consent of defendant these words: "1920 crop stemmed and cleaned. Buyers' inspection final." The contract was signed "T. Miwa Company, by R. H. Newman."

Defendant objected to the introduction of the confirmation and contract in evidence unless a showing was made that R. H. Newman had some written authority authorizing him to make a binding contract on T. Miwa Company, and the court allowed the introduction of the instruments conditionally on its being shown that Newman had the authority to act for the T. Miwa Company.

[1] That Newman had no authority in writing to execute the confirmation or contract is clearly shown by the evidence. He himself says:

"I was employed by Mr. Wolfsohn to work for T. Miwa Company. He gave me authority to buy and sell merchandise for the company. My authority was verbal."

The Mr. Wolfsohn referred to was a partner in the T. Miwa Company. He testified that Newman was not an employee of the firm, that he worked on a commission basis for it, was to receive certain profits from the sale of these goods, had no written agreement in that regard, that his arrangement was entirely verbal, that at the time the contract was signed he was busily engaged in other duties, and that on Newman saying to him, "I bought 10 cars of grapes, Mr. Wolfsohn," he, Wolfsohn, said, "Very well, I give you full power to sign T. Miwa Company's name, by yourself, to this transaction."

Under section 1624 of the Civil Code, a contract such as the one in question, being for a sale of goods at a price exceeding \$200, is not valid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent, and, under the provisions of section 2309 of the Civil Code, the authority to sign such instrument as agent can only be given by an instrument in writing.

[2-6] The relation between a broker and his principal is of a confidential nature and imposes upon the broker the duty of acting in the highest good faith towards his principal. In order to recover commissions on a sale made by him, he must show that he was duly authorized to perform the services for which he seeks compensation, and that he performed the services according to the terms of his contract of employment. His right to commissions does not accrue until he has brought the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made. He must be the procuring source of the transaction, and to be adjudged such he must prove that he found a purchaser ready, willing, and able to buy the property on the terms fixed and procured from that person a valid contract binding him to purchase the property on those terms, or that he brought the vendor and purchaser together so that the vendor might have secured such contract if he desired. *Gunn v. Bank of California*, 99 Cal. 349, 33 P. 1105; *Sill v. Ceschi*, 167 Cal. 698, 140 P. 949; *Jauman v. McCusick*, 166 Cal. 517, 137 P. 254; *Carrington v. Smithers*, 26 Cal. App. 460, 147 P. 225; *Mattingly v. Penne*, 105 Cal. 514, 39 P. 200, 45 Am. St. Rep. 87; *Douglas v. Spangenberg*, 23 Cal. App. 294, 137 P. 1103; *Cone v. Keil*, 18 Cal. App. 675, 124 P. 548.

[7] The finding that the T. Miwa Company was not at any time able, ready, or willing to buy the grapes in question finds ample support in the evidence offered. Both Newman and Wolfsohn testified that the partnership did business with the American National Bank of San Francisco. The bank balance sheet of this bank shows that for the month of November, 1920, the most T. Miwa Company had on deposit during that month was \$267.25. Wolfsohn testified that T. Miwa Company had no property, and that he had made no arrangements with any bank or other institution for credit relative to the purchase price of the grapes. While he stated that he had letters of credit from clients in the Orient which he could have used, he could not give any of the particulars concerning the letters of credit.

[8] The contention of respondent that the contract with T. Miwa Company is conditional because of its containing the clause, "Buyers' inspection final," must be sustained. This clause was inserted in the contract at

the special instance and request of the plaintiff made to defendant on November 20, 1920.

No contract was completed concerning the sale of these grapes until November 20, 1920, and under the contract as completed no grapes would be considered as finally sold until T. Miwa Company had inspected and approved the same. That samples of grapes were thereafter offered by defendant to the T. Miwa Company and not accepted by it, is clearly shown by the evidence.

[9] That a broker is not entitled to recover a commission merely for negotiating a sale of goods where the memorandum of sale upon which the broker relies for recovery especially provides that the goods must meet the buyers' approval, and that contracts of this sort are executory in character, making the commissions depend upon their execution, is clearly decided in the late decisions of *Ball v. California Conserving Co.*, 189 Cal. 326, 207 P. 1011; *McAdoo v. Moore*, 70 Cal. App. 408, 233 P. 391.

The judgment appealed from is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

83 Cal. App. 183

RANDOLPH v. WISE et al. (Civ. 4840.)

District Court of Appeal, Second District, Division 1, California. May 18, 1927.

1. Vendor and purchaser ⇨299(2)—Before tendering deed, vendor, unable to give perfect title, cannot bring ejectment against vendee refusing to pay purchase price.

Plaintiff agreed to sell defendant land. Defendant took possession. Plaintiff had only one-half interest in the land. Plaintiff refused defendant's offer of one-half price. Defendant refused to pay full price or surrender possession. *Held*, that plaintiff could not bring ejectment without tendering deed conveying such title as she had.

2. Evidence ⇨413—Parol evidence that, when plaintiff contracted to convey land, defendant knew she had only partial title held inadmissible.

In ejectment action, parol evidence to effect that, when plaintiff executed written contract providing for conveyance of complete title to land, defendant knew that plaintiff had only partial title held inadmissible, all prior understandings being merged in the written contract.

Appeal from Superior Court, Los Angeles County; Michael J. Roche, Judge.

Ejectment by Mary Randolph against Frederick W. Wise and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John C. Miles and Donald R. Peck, both of Los Angeles, for appellant.

Melville P. Frasier, of Los Angeles, for respondents.

McLUCAS, Justice pro tem. Action in ejectment. Plaintiff appeals from an order granting defendant's motion for a nonsuit.

It appears from the evidence that plaintiff was the owner of an interest in certain real property held in the possession of the defendant. The property was conveyed by deed to the plaintiff, a married woman. On June 17, 1921, plaintiff entered into a written agreement wherein plaintiff agreed to sell lot 6, block 7, of C. S. Miles' addition to Huntington Park, for the sum of \$950, and to execute and deliver a good and sufficient deed of grant, bargain, and sale therefor. Plaintiff's husband having disappeared, she was unable to secure his signature to the deed and could not deliver title on which the title company would issue a certificate. On February 23, 1922, plaintiff was granted a decree of divorce, the court holding that the property involved was community property, and awarding the plaintiff an undivided one-half interest therein. Defendant paid no part of the purchase price of \$950, but remained in possession of the property, having made some improvements thereon after plaintiff had deposited with defendant the sum of \$300 as a guaranty that she would give clear title. Some time during the fall of 1922, defendant tendered to plaintiff's attorney one-half of the contract price of the property for a deed to a one-half interest in the property. This offer was not accepted. Plaintiff served upon defendant a written notice demanding possession of the premises and offering to allow defendant any offsets or credits to which he might be entitled to the extent of \$300, any additional claims to be submitted to her attorney. Plaintiff at no time offered to comply with the terms of the agreement by tendering a deed for the premises to be conveyed. Defendant neither rescinded the contract nor offered to carry out the terms of the contract by offering to pay plaintiff the sum of \$950 and accepting such title to the property as she was able to give. Instead, he offered her the sum of \$475 for her half interest in the property and refused to give up possession of the property to the plaintiff.

Appellant's first contention is that the court erred in holding that the evidence introduced by plaintiff failed to make out a cause of action in ejectment, citing cases which hold as follows: A purchaser of land in possession thereof under a contract of sale, by the terms of which the vendor is to execute and deliver to the vendee a good and sufficient grant, bargain, and sale deed to the property, together with an acceptable certificate of title showing the property to be free and clear of all incumbrances, cannot, upon the failure to convey a good and perfect title, retain both the land and the purchase money until a perfect title shall be offered to him. He must pay the purchase price according to

the contract and receive such title as the vendor is able to give, if he chooses to retain the possession of the land. *Luther v. Clark*, 58 Cal App. 59, 207 P. 1033; *Garvey v. Lashells*, 151 Cal. 526, 91 P. 498; *Haile v. Smith*, 128 Cal. 415, 60 P. 1032; *Worley v. Nethercott* 91 Cal. 512, 27 P. 767, 25 Am. St. Rep. 209. If a perfect title was to be conveyed and the vendor is unable to give such a title, the vendee has appropriate remedies, but he cannot keep both the property and the purchase money. *Garvey v. Lashells*, supra. Under such a contract, if the vendee surrenders possession he may recover the value of his improvements, after deducting the fair rental value of the land. *Haile v. Smith*, supra; *Worley v. Nethercott*, supra; *Garvey v. Lashells*, supra. If the vendee fails and refuses to pay the purchase price, or to rescind the contract and restore the possession to the vendor, he is liable to an action in ejectment by the vendor. *Garvey v. Lashells*, supra; *Haile v. Smith*, supra. The foregoing rules are well settled, but under the proof plaintiff is not entitled to the benefit of these rules. In all of the above cases, the plaintiff had tendered a deed before suit brought.

[1] In the instant case, if the plaintiff had tendered a deed to defendant before suing in ejectment, the action would lie. Not having first offered to comply with the contract by offering to perform the same, plaintiff did not put the defendant in default by demanding possession of the premises. Defendant would not be in default for failure to pay the purchase price until plaintiff had first offered to comply with the contract by tender of deed. If defendant had refused the deed so tendered, then under the authorities defendant must either pay the purchase price according to the contract, or surrender possession. But here no deed was tendered and defendant was entitled to remain in possession until plaintiff offered to comply with the contract.

[2] Appellant insists that the court erred in refusing to allow plaintiff's witnesses to testify to transactions and conversations had prior to the execution of the contract on June 17, 1921, on the ground that parol evidence is admissible to show the situation of the parties and the circumstances surrounding the execution of the instrument. Plaintiff offered to show that the deal between plaintiff and defendant had its inception in January, 1921; that escrow instructions were placed with the title company during the latter part of January, 1921; that the plaintiff received word from the title company that they would not issue a certificate of title to the property, and that she was the owner of but an undivided one-half interest therein; that the plaintiff immediately communicated this fact to defendant. The trial court sustained defendant's objection to this testimony. We find no error in this ruling, since,

notwithstanding the fact that both plaintiff and defendant, according to this offer of proof, had received notice that the title company refused to issue a certificate, yet subsequently they entered into the written contract received in evidence, which provided for a conveyance of the property from plaintiff to defendant and wherein plaintiff agreed to sell and convey and defendant agreed to buy the premises; the consideration to be paid through the title company, upon delivery to them of an acceptable certificate of title showing the title to be vested in the defendant as trustee, free and clear of all incumbrances. We fail to see how the testimony offered could have affected the absolute liability of the plaintiff under the terms of the contract of June 17, 1921; and if such testimony had been received, it would not have affected the decision, there being no allegation of mistake or fraud in the complaint. Such testimony would not have assisted the court in determining the intention of the parties, which is so clearly stated by the instrument itself.

It is ordered that the judgment be affirmed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 290

BADOSTAIN v. PACIFIC ELECTRIC RY. CO. (four cases). (Civ. 5197.)★

District Court of Appeal, First District, Division 1, California. May 23, 1927.

Hearing Denied by Supreme Court July 22, 1927.

1. Railroads ⇨350(7)—Whether signals were given by interurban car striking automobile held for jury.

In actions for injuries sustained by collision with interurban electric car with automobile at grade crossing, whether signals were given held for the jury.

2. Evidence ⇨586(3, 4) — Negative evidence held to sustain finding of negligence of electric car in failing to give warning signals.

In actions against railway for injuries sustained from collision with electric car, negative evidence of witnesses, that they heard no signals given, held to sustain finding of negligence in not giving warning signals.

3. Railroads ⇨350(11)—Whether electric car approached crossing at excessive speed held for jury.

In actions against railway for injuries from collision of automobile with electric car, whether car approached crossing at excessive speed held for jury.

4. Railroads ⇨327(4)—One approaching railway track is bound to look and listen.

A railway crossing is in itself a sign of danger, and one intending to cross must look and listen to ascertain whether cars are approaching.

5. Railroads ⚡327(7)—One approaching railway crossing must use ordinary care in selecting time and place to look and listen, and should stop if necessary.

One approaching railway crossing in automobile must use ordinary care in selecting a time and place to look and listen for approaching cars, and should stop if necessary; it not being sufficient that he rely on belief that those operating car will sound warning.

6. Railroads ⚡350(13)—Negligence of person crossing railway becomes question of law, where facts are undisputed and but one conclusion can be drawn.

Whether a person struck at railway crossing was negligent is ordinarily a question for the jury, and becomes a question of law only when the facts are undisputed, and even then only when reasonable minds can draw but one conclusion from them.

7. Railroads ⚡350(21)—Contributory negligence of travelers in automobile colliding with electric car held for jury.

Whether persons in automobile, injured in collision with electric car at railway crossing, were guilty of contributory negligence, held for jury.

8. Trial ⚡296(3)—Instruction not based on evidence held not prejudicial, in view of other instructions.

Instruction that railroad was negligent in maintenance of station or platform, obscuring view of persons approaching crossing in automobile, held not prejudicial because not based on evidence, in view of other conditions around station and instructions as to care required of both railroad and occupants of automobile approaching crossing.

Appeals from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Martina Badostain, two actions by Bernabe Badostain, and an action by Frank Badostain against the Pacific Electric Railway Company. Judgments for plaintiffs in all actions, and defendant appeals. Affirmed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Frank Karr, R. C. Gortner, and C. W. Cornell, all of Los Angeles, for appellant.

Wm. Jennings Bryan, Jr., and Dockweiler, Dockweiler & Finch, all of Los Angeles, for respondents.

CASHIN, J. Appeals from the judgments entered against appellant, Pacific Electric Railway Company, a corporation, upon verdicts returned by a jury in four separate actions. The actions were tried together, and the appeals are presented on the same transcript.

Three of the actions were brought by Martina Badostain, Frank Badostain, and Bernabe Badostain to recover for personal injuries suffered by them, and the fourth, by Bernabe Badostain, to recover for the death

of Jose Badostain, his minor son, and it was averred in each complaint that the damages alleged were caused by the negligence of appellant. Respondents Bernabe and Martina Badostain are husband and wife; Frank Badostain being their son, as was also the deceased.

At about 3:30 p. m. on September 25, 1921, respondents and the deceased were traveling in an automobile owned by Bernabe Badostain, and driven by his son Frank, in a southerly direction along Bloomfield avenue, a public highway in Orange county. At Crescentia Station the highway, which runs north and south, crosses the double-tracked electric railway operated by appellant, which at this point is laid in the direction of southeast-northwest. The station, which was situated east of the highway and northeast of the railway, in the angle made by their intersection, was a one-story frame building, unboarded on the sides facing the south and east, and built upon a loading platform above the level of the tracks. The length of the platform along the tracks was 40 feet; its distance from the first rail being 8 feet. Along the highway its length was 20 feet, and its height above the center of the highway, which slopes from the crossing to the north, varies from 3½ to 5 feet. At a point about 20 feet southeast from the platform was a cattle guard, from which to the northwest across the right of way a fence was maintained. According to the testimony and as shown by photographs in evidence there were growing along the east side of the highway, but not upon appellant's property, several eucalyptus trees, the branches of which, with a growth of weeds on the right of way north of the platform, tended to a certain extent to obscure the view to the southeast. It was further testified that certain of the branches were removed after the accident and before the photographs were taken, and it may fairly be inferred from the evidence that these overhung the right of way.

The complaints alleged that the death and injuries complained of were caused by appellant's negligent operation of its electric car which approached the crossing from the southeast; that the car was operated at an excessive rate of speed; that no warning of its approach was given nor were the brakes applied, and that appellant was also negligent in the construction and maintenance of the platform and station and in permitting branches of the trees and the weeds mentioned to obscure the view of the track from the highway. These averments were denied by appellant, which alleged that the negligence of respondents was the sole proximate cause of the accident.

It was testified by the latter that the automobile was stopped at a point 45 feet north of the crossing; that from that point, with the exception of about 500 feet of the tracks,

which were obscured by the platform and station, they were afforded a view to the southeast for approximately a mile; that, seeing no car approaching and hearing no warning signals, they proceeded at a speed between 8 and 9 miles per hour, but that, after proceeding a few feet, their view was then obstructed by the buildings mentioned; that, when they reached a point about 9 feet from the track they first observed the approaching car, which was then, according to their various estimates, between 15 and 60 feet away; that at this point the brakes were applied and the course of the car turned to the right, too late, however, to avoid a collision, which resulted in the death and injuries alleged. According to their testimony none of the occupants of the automobile had previously seen or passed over the intersection with the exception of the driver, who on one occasion had crossed at night. It appears from the photographs that from the point where the automobile was stopped, which was a few feet below the level of the track, no direct view along the railroad to the southeast could be obtained. The speed of the electric car as it approached the crossing, according to the testimony of the several witnesses, was from 30 to 50 miles per hour, the estimate of the motorman being 40 miles. According to the testimony of the latter and the trainmaster of appellant, who was a passenger, the power had been turned off about 1,000 feet east of the crossing, and at the time of the accident the car was coasting, the noise from the car when so running being less than when the power is applied. The witnesses differed as to whether signals of its approach were given, those called by respondents testifying that they heard none.

Appellant contends that the only conclusions reasonably to be drawn from the evidence were that the car was operated with due care, that respondents were guilty of negligence which proximately contributed to the damage alleged, and that certain of the court's instructions were prejudicially erroneous.

[1, 2] As stated, the evidence that the motorman was negligent in failing to give proper warning of the approach of the car was negative, consisting of testimony of witnesses that they heard no signals; but, as held in the following cases, this testimony, even as opposed to positive testimony that signals were given, presented a question for the jury, and was sufficient to sustain a finding of negligence. *Thompson v. Los Angeles & San Diego, etc., Ry. Co.*, 165 Cal. 748, 134 P. 709; *Keena v. United Railroads, etc.*, 197 Cal. 148, 239 P. 1061.

[3] The further question whether the speed in approaching the crossing was so dangerous or excessive, in view of the conditions shown to exist, as to constitute negligence, was also one for the jury (*Bilton v. Southern Pac. Co.*,

148 Cal. 443, 83 P. 440; *Tousley v. Pac. Elec. Ry. Co.*, 166 Cal. 457, 137 P. 31), and we cannot say that a finding adverse to appellant on either of these issues would be unsupported.

[4-6] A railway track is in and of itself a sign of danger, and one approaching such track with intent to cross is bound to exercise his faculties of sight and hearing in order to ascertain whether cars are approaching. *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 53 P. 651. It is his duty to use ordinary care in selecting a time and place to look and listen for approaching cars, and he should stop for the purpose of making such observations when necessary, it not being enough that he merely listen, believing that those operating the car will give warning of its approach (*Griffin v. San Pedro, etc., R. R. Co.*, 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842); but whether a person struck in crossing a railroad track was guilty of negligence is ordinarily one of fact for the jury, and it becomes a question of law for the decision of the court only where the facts are undisputed, and even then only where on those facts reasonable minds can draw but one conclusion on the issue of plaintiff's negligence (*Loftus v. Pac. Elec. Ry. Co.*, 166 Cal. 464, 137 P. 34). If, however, the established facts and conditions are such as to make it plain that a person looking and listening must have seen or heard, his testimony that he looked and listened but did not see or hear is not enough to support a verdict in his favor. *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 116 P. 513.

[7] In the instant case it was sufficiently shown that respondents were not apprised of the danger by warning signals from the car until too late to avoid the accident, and that, as operated, the noise of its approach was thereby lessened; and it does not appear from the testimony, in view of the conditions shown, that respondents, by looking from the spot where they stopped, must necessarily have seen its approach, nor that by again stopping before reaching the point where the car was first seen its approach would have been discovered. The facts are similar to those in *Cooper v. Los Angeles Ry. Co.*, 137 Cal. 229, 70 P. 11, and *Loftus v. Pac. Elec. Ry. Co.*, supra; and under all circumstances the inference was not unreasonable that respondents, in approaching the crossing after making the observations shown, were exercising the degree of care which an ordinarily prudent man so situated would have exercised, and that the car could have been neither seen nor heard by them until too late to avoid the collision; and we cannot say but that the sole proximate causes of the injuries and deaths were the excessive speed of the car and appellant's failure to give timely warning of its approach.

[8] Appellant assigns as error an instruc-

tion stating, in substance, that if the jury believed from the evidence that appellant at the time of the accident was negligent in maintaining a platform and station which obstructed the view of the plaintiffs as they approached the crossing, and they further believed that weeds, brush, and the overhanging branches of trees growing adjacent to and along its right of way prevented plaintiffs from seeing the approach of the car in time to avoid being struck, and also prevented the motorman from seeing the automobile in time to avoid colliding with it, and the plaintiffs were free from negligence, their verdict must be for the latter.

The jury was further instructed as follows:

"The plaintiffs in this action have claimed that the defendant was negligent in maintaining the loading platform on its right of way. The court instructs you that the defendant not only had the right to, but should, maintain suitable and necessary stations and platforms for the use of itself and the patrons of the railway along its right of way. This was not negligence, and you cannot consider the defendant negligent in maintaining this loading platform. There was no negligence whatsoever in having this loading platform at the place that it was. Not only must the plaintiffs prove that the defendant was negligent, but they must prove that the negligence of the defendant was the proximate cause of the collision and injury to the plaintiffs; if from all the evidence you were to believe that the occupants of the automobile were so conducting themselves as they approached this track that they would not have noticed the approach of the car or heeded the approach of the car, regardless of weeds or limbs on the right of way between the car and themselves, then the presence of weeds and branches, if you believe there were such to the extent that the defendant was negligent in this respect, would not be a proximate cause of the accident, but the inattentiveness of the occupants of the automobile would be a proximate cause of the accident. In other words, if you believe from all the evidence that the occupants of the automobile were so conducting themselves that it would have made no difference whether or not the right of way was filled with weeds and branches, then, even if you believe the defendant was negligent in this respect, still this negligence would not be the proximate cause of the collision. In other words, one cannot complain of a condition which would have made no difference to him."

Although a growth of weeds on appellant's property north of the intersection was shown and that the limbs of trees growing on adjacent land overhung the right of way, all of which appellant might have removed (*Grandona v. Lovdal*, 78 Cal. 611, 21 P. 366, 12 Am. St. Rep. 121), and did partially remove after the accident and before the photographs were taken, and that these obstructions to a certain extent obscured the view from the highway, there was no evidence sufficient to support a finding that appellant was negligent in the

maintenance of either the station or platform. While the giving of an instruction which finds no support in the evidence is improper (*Boone v. Oakland Transit Co.*, 139 Cal. 490, 73 P. 243; *Idemoto v. Scheidecker*, 193 Cal. 653, 226 P. 922), and, if prejudicial, is ground for reversal (*Eppinger v. Kendrick*, 114 Cal. 620, 46 P. 613; *Bosqui v. Sutro R. R. Co.*, 131 Cal. 390, 63 P. 682; *Wallis v. Southern Pac. Co.*, 184 Cal. 663, 195 P. 408, 15 A. L. R. 117; *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 393, 212 P. 913), in the instant case, in view of the conditions north of the station, the instructions quoted, with others by which the jury was fully advised as to the care required of both appellant and the occupants of the automobile in approaching the crossing, were sufficient to remove the effect of an otherwise misleading instruction, and it cannot reasonably be said that the error was prejudicial.

Other instructions with respect to the care required in approaching a railway crossing and of one suddenly placed in a position of peril are also criticized by appellant. Such instructions, in view of the evidence, were proper, and those in question correctly stated the general rules applicable thereto, and were not, as claimed by appellant, misleading. We are satisfied from an examination of the entire record that the evidence was sufficient to sustain the verdict in each case, and that no error is shown which can fairly be said to have resulted in a miscarriage of justice.

The judgments are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

83 Cal. App. 356
WHITE v. WHITE et al. (Civ. 4850.)

District Court of Appeal, Second District, Division 1, California. May 24, 1927.

Divorce — 332—Where foreign divorce decree awarded child to mother, father held not liable for support, where need of father's assistance was not shown.

Where a divorce decree obtained in another state awarded the custody of a minor child to its mother with no provision for its support by father, the father was not liable for support, where it was not shown that the child had any need of the father's assistance, and there was some evidence to the contrary.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Lauretta O. White, Jr., a minor, appearing by her guardian ad litem, Lauretta O. White, against Kenneth White and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank C. Prescott and Frank G. Falloon, both of Los Angeles, for appellant.

Wetherhorn, Hoyt & Jones, of Los Angeles, for respondent.

HOUSER, J. This is an appeal by plaintiff, as guardian of a minor child, from an order in a proceeding instituted for the purpose of compelling defendant (the father of the child) to pay a certain sum of money for the support of the child.

It appears that the child is the minor daughter of defendant and his divorced wife; that the divorce between the father and the mother of the child was obtained by the father in the state of Texas; and that, without any provision being made in the decree for the support of the minor child of the parties, the court awarded the absolute custody of the child to the wife.

In such circumstances it appears to have been ruled directly by the higher courts of this state that a separate action by the child against the father to compel him to furnish support for the child will not lie. *Lewis v. Lewis*, 174 Cal. 336, 163 P. 42; *Matter of McMullin*, 164 Cal. 504, 129 P. 773; *Ex parte Miller*, 109 Cal. 643, 648, 42 P. 428. See, also, *People v. Hartman*, 23 Cal. App. 72, 137 P. 611; *In re Perry*, 37 Cal. App. 189, 174 P. 105.

There is, however, later authority to the effect that, because in a divorce proceeding the custody of a minor child of the parties has been awarded to the mother, this does not relieve the father from his duty to support the child who has no other source of maintenance. *Pacific Gold Dredging Co. v. Industrial Acc. Com.*, 184 Cal. 462, 194 P. 1, 13 A. L. R. 725; *Svoboda v. Superior Court*, 190 Cal. 727, 214 P. 440; *Llewellyn Iron Works v. Industrial Acc. Com.*, 191 Cal. 28, 214 P. 846; *Federal Mutual L. I. Co. v. Indus. Acc. Com.*, 195 Cal. 283, 233 P. 335.

The rule as announced in the case of *Davies v. Fisher*, 34 Cal. App. 137, 166 P. 833, is that the mother of a minor child whose custody was awarded to the mother in a decree of divorce granted in a sister state, and which decree made no provision for the support by the father of the minor child, may bring an independent action in this state to compel the father to support the minor child, where it is made to appear that both parties are residents of this state, and the wife is without means to contribute to such support.

On the hearing of the instant matter, which resulted in the order to which exception is taken by appellant, no evidence was introduced which showed that the child was in need of support from the defendant. To the contrary, the evidence was to the effect that the child was a remainderman of a one-fourth interest in an estate of the value of \$250,000. Nor, aside from testimony that the wife was the owner of a one-fourth interest in the "Octagon Drop Forge Company," was any showing made regarding the financial

ability of the wife to provide the child with the necessities of life.

In the face of the record and the law as hereinbefore noted, it was legally impossible that the relief for which plaintiff prayed be granted.

The order is affirmed.

We concur: **CONREY, P. J.; YORK, J.**

83 Cal. App. 352

SONDERGARD v. BREAU. (Civ. 5806.)★

District Court of Appeal, First District, Division 2, California. May 24, 1927.

Hearing Denied by Supreme Court July 21, 1927.

1. Appeal and error §76(1)—Judgment disposing of all material issues is appealable.

Judgment disposing of all material issues is final and appealable.

2. Appeal and error §101(1)—Appellate court cannot hold that there is no evidence supporting finding, where conflicting evidence authorized decision either way.

Where trial court could have decided either way on conflicting evidence as to existence or nonexistence of partnership, appellate court cannot hold that there is no evidence supporting finding that partnership was created.

3. Partnership §53—Evidence held to support finding, in suit to dissolve partnership, that partnership existed.

In action for dissolution of partnership, evidence held sufficient to support court's finding that partnership existed.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by J. C. Sondergard against Rudolph Breau. Judgment for plaintiff, and defendant appeals. Affirmed.

Anson Hilton, of San Francisco, for appellant.

J. W. Bingaman and Ralph W. Arnot, both of Oakland, for respondent.

STURTEVANT, J. From a judgment in favor of the plaintiff, the defendant has appealed and has brought up a bill of exceptions. The judgment dissolved an alleged partnership and ordered a sale of the property owned by the partnership and a division of the proceeds after the payment of the debts. No accounting was ordered, because one had already been made and filed, and the same was adopted by the trial court.

[1] The respondent makes a preliminary objection that the alleged judgment is an interlocutory decree which is not appealable. The appellant replies that the judgment appealed from disposes of all the material issues and therefore comes within the rulings in such cases as *Zappetini v. Buckles*, 167

Cal. 27, 138 P. 696, and Guaranty Trust, etc., Bk. v. Los Angeles, 186 Cal. 110, 199 P. 35. We think the reply is sufficient.

[2, 3] On the appeal the appellant presents one point, that the finding that a partnership existed between the parties is wholly unsupported by the evidence. J. C. Sondergard, the plaintiff, alleged, and the trial court found, that he, Paul J. Rasmussen, and Rudolph Breau, were copartners, and as such the owners of the parcel of land situated in the city of Oakland and described in the complaint. J. C. Sondergard and Margaret Sondergard are husband and wife. Rudolph Breau and Margaret Sondergard are brother and sister. Paul J. Rasmussen, if not related to, is a boarder in the family of, Rudolph Breau. Carl O. Breau is a nephew of Rudolph Breau and of Mrs. Sondergard. Commencing in June, 1923, the parties discussed buying a piece of real estate, building on it, and selling off parcels as so improved. Rudolph Breau is a carpenter. Rasmussen is a plasterer. Mrs. Sondergard keeps a store. Mr. Sondergard has various business connections. All of the parties are of Danish birth and more or less unfamiliar with the English language, but the Sondergards are more familiar with English, and, throughout the proceedings in making the purchase, they acted as spokesmen. Before any property was purchased, all seemed to be on friendly terms. Soon after the purchase was made, the friendly relations became strained. The testimony taken at the trial discloses the existence of a family quarrel. For the purpose of proving his case, the plaintiff took the stand, and later he called as witnesses his wife, Paul J. Rasmussen, Carl O. Breau, and S. C. Hunt. Each and all gave at least some testimony supporting the claim of the plaintiff. The only witness called by the defense was the defendant himself. All of the witnesses agreed that at least at one time they discussed the matter of buying, building, and selling as above stated. The witnesses for the plaintiff testified an agreement was reached to the effect that they should proceed to buy a parcel known as 2576 Twenty-Fifth avenue; that the defendant, with the assistance of Sondergard and Rasmussen, was to do the carpenter work; that Rasmussen was to do the plastering; and that Sondergard was to be the business agent. The witnesses for the plaintiff then testified that later it was decided not to buy the property last mentioned but to buy instead the parcel of land described in the complaint which is also known as the Fruitvale avenue property. Speaking of the time when they examined the

latter property, the appellant testified that he remarked, "This looks better than the other, and I believe we will buy this." It is not disputed but what the latter property was bought, and that the title was taken in the name of the defendant. It is not disputed that the total cost was \$8,014.94; that of that sum \$6,000 was borrowed on a mortgage; that \$1,200 was borrowed by the defendant on his promissory note indorsed by a stranger; that the remaining moneys were received partly from J. S. Sondergard, partly from Mrs. Sondergard, partly from Rasmussen, and partly from the appellant. At this point all else rests in conflict. The defendant claims that he was the sole purchaser and that the moneys paid by the others were loans made to him, whereas both Rasmussen and Sondergard claim that the advances were not loans to the appellant but were part payments in liquidation of the pro rata obligations of Rasmussen and Sondergard. We have carefully read the record many times in an attempt to obtain a full understanding of the story. After having done so, we think it is clear that the case is one which the trial court could have decided either way; that the record presents a conflict of evidence as to the existence or nonexistence of the partnership; and that we are not entitled to hold there is no evidence supporting the finding that a partnership was created as alleged in the plaintiff's complaint. All of the parties testified that a partnership was discussed. Sondergard and Rasmussen testified that one was agreed upon; whether it was agreed upon regarding the property located on Twenty-Fifth avenue or the property on Fruitvale avenue is not clear; but there is no evidence in the record that the agreement once formed was thereafter wholly canceled or abandoned. Mr. S. C. Hunt, an official of the Oakland bank which granted the mortgage loan, testified: That he waited on Sondergard and Breau when they called regarding the loan. "Sondergard said that they were to purchase the property together, and to cut it up into lots, and contemplated building. They did not mention any name, but spoke of it as 'we,' and that their brother and brother-in-law who were present at the time were to be in on the deal." As Mr. Hunt was a disinterested outsider, it is difficult to ascertain why his testimony should not be given full weight. No doubt the trial court did give it full weight, and we may not say that it erred in doing so.

For the foregoing reasons the judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

83 Cal. App. 276

PINE v. HIGGINS et al. (Civ. 3274.)

District Court of Appeal, Third District, California. May 20, 1927.

1. Partnership ⚡217(3)—Evidence held insufficient to sustain finding that purchaser of goats had knowledge of partnership therein, in suit to foreclose mortgage on goats, executed by one partner.

In suit to foreclose mortgage on goats as partnership property, where mortgage was executed by only one of alleged partners, evidence held insufficient to sustain finding that purchaser of goats had knowledge of partnership.

2. Partnership ⚡142(1)—Record of chattel mortgage is constructive notice only of what mortgage contains.

Where record of chattel mortgage of partnership property showed only an individual mortgage of one of the partners, it was constructive notice only of what mortgage contained.

3. Chattel mortgages ⚡278—Evidence held to sustain finding that property redelivered to seller was sufficient to satisfy both seller's indebtedness and plaintiff's mortgage.

In suit to foreclose mortgage on goats, evidence held to sustain finding that at time goats were redelivered to seller their value was sufficient to cover buyers' indebtedness to seller and the indebtedness of plaintiff.

4. Appeal and error ⚡1177(2)—Foreclosure judgment, directing sale of partnership property when only one partner's interest was mortgaged, requires reversal where mortgaging partner's interest was not shown.

Foreclosure judgment directing sale of goats as partnership property, when only one partner's interest was mortgaged, held to require reversal where the record did not disclose the extent of the mortgaging partner's interest.

Appeal from Superior Court, Tehama County; K. S. Mahon, Judge.

Foreclosure proceeding by A. J. Pine against Guy S. Higgins, J. D. French, and Floyd E. Hendricks. Judgment for plaintiff, and defendants French and Hendricks appeal. Reversed with directions.

James T. Matlock and M. J. Cheatham, both of Red Bluff, for appellants.

W. A. Fish and W. P. Johnson, both of Red Bluff, for respondent.

PLUMMER, J. Plaintiff had judgment of foreclosure of a chattel mortgage, dated the 29th day of April, A. D. 1920, from which judgment the defendants French and Hendricks appeal.

The transcript shows that on or about the 20th day of April, 1920, the defendant J. D. French sold and transferred to Guy S. Higgins and Ashley E. Higgins a certain band of goats comprising about 1,400 head and a

certain tract of land covering about 160 acres, all in the county of Tehama, state of California; that the total selling price of said property was the sum of \$9,000; that \$2,707 of the selling price of said property was unpaid, and to secure the payment of the same by the said Guy S. Higgins and Ashley E. Higgins to the said J. D. French, Guy S. Higgins, Ashley E. Higgins, Mary A. Higgins, and Delia M. Higgins executed and delivered to the defendant J. D. French a certain promissory note in the sum of \$2,707, payable on or before three years after date, and to secure the payment of said note, the said Guy S. Higgins and Ashley E. Higgins executed and delivered a chattel mortgage upon all of the goats hereinbefore referred to and a mortgage covering the real estate theretofore sold by the said J. D. French to said Higgins, the real estate mortgage being executed by all of the signers to the promissory note hereinbefore mentioned.

That after the execution of the instruments herein referred to, the defendant Guy S. Higgins executed and delivered to the plaintiff, A. J. Pine, a certain chattel mortgage, bearing date of the 29th day of April, 1920, covering the band of goats mentioned in the mortgage, just mentioned as executed and delivered to the defendant J. D. French. This chattel mortgage was executed and delivered first to secure the payment of a certain promissory note for \$156, dated March 29, 1920, payable one day after date, executed and delivered by the defendant Guy S. Higgins to the plaintiff. Said mortgage executed and delivered by the said Guy S. Higgins to the plaintiff, A. J. Pine, and for the foreclosure of which the decree was entered in this case also contained the following provision:

"And also to secure the payment of all future loans, balances of account, other indebtedness or advances made by the mortgagee to the mortgagor not to exceed for the principal secured of such loans or advances the sum of eight hundred and 00/100 dollars."

The complaint in the action alleges that after the execution of the mortgage just referred to the plaintiff sold and delivered to the defendant Guy S. Higgins of Red Bluff, Tehama county, goods, wares, and merchandise amounting to the sum of \$806.77; that the last of said advances was made on the 30th day of April, 1921. Nonpayment of the note and the advances is alleged.

The transcript further shows that the instruments herein referred to were all recorded in the county recorder's office of the county of Tehama. Thereafter, and on or about the 19th day of October, 1921, for the purpose of satisfying the indebtedness mentioned in the promissory note executed and delivered by Guy S. Higgins, Ashley E. Higgins, Mary A. Higgins, and Delia M. Higgins, Guy S.

Higgins and Ashley E. Higgins executed and delivered a deed conveying the real property included in the real estate mortgage hereinbefore referred to, and, also, turned over to the defendant French all of the band of goats theretofore bought by the said Higgins from the defendant French, and included in the chattel mortgage executed to pay the \$2,707 note, and upon said reconveyance of said real estate being made and redelivery of said band of goats, the said J. D. French satisfied both the chattel and real estate mortgages theretofore given to him by the Higgins to secure the unpaid portion of the purchase price of said property; that no foreclosure sale was had, nor was any sale had of any of said property under the mortgages executed and delivered by the Higgins to the defendant French, and the property was turned back to him in the manner above stated; that at a period of time about one and one-half years after the real estate referred to had been reconveyed to the defendant French and the band of goats redelivered to him, the defendant French sold and conveyed to the defendant Floyd E. Hendricks the real estate referred to herein, and also all that was remaining of the band of goats redelivered by the Higgins to the defendant French, and the increase thereof during the period of time said goats were in the possession of the said French. After these transactions had taken place the plaintiff began this action to foreclose the chattel mortgage on the band of goats referred to, executed and delivered to him solely by Guy S. Higgins. Guy S. Higgins made default, and judgment went against the defendants French and Hendricks for foreclosure of the mortgage and sale of the band of goats.

The transcript contains testimony to the effect and the court found that the advances made under the chattel mortgage executed to the plaintiff by Guy S. Higgins alone consisted of an account made up of the selling prices of goods, wares, and merchandise used by the defendant Guy S. Higgins and his family and Ashley E. Higgins and his family during the time they had possession of and were caring for said band of goats, and in the caring for and "running of the same." There is also testimony to the effect that the defendant J. D. French knew of the execution of the second mortgage of the alleged purposes for which it was executed, and consented thereto, and the court found that the defendant French knew thereof and consented thereto. The court also found that at the time the defendant French became repossessed of the property herein referred to without any foreclosure sale, the value of the property was sufficient to cover not only the indebtedness then due to him, but also the indebtedness evidenced by the mortgage executed and delivered to the plaintiff by Guy S. Higgins.

There is, however, not a scintilla of evidence in the transcript showing that the defendant Floyd E. Hendricks knew of any of the transactions had between the parties referred to, or of the purposes for which the mortgage was given, other than such constructive notice as is conveyed to a subsequent purchaser by the record of plaintiff's mortgage herein mentioned.

As to the existence of a partnership between Guy S. Higgins and Ashley E. Higgins, the transcript shows the following:

Testimony of the witness A. J. Pine:

"Q. You understood that Guy Higgins and A. E. Higgins were partners in the business out there? A. Not exactly partners; no. They put their goats together and had one camp.

"Q. And they were running the bands together as one band? A. Yes; and he had it put under that name (Guy Higgins) so he would join in and help pay it—help pay for the merchandise."

Testimony of Guy S. Higgins:

"Q. How did you arrange with Mr. Pine for the account—how were they to be charged? A. Under the name of A. E. and G. S. Higgins.

"Q. You made those arrangements with Mr. Pine yourself? A. Yes, sir.

"Q. And when you opened this account at Mr. Pine's, you opened that account as the account for this business of your brother and yourself? A. Yes, sir.

"Q. And in which you say you intended and agreed to share the profits equally and the losses equally? A. Yes, sir.

"Q. And that account was not your individual account? A. No, sir."

Testimony of Ashley E. Higgins:

"Q. When you opened the account at Mr. Pine's it was a partnership account, wasn't it? A. Yes, sir.

"Q. The groceries bought there were used in the partnership business for your family, and for your brother's family, while you resided out there running the goats? A. Yes, sir."

Upon this testimony the court found that Guy S. Higgins and Ashley E. Higgins were partners in the goats and the land hereinbefore referred to. The court also found that, at the time the mortgage on the goats in question was given by Guy S. Higgins to the plaintiff, Guy S. Higgins and Ashley E. Higgins were the owners of the goats described therein.

[1] In none of the conveyances herein referred to was the property described as purchased for a partnership, or by a partnership, or mortgaged as a partnership, or reconveyed to the defendant French as partnership property, and, while the testimony may be sufficient to show a partnership in the use of the property as between Guy S. Higgins and Ashley E. Higgins and as to the plaintiff, A. J. Pine, it is absolutely insufficient to sustain any such finding as to the defendant Floyd E. Hendricks. The record of which the defendant Floyd E. Hendricks must be held to have had constructive notice shows only a cotenancy or tenancy in common, both as

to the band of goats and the real estate mentioned in the conveyances. Oral testimony as to any other matters cannot be considered in the determination of the rights of the defendant Floyd E. Hendricks in and to the band of goats purchased by him from the defendant French, for the reason that there is not a scintilla of evidence in the record, as we have said, showing that the defendant Floyd E. Hendricks had any knowledge whatever of any of the transactions now appearing in the record. The trial seems to have been had and the findings made upon the theory that if the seller of the goats had knowledge the purchaser was chargeable also with such knowledge. It requires no citation of authority to controvert such a conclusion.

[2] As said in 5 California Jurisprudence, p. 56, § 14:

"Though there are no provisions in the Codes which expressly make the recordation of a valid chattel mortgage constructive notice of its contents, yet it is well settled that such recordation is notice to all the world of the contents of the mortgage, and consequently subsequent purchasers and incumbrancers take subject to the lien of the mortgage since they are charged with notice thereof" (citing a number of cases).

The same section also contains the rule well supported by authority that the "record imparts constructive notice only of what the mortgage contains."

The mortgage executed by Guy S. Higgins to the plaintiff does not upon its face purport to be anything but his individual mortgage. It does not purport to mortgage partnership property. It does expressly, however, purport to secure the payment of an individual note of Guy S. Higgins due at the date of the execution of the mortgage and advances that might be made to him. In this particular we may state that the advances made by Pine to Guy S. Higgins were not made by Pine under a view that Guy S. Higgins and Ashley E. Higgins were partners. They were advanced to Guy S. Higgins and Ashley E. Higgins as two persons running their goats together. Under such circumstances, the advances made to Guy S. Higgins the court might properly find as advances contemplated and included within the terms of the mortgage.

As we have said, the court found ownership of the goats at the time the chattel mortgage was executed and delivered to the plaintiff to be in Guy S. Higgins and Ashley E. Higgins, from which, under the circumstances which we have set forth, and the terms of the mortgage, mortgaged only the interest of Guy S. Higgins. The record is silent as to the extent of that interest.

[3,4] The finding of the court, that the value of the property at the time it was redelivered to the defendant French was sufficient to cover the indebtedness to him and

also the indebtedness to the plaintiff, is attacked as not being supported by the testimony. The only testimony there is in the record is to the effect that the property was once sold to the Higgins for \$9,000 and subsequently sold to the defendant Floyd E. Hendricks for \$4,000. This testimony, having been admitted without objection, we think, sustains the finding of the court. As there is nothing in the record showing the extent of the interest of Guy S. Higgins at the time of the execution and delivery of the chattel mortgage on the band of goats to the plaintiff, we have nothing upon which to base an order directing a modification of the judgment, and as the judgment directs the sale of the band of goats as though it were partnership property, and property mortgaged as a whole against the defendant Floyd E. Hendricks, the rights of the parties can only be determined by sending the case back to the trial court for further consideration and determination of the extent of the interest of Guy S. Higgins actually mortgaged, and to direct foreclosure and sale of such interest. The judgment of foreclosure is reversed and the trial court directed to proceed further in the case in accordance with this opinion.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

83 Cal. App. 245

AUGUST v. GONSALVES et al. (Civ. 4745.)

District Court of Appeal, Second District, Division 1, California. May 20, 1927.

Receivers ⇨212—Where attorneys made no separate charges for vacating receiver's appointment, fees cannot be recovered on bond to indemnify defendant for wrongful appointment.

Where attorneys in receivership action made no separate charges for vacating the appointment of the receiver, but only a charge for the entire services rendered in the whole action, attorney's fees cannot be recovered in an action on a bond given to indemnify the defendant in the receivership action for damages for the wrongful appointment of a receiver.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by John August against Manuel Gonsalves and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. Scott Jacobs and Chas. E. Watkinson, both of Hanford, for appellant.

Clark Clement, for Lemoore, for respondents.

HOUSER, J. This is an appeal from a judgment rendered in favor of defendants in an action on a bond for damages arising out

of the alleged wrongful appointment of a receiver in a former action between the same parties, the position of the parties therein being reversed; that is to say, the plaintiff herein was the defendant in the former action and the plaintiff in that action is the defendant in this action.

The specific damages claimed by plaintiff herein were for attorney's fees in the sum of \$1,300, alleged to have been paid by him to counsel representing him in the action in which the receiver was appointed.

On the trial of the present action, among other things, the court found:

"That the said Manuel Gonsalves did not procure the appointment of said receiver wrongfully, maliciously, and without sufficient cause; that said John August has paid to his attorneys as aforesaid the sum of \$1,300, but that said sum was not paid for the purpose of procuring a dissolution of the receivership in said action No. 4771; that said sum of \$1,300 was not and is not a reasonable sum for attorney's fees in said action for obtaining the discharge of said receivership; that the sum of \$1,300 was a gross sum charged by said attorneys in connection with said action No. 4771; and that no separate charge was made by said attorneys for any work in connection with the receivership."

The record herein shows that on the day on which the receivership action was commenced the defendant employed attorneys to represent him generally therein, and that no receiver was appointed in such action until one week thereafter. In the case of *Lambert v. Haskell*, 80 Cal. 611, 624, 22 P. 327, 331, it is said:

"* * * In the first place, the liability of the sureties commences with the giving of the undertaking. They are not liable for counsel fees or loss of profits previously expended or incurred. * * *"

See, also, *Curtiss v. Bachman*, 110 Cal. 433, 42 P. 910, 52 Am. St. Rep. 111; *Black v. Hilliker*, 130 Cal. 190, 62 P. 481.

Moreover, the appointment of a receiver was incidental only to the main question in the action in which the receiver was appointed. No question having been raised by appellant regarding the sufficiency of the evidence to support the findings, it conclusively appears that the attorney's fees charged the defendant in the action covered the entire case, and that there was no segregation in the charge of the attorneys showing what sum was charged in connection with that part of the action which dealt exclusively with the question of the validity of such appointment—which question was tested in the court below by a motion to vacate the order appointing the receiver, but which motion was denied.

While the attention of this court has been directed to no California case involving the question of whether bondsmen are liable for general attorney's fees paid or incurred by the defendant in defense of an action where

a part of the relief sought by the plaintiff was by and through the appointment of a receiver, authorities are not lacking which in principle clearly indicate that attorney's fees paid generally in defense of a suit in which a receiver is appointed are not recoverable; but that such fees only (if any) are recoverable as were paid or incurred for the purpose of obtaining the discharge of the receiver.

As showing the similarity of the basis for an action on a bond given on the appointment of a receiver and an action founded on an undertaking given on the issuance of an injunction, it may be noted that section 566 of the Code of Civil Procedure lays a foundation for the recovery of damages where a receiver is appointed "wrongfully, maliciously or without sufficient cause"; and that by section 529 of the Code of Civil Procedure it is provided that an injunction bond must contain the undertaking that the plaintiff will pay to the party enjoined "such damages, * * * as such party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled thereto." The basis for the present action was that the receiver in the former action was appointed "without sufficient cause."

In the case of *Bustamente v. Stewart*, 55 Cal. 115, it was held that (syllabus):

"The amount recoverable, on account of attorney's fees, in an action upon an injunction bond, is limited to fees paid counsel for procuring the dissolution of the injunction, and does not extend to fees paid for defending the entire case."

In the case of *Curtiss v. Bachman*, 110 Cal. 433, 42 P. 910, 52 Am. St. Rep. 111, the question was thoroughly considered. Among other things, it is said therein (page 438 [42 P. 912]):

"* * * It is well settled that the services of counsel rendered in the trial of a cause are not a portion of the damage sustained by reason of the injunction. * * *"

Referring again to *Lambert v. Haskell*, 80 Cal. 611, 624, it will be found that, in addition to the language already quoted herein from that case, the opinion contains the following statement:

"In the second place, the counsel fees for which the sureties may be held are not those expended for the defense of the suit, but only those which have been expended solely or principally in procuring a dissolution of the injunction [citing cases]. And the evidence must show a case within the rule. It is not sufficient to show the value of service rendered in the case generally."

The syllabus in the case of *Mitchell v. Hawley*, 79 Cal. 301, 21 P. 833, contains the following:

"In a suit on an injunction bond in a case where a gross counsel fee was paid for the defense of a suit, and no separate or distinct amount of money was paid to the attorneys

for an unsuccessful attempt to procure a dissolution of the injunction, and no special charge was made therefor, and there is no sufficient showing in the evidence of a segregation and apportionment of the services, no counsel fee can be allowed as damages, though the court finally decided by dismissal of the action that the plaintiff was not entitled to an injunction. The allowance of counsel fees as damages is exceptional, and should not be carried beyond the point to which former decisions have taken it."

To the same effect, see the following cases: *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216, 35 P. 651; *Black v. Hilliker*, 130 Cal. 192, 62 P. 481; *Porter v. Hopkins*, 63 Cal. 53; *Spooner v. Cady*, 5 Cal. Unrep. 357, 44 P. 1018.

[1] As hereinbefore stated, by the findings of the trial court it conclusively appearing that the attorney's fees in the action for the appointment of a receiver were for the entire services rendered by the attorneys therein, and that no separate charge was made by the attorneys for their services in connection with their efforts to have vacated the order appointing the receiver, it follows that the action could not be maintained and consequently that the judgment should be affirmed.

It is so ordered.

We concur: CONREY, P. J.; YORK, J.

TUBBY v. TUBBY. (Civ. 5787.) ★

District Court of Appeal, First District, Division 2, California. May 19, 1927.

Hearing Granted by Supreme Court July 18, 1927.

1. Motions ⇨21—Where written notice of motion is required, grounds of motion must be stated (Code Civ. Proc. § 1010).

In instances where a written notice of motion is required, the grounds of the motion must be stated, under Code Civ. Proc. § 1010, providing that the notice of a motion other than for a new trial must state the grounds upon which it will be made.

2. Motions ⇨30—Failure of notice of motion to state grounds thereof can be cured by affidavit setting forth grounds only if affidavit is served with notice (Code Civ. Proc. § 1010).

In order for the failure of a notice of motion to state the grounds thereof to be cured by the fact that the affidavit sets forth the grounds, the affidavit must be served with the notice, under Code Civ. Proc. § 1010, providing that notice of motion other than for new trial must state grounds thereof and papers, if any, on which it is based, and that, if such paper has not previously been served on party to be notified and was not filed by him, a copy must accompany the notice.

3. Divorce ⇨164—Attorney who has appeared for party in divorce action is entitled to notice of motions to modify final divorce decree until substitution of attorney has been made (Code Civ. Proc. §§ 284-287, 1015).

Where an attorney has appeared for a party to a divorce action, he is entitled, under Code Civ. Proc. § 1015, to notice of other party's motions to modify final decree of divorce until valid substitution of attorneys has been made as provided in sections 284-287.

4. Appearance ⇨9(5)—Appearance of attorney solely to ask continuance is not "general appearance."

Where an attorney appears for the sole purpose of asking for a continuance, he is not deemed to make a "general appearance."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

5. Appearance ⇨19(3)—Plaintiff's attorney's request for continuance of hearing on defendant's motion was not waiver of objections to jurisdiction.

Plaintiff's counsel of record did not waive all objections to court's jurisdiction to hear motion to modify final decree of divorce on the merits by asking for a continuance of the hearing; an appearance for the sole purpose of asking for continuance not being a general appearance.

6. Divorce ⇨309—Defendant procuring reassignment to another department of motion to modify final decree of divorce was bound to give notice thereof.

Where defendant procured reassignment of his motion to modify, as respects support of child, final decree of divorce to another department for hearing, he was bound to give notice to plaintiff or his counsel of such reassignment.

7. Divorce ⇨309—Notice to office of plaintiff's counsel by telephone of reassignment of motion to modify final decree of divorce was insufficient.

Notice to office of plaintiff's counsel over the telephone that defendant had procured reassignment to another department of his motion to modify, as respects support of child, a final decree of divorce was insufficient, even if the impression was given that plaintiff's counsel had withdrawn from the case.

Appeal from Superior Court, City and County of San Francisco; Benjamin K. Knight, Judge.

Divorce action by Oliver G. Tubby against Leah Rodman Tubby. From an order modifying a final decree of divorce, plaintiff appeals. Reversed.

J. L. McNab, of San Francisco (R. H. Countryman, of San Francisco, of counsel), for appellant.

Clara Shortridge Foltz, of Los Angeles, for respondent.

NOURSE, J. On June 8, 1923, the defendant obtained an order modifying a final de-

cree of divorce which had been granted to the plaintiff upon the ground of the defendant's willful desertion. In the final decree the custody of the minor child of the parties was awarded to the defendant "by the consent of the plaintiff," but no order was made respecting the payment for the care or support of the child. The property rights of the parties were settled out of court, and, by agreement, the plaintiff paid to the defendant the sum of \$35 a month for the child's support. This continued until May, 1923, when the defendant served upon plaintiff an order to show cause and notice of motion to modify "the order heretofore made * * * and for a further order commanding the plaintiff to pay the sum of \$50 per month for the support and maintenance of the minor child." Neither the order to show cause nor the notice of motion stated the grounds upon which they were based, and neither was served upon plaintiff's counsel of record. An affidavit of the defendant was referred to in the notice, but this was not served on either plaintiff or his counsel.

On the day set plaintiff's counsel appeared in open court and arranged for a continuance, and this was granted without any hearing on the merits of the motion. On June 8, 1923, the day to which the matter was continued, defendant's counsel procured an order from the presiding judge transferring the cause to another department for hearing at 10 o'clock a. m. of the same day. No notice of this transfer, either written or oral, was given to plaintiff or to his counsel. At 12 o'clock noon of that day the matter was called and the absence of plaintiff and his counsel was noted by the court. Upon the representation of defendant's counsel that she had communicated by telephone with the office of plaintiff's counsel and had been informed by some one in the office that said counsel had withdrawn from the case, the court heard the motion and entered an order awarding to the defendant the sole custody of the minor child and fixing the sum of \$50 a month as the sum plaintiff should pay for the child's maintenance.

The appeal from this order is based upon the ground that it was beyond the jurisdiction of the trial court. The argument is founded upon the failure to state any grounds of the motion, the failure to serve appellant's attorney with any notice of any character, the failure to serve on either appellant or his attorney a copy of respondent's affidavit, and the failure to serve upon either any notice of the reassignment of the cause to the department where it was heard. Re-

spondent does not answer any of the points raised by appellant, but rests her brief on the argument that the welfare of the child demands that the mother should have its custody and that the father should pay a reasonable sum for its support.

[1, 2] It is elementary that when written notice of a motion is required the grounds of the motion must be stated. Code Civ. Proc. § 1010. If reliance is placed on the grounds set forth in the affidavit to excuse the omission of the statement of grounds in the notice (*Savage v. Smith*, 170 Cal. 472, 150 P. 353), the affidavit does not cure the defect unless served with the notice (Code Civ. Proc. § 1010).

[3] It would seem equally clear that when an attorney has appeared for a party he is entitled to notice of motions of this character until a valid substitution has been made. Code Civ. Proc. §§ 285, 1015. The process of changing an attorney of record is provided in sections 284 to 287, Code of Civil Procedure, and until a valid change has been made the other party must recognize the former attorney.

[4, 5] When an attorney appears for the sole purpose of asking a continuance, he is not to be deemed to have made a general appearance (*Davenport v. Superior Court*, 183 Cal. 506, 509, 191 P. 911), and so, when appellant's counsel of record asked for a continuance of the hearing, he cannot be said to have waived all objections to the court's jurisdiction to hear the matter on the merits.

[6, 7] The continuance until June 8 being regular, it was incumbent upon the respondent to notify appellant or his counsel that the matter had been assigned to another department, and notice to the office over the telephone is not sufficient, even if the impression is given that counsel has withdrawn from the case. The danger of practice of this kind is illustrated by this particular case. Respondent's counsel proceeded on information from some one in her adversary's office that counsel had withdrawn from the case, and the hearing was held and the order made in the absence of both appellant and his counsel, and this telephone information was the only excuse for the failure to give legal notice. This information afterwards proved to be incorrect; appellant's counsel had not withdrawn, but he failed to appear because he had no notice of the place of hearing.

Order reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

83 Cal. App. 334

BINGHAM v. DOUGLASS et al. (Civ. 3283.)

District Court of Appeal, Third District, California. May 23, 1927.

1. Schools and school districts ☞69—Vote of electors at mass meeting for change of school site held not vote to change location of schoolhouse, requiring two-thirds majority (Pol. Code, § 1611).

Majority vote of electors of district, at mass meeting to change school site chosen by trustees, though less than two-thirds majority, held sufficient, notwithstanding Pol. Code, § 1611, requires vote in favor of changing location of schoolhouse to be two-thirds of electors voting.

2. Injunction ☞78—Injunction to prevent trustees' purchase of site previously selected for school held not warranted by electors' vote to change site (Pol. Code, § 1611).

Vote of electors of district at mass meeting under Pol. Code, § 1611, that site chosen by trustees for school should be changed, held not instruction to board of trustees as to site to be purchased, requiring injunction to restrain purchase of site which trustees had previously selected.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by C. W. Bingham against E. E. Douglass, F. D. Arnold, and Joseph A. Wilson, as members of the Board of Trustees of the Manteca Grammar School District, and others, for an injunction. From judgment dismissing action, plaintiff appeals. Affirmed.

Louttit, Stewart & Louttit, of Stockton, for appellant.

Daniel V. Marceau and R. C. Pardoe, both of Stockton, for respondents.

PLUMMER, J. By this action the plaintiff sought an order of the superior court restraining and enjoining the board of trustees of the Manteca grammar school district from purchasing a certain site mentioned in the complaint and also to prevent the delivery of a certain warrant, as a part of the purchase price thereof. The demurrer of the defendants to the complaint was sustained, and, the plaintiff declining to amend, judgment of dismissal was entered. From this judgment the plaintiff appeals.

After the formal parts of the complaint, not necessary to be set forth herein, it is alleged that on or about the 16th day of March, 1925, after proper proceedings taken and had therefor, an election was held authorizing the issue of bonds in the sum of \$60,000 for the purpose of raising money for purchasing school lots, etc.; that, after the sale of said bonds and the receipt of the money therefor, and the deposit of the same with the county treasurer of the county of

San Joaquin, the board of trustees, on or about the 25th day of March, 1925, at a meeting of the board of trustees of said Manteca grammar school district, at which meeting all the members thereof were present, and of which meeting due notice had been given, there was entered on the minutes of said meeting the following statement, to wit: "After some discussion as to a site, the one known as the Spreckels site was chosen as the place to erect the new building." The complaint then alleges that thereafter, and on the 11th day of May, 1925, a petition was filed with the board of trustees of said district, signed by 535 persons residing in the said school district, more than 300 of whom were heads of families; that there were not in said district at said time more than 500 heads of families. The petition was in the following words:

"The undersigned, being the heads of families and the majority of the heads of families in said district, hereby petition the board of trustees of said school district to call a meeting of the qualified electors of said district for determining the location of the new schoolhouse for the construction of which bonds have heretofore been voted, and said board is hereby requested to give the notice or notices of such meetings as required by law."

That on the said 11th day of May, 1925, the board of trustees of the Manteca grammar school district adopted the following resolution:

"Be it resolved that this board do call a meeting in the Manteca school auditorium, on Monday, May 25th, at 8 o'clock p. m., for the purpose of considering the change of the site already selected by the trustees."

Notice of this meeting was given by posting the following:

"Notice of Mass Meeting. Notice is hereby given that a mass meeting of the electors of the Manteca grammar school district will be held at the Manteca School auditorium on Monday evening, May 25, 1925, at 8 o'clock p. m., for the purpose of considering the change of the site of the proposed new school. No other business will be transacted at this meeting. [Signed by the board of trustees.]"

The board of trustees had not entered into any contract for the purchase of the site referred to, called the "Spreckels site." Thereafter, and on or about the 11th day of June, 1925, the board of trustees of the said Manteca grammar school district drew a warrant in favor of the Spreckels Sugar Company, a corporation, in the sum of \$3,638.40 in payment of 4.54 acres of land for a school site, and that plaintiff is informed and believes, and therefore alleges that the 4.54 acres of land proposed to be purchased is the same tract of land hereinbefore described as the Spreckels site. It is further

alleged that, unless restrained, the defendants will deliver said warrant to the said Spreckels Company.

[1] Section 1611 of the Political Code authorizes and requires boards of trustees in school districts, not including districts having city boards of education, to call mass meetings of the qualified electors for determining or changing the location of a schoolhouse. The procedure to be followed in such mass meetings is specifically mentioned. After setting forth the necessary procedure in assembling such mass meetings, the section specifies: "A meeting so called shall be competent to instruct the board of trustees: 1. In regard to the location or change of location of the schoolhouse or the use of the same for other than school purposes; * * * 2. In regard to the sale and purchase of school sites; 3. In regard to prosecuting, settling or compromising any litigation," etc., and other matters not involved in this proceeding; the section concluding with the following proviso: "Provided that the vote in favor of changing the location of the schoolhouse be two-thirds of all the electors voting at said meeting upon the proposition to change the location."

At the mass meeting of the electors of said district called as aforesaid, the following question was voted upon: "Shall the site chosen by the trustees known as the Spreckels site be changed?" One hundred and thirty-three voted affirmatively and one hundred and twenty-five negatively.

The appellant, basing his argument upon the affirmative vote of 133 as against the negative vote of 125, calls our attention to the following cases, from which it is concluded that the court erred in sustaining the defendants' demurrer, the demurrer of the defendants having been sustained apparently on the theory that a two-thirds affirmative vote upon the proposition presented was necessary under the last proviso contained in section 1611 of the Political Code:

In the case of *Landers v. Van Aukin*, 77 Or. 479, 151 P. 712, the Supreme Court of Oregon had before it a somewhat similar question. It was there held that, under the school laws of that state, by majority vote of any legally called school meeting a schoolhouse site may be selected, but that it required a two-third vote to order the removal of a schoolhouse.

In *Griebel v. School District No. 6*, 110 Kan. 317, 203 P. 718, the Supreme Court of Kansas held that it is competent for a school district to acquire more than one site and locate additional school buildings thereon, where more schools are necessary in the district, and the purchase of such additional sites may be authorized by a majority of those voting at a regularly called meeting.

In the case of *Lumijarvi v. School District*, 112 Or. 344, 229 P. 684, under a some-

what similar statute, the Supreme Court of Oregon again held that, in order to purchase a schoolhouse site only a majority vote of the electors in mass meeting assembled was necessary, but that it required a two-third vote of those present to order a removal of a schoolhouse.

In *Behrens v. Bechtel*, 131 Wash. 508, 230 P. 426, it was held that a majority vote of the electors in mass meeting assembled only was necessary to authorize or direct the purchase of a site.

In the case of *Jennings v. Clearwater School Dist.*, 65 Cal. App. 102, 223 P. 84, the Court of Appeals of this state held a majority vote of the electors present sufficient to adopt a resolution selecting a new school site and directing the erection of a schoolhouse thereon, where such resolution does not call for the sale or abandonment of the school already maintained.

In answer to the construction placed upon the Code provisions under consideration by the authorities above cited, the respondent calls our attention to the meaning of the word "location," some of which may be found in 38 C. J. 132, and argues the conclusion that the last proviso contained in section 1611 relative to the change of the location of the schoolhouse includes also a site selected by the board of school trustees. The section of the Code, however, sets forth the meaning of the Legislature in clear and unmistakable language. Subdivision 2, which we have quoted, specifies that the electors possess authority to instruct the board of trustees "in regard to the sale and purchase of school sites." In so far as this exercise of authority is conferred, the section makes no mention of the necessity of two-thirds of the electors at such mass meetings voting in favor of the resolution instructing the trustees in regard to the sale and purchase of school sites. It is only when the removal of the schoolhouse is to be had that two-thirds of the electors must vote affirmatively. There is a clear distinction between changing a location for a schoolhouse and the changing of the location of the schoolhouse. The proviso does not apply, unless the latter condition is involved. It is urged by respondent that the requirement of a two-third affirmative vote could not be had or would not be required until the last nail is driven or the last paint brush is swung on the building designated as a schoolhouse, unless it also applies to a site selected for the schoolhouse. In this particular we think the argument begins at the wrong end of the proposition. The court would look to the intent of the Legislature, which is to guard against an ill-considered sacrifice of public property, and that the application of the proviso would take place immediately upon any substantial portion of the schoolhouse being built upon or in-

stalled upon a site selected for the schoolhouse; that so long as the site remains the site it is subject to change, as stated, in the cases which we have cited, but the very moment it begins to be the location of the schoolhouse, the provision, as we have said, intended to guard against ill considered action and sacrifice of public property applies and requires a two-third vote.

[2] Does this conclusion necessitate a reversal herein? We think not. As heretofore stated, section 1611, Political Code, authorizes the electors in mass meeting assembled to instruct the board of directors. In the instant case there is no instruction as to the location of the school building. There is, of course, no instruction as to the change of the schoolhouse. The language of the proposition voted on was simply, "Shall the site chosen by the trustees known as the Spreckels site be changed?" That is not an instruction as to where the schoolhouse is to be located. It amounts simply to a meaningless gesture. The board of school trustees of the Manteca school district were given no information whatever as to where the school should be placed, nor were they directed as to the site to be purchased. Whether the language of the proposition submitted to the voters was purposely worded so as to make it meaningless is of no moment now. The electors simply did not instruct the board of trustees as to the site to be purchased, and that is conclusive in favor of the judgment of the trial court. In several of the cases which we have referred to, what is necessary to instruct as to the sites is set forth. In these instances the electors designated the sites to be purchased.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

83 Cal. App. 298

PARRISH v. AMERICAN RY. EMPLOYEES' PUB. CORPORATION. (Civ. 5330.)

District Court of Appeal, First District, Division 1, California. May 23, 1927.

1. Words and phrases—"Cash" in its ordinary sense is antonym of "credit."

"Cash" in its ordinary sense is an antonym of "credit" as generally understood and defined by the courts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series. Cash; Credit.]

2. Corporations §99(1)—Corporation issuing stock in violation of permit authorizing sale at par for cash may not thereafter recover its value.

Where corporation issued stock without any payment of cash in violation of terms of

permit authorizing sale of stock at par for cash, it may not thereafter recover value thereof, since it was in pari delicto in consummating the transaction.

3. Corporations §99(1)—Acceptance of corporate stock authorized to be sold for cash held not agreement to pay cash so as to make transaction legal (Civ. Code, § 1784).

Where corporate stock under terms of permit was required to be sold at par for cash, acceptance of stock and exercise of acts of ownership held not to constitute such an agreement to pay purchase price therefor in cash upon delivery, within meaning of Civ. Code, § 1784, sufficient to make transaction legal and serve as basis for recovery of value thereof by corporation.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by R. L. Parrish against the American Railway Employees' Publishing Corporation, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

William M. Morse, Jr., and Rosecrans & Emme, all of Los Angeles, for appellant.

Clark & Law, of Los Angeles, for respondent.

KNIGHT, J. This is an appeal by the defendant corporation from an adverse judgment given on a cross-complaint to recover from plaintiff the par value of 997 shares of defendant's capital stock issued to plaintiff while he was serving as an officer and employee of said corporation. The question presented for determination is whether the trial court erred in holding as it did that the issuance of said stock was violative of the permit granted by the corporation commissioner and therefore constituted an illegal transaction upon which no recovery may be had.

In February, 1921, defendant, being then engaged in the publishing business, entered into a written contract with plaintiff to manage and conduct its affairs for a period of five years for a stated salary and a percentage of the gross receipts. A year later, in February, 1922, plaintiff commenced the instant action to collect wages claimed to be due in the sum of \$987.62; also an assigned claim for printing. Besides answering, defendant filed a cross-complaint containing three counts, the second of which was for the recovery of the par value of said stock. The circumstances relating to the issuance of said stock were as follows: After accepting the employment under said written contract, plaintiff was made a member of the board of directors, consisting of five members, and elected treasurer of said corporation. While acting in such capacities the corporation issued and delivered to him two certificates calling for an aggregate of 997 shares of its capital stock of the par value of \$1 each,

both certificates being regularly signed by the president and the secretary of said corporation. The permit granted by the corporation commissioner to defendant authorized the latter to issue and dispose of its stock "at par, for cash," and it is admitted that plaintiff did not pay or expressly agree to pay any cash or other consideration for said stock. It does not appear from the record why said stock was issued to or accepted by plaintiff, but does show that plaintiff signed no subscription agreement for the same; that the stock was not issued to him as a gratuity, by way of bonus, or on credit; and that, although the same was issued "by the president and secretary of defendant corporation in the regular course of business," plaintiff made no "arrangements of any kind whatsoever with the board of directors" with reference to the issuance thereof. The stock remained in plaintiff's possession or under his control, and was voted by him at corporate meetings, until the commencement of the trial of this action in October, 1922, at which time he offered to surrender the two certificates to defendant, who refused to accept them; whereupon the court ordered said certificates deposited with the clerk of the court.

In the case of *Domenigoni v. Imperial Live Stock, etc., Co.*, 189 Cal. 467, 209 P. 36, a permit issued by the corporation commissioner authorized the sale of stock "upon subscription agreements providing for the payment of 25 per cent. of the subscription price in cash, and the execution of promissory notes bearing interest at 6 per cent., by the subscriber for the balance." In lieu of making the initial cash payment, a purchaser delivered to the salesman as agent for the corporation issuing the stock his promissory note for 25 per cent. of the purchase price, payable to himself in six months, and the note was then indorsed and delivered to said agent. Action was afterwards brought by the purchaser to cancel said note and the others given for the balance of the subscription, upon the ground that the transaction was violative of the terms of the permit.

In reversing the judgment the Supreme Court held in substance that said note was delivered to the stock salesman as the agent of the corporation and not as his own, in payment of the initial installment due on the purchase price of said stock, and that it was plain that the transaction evidenced thereby

was planned and executed in an endeavor to circumvent the statute and evade the requirements of the permit allowing the corporation to sell its stock, and was therefore illegal; but that the purchaser, having been equally guilty with the corporation in such circumvention and evasion, was entitled to no relief even if the point was not raised on appeal.

[1, 2] We are of the opinion that the case just cited is decisive of the present appeal. Here the permit required the stock to be issued "for cash," which excluded the idea of credit (*Philadelphia & Reading R. Co. v. Lehigh Coal & Nav. Co.*, 36 Pa. 204; *Berlainsky v. Rosenthal*, 104 Me. 62, 71 A. 69; *Hall v. Storrs*, 7 Wis. 253; *State v. Woodward*, 208 Ala. 31, 93 So. 826), and required payment concurrent with delivery (*Mears v. Biddle*, 122 Me. 392, 120 A. 181). In other words, "cash" in its ordinary sense is the antonym of "credit," and the courts have so generally understood and defined it. *State v. Woodward*, supra. Admittedly, the instant transaction was consummated without the payment of any cash to the corporation at any time. It was therefore violative of the terms of the permit; and the defendant corporation, being in *pari delicto* with plaintiff in consummating said transaction, is not entitled to any relief.

[3] Defendant advances the theory that because plaintiff accepted delivery of said stock and afterwards exercised acts of ownership over the same, the implication of law is that he agreed to pay the purchase price therefor in cash and that since no time of payment was fixed by the parties payment was due upon delivery. *Gilfallan v. Gilfallan*, 168 Cal. 23, 141 P. 623, Ann. Cas. 1915D, 784; Civ. Code, § 1784. There would be much merit in defendant's theory were we considering the question of a sale of personal property which was free from statutory regulations and control. But such is not the case. The subject of this controversy is corporate stock, which is required to be issued and disposed of in strict conformity with the permit granted for that purpose by the corporation commissioner, and this was not done. The transaction was therefore illegal and cannot serve as the basis of recovery.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

83 Cal. App. 173

REICHHOLD v. SOMMARSTROM INV. CO.
et al. (Civ. 5473.)★

District Court of Appeal, First District, Division 1, California. May 18, 1927.

Hearing Denied by Supreme Court July 13, 1927.

1. Landlord and tenant §171(3)—Any disturbance of tenant's possession by landlord is constructive eviction if tenant so elects.

Any disturbance of tenant's possession by landlord or one acting under his authority rendering premises unfit for occupancy for purposes for which they are demised, or depriving tenant of beneficial enjoyment of premises, amounts to constructive eviction if tenant so elects, actual ouster being unnecessary.

2. Landlord and tenant §150(3)—Landlord's authority to enter and put premises in safe condition did not authorize improvements exceeding those ordered by city inspector; "trespass" (Civ. Code, § 1941).

Landlord's right to enter premises and put them in safe condition, under Civ. Code, § 1941, held not to warrant extensive improvements in addition to those ordered by city inspector, and making of such improvements constituted "trespass."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trespass.]

3. Landlord and tenant §130(4)—In estimating tenant's damage by landlord's disturbance of possession, deprivation of use of premises, including profits of established business, may be considered.

In estimating damage to tenant due to landlord's disturbance of his possession, it is proper to consider enforced removal to another place of business and damage resulting from being deprived of use of premises abandoned, which would include actual profits from established business.

4. Landlord and tenant §80(4)—Tenant held not released from liability for landlord's interference with subtenant's possession by building wall requested by tenant.

In subtenant's action for damages for interference with possession by building of partition wall at request of tenant occupying part of premises, tenant was not released from liability on ground that act was that of landlord.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Henry Reichhold against the Sommarstrom Investment Company and others, in which Arthur Reichhold, administrator of the estate of Henry Reichhold, deceased, was substituted as plaintiff. Judgment for plaintiff, and the named defendant and another appeal. Affirmed.

H. W. Brunk and J. E. Pemberton, both of Berkeley, for appellant Witkow.

C. L. Colvin, of Oakland, for appellant Sommarstrom Inv. Co.

James M. Koford, of Oakland, for respondent.

TYLER, P. J. Action for damages for disturbance of lease. Defendant Sommarstrom Investment Company, a corporation, was at the time of the commencement of this action the owner of a three-story building situated in the city of Berkeley. The two upper stories thereof were divided into apartments, which were occupied by some fifteen families. The lower story was divided into stores used for business purposes. These stores were leased by the company to one Witkow, codefendant herein, for a term of five years ending on December 15, 1924. The stores were not partitioned off one from the other, but constituted one large space with three entrances. From the 15th day of September, 1919, Witkow conducted and carried on a grocery in the premises, the business occupying about two-thirds of the space thereof. About April 17, 1920, he subleased to plaintiff the portion of the premises not used by him. The space so leased extended from the north wall of the building to a row of wooden pillars which supported the superstructure and formed a part of the wall dividing the stores. This lease was for a period beginning May 15, 1920, and ending September, 1924. The premises were to be used by plaintiff for the purpose of conducting a butcher shop, and this, together with the grocery business of defendant Witkow, constituted what was known as the "Sunkist Market." The complaint alleges, in substance, that plaintiff began operating his business under his lease, and built up and enjoyed a profitable trade as retail butcher and dealer in meats from the patronage of a large number of householders, residents of the vicinity and neighborhood, and also from the patrons of the grocery department of the market. That on January 10, 1923, and against his will and consent, defendants broke and entered into the premises so occupied by plaintiff as tenant, and forcibly and unlawfully began the alteration and change of the premises by tearing out the north and rear walls, and the ceiling and floor thereof, and erecting a solid wall and partition which cut off completely the space leased by plaintiff from the other part of the premises occupied by the market. That by reason of said action on the part of defendants dirt, plaster, and other foreign substances covered the meats handled and sold by plaintiff, and rendered the conduct of his business in said premises impossible; that in consequence of these acts, plaintiff was forbidden by the food inspector of the city of Berkeley from conducting his business in said premises; that said action of defendants rendered the premises totally unfit for his business, and as a result thereof he was compelled to and did move from the premises, thereby suffering the loss of his

established trade, his leasehold interest, and damage to his fixtures by reason of such removal. Judgment was prayed for in the sum of \$5,085.

Defendant investment company, answering, alleged, among other things, that its acts were warranted by law and under the terms of the lease with Witkow, the provisions of which were known to plaintiff. By way of special defense it further alleged that on or about the 10th day of January, 1923, the building of which the stores were a part became dilapidated, unsafe, and dangerous, and that the company and the lessees were notified by the building inspector of the city of Berkeley that it would be condemned and closed unless steps were immediately taken to place it in a safe and sound condition, and defendants and plaintiff were ordered to do certain work to accomplish this result. It is then charged that plaintiff and defendant Witkow neglected to make the repairs so ordered, and defendant thereupon, at the request and with the consent of the lessees, entered upon the premises for the purpose of complying with the order of the building inspector, and that all the changes made were necessary to render the building safe; that the partition, the erection of which is complained of by plaintiff, was reinstalled at plaintiff's request; that during the course of the alterations he, without any necessity therefor, voluntarily removed from the premises for the reason that his business had proved unprofitable. Defendant Witkow, after denying any loss on the part of plaintiff, set up the special plea that the work was done by his codefendant Sommarstrom Investment Company, or the city officials, and whatever injuries the plaintiff may have suffered were inflicted by them and not by him. It appeared in evidence that the improvements made were of an extensive character. The changes consisted in the removal of fourteen wooden pillars and the replacing of them with steel; the tearing up the floor completely and replacing it with cement and taking off and replacing the plaster of the ceilings, and all walls, and the erection of a solid partition cutting plaintiff's place of business entirely off from the adjoining space occupied by the grocery and fruit market. It also appeared that the city building inspector had found four of the wooden pillars decayed, and ordered them repaired, but that he did not order the extensive alterations which were made or any improvement other than the removal of the decayed pillars. It further appeared from the testimony of Witkow that upon the commencement of the work he had moved across the street for the reason that he could not conduct his business while the work was in progress; that it was at his request the partition wall was erected, as he did not want a butcher of plaintiff's type in the premises. From this and other evidence the trial court found, in effect, that all of

plaintiff's allegations were true. It also found that the Sommarstrom Investment Company had consented, in writing, to the subletting by Witkow to plaintiff of the premises in question; that the extensive alterations made were not made necessary under the notice from the public authorities to put the building in a safe condition; and that plaintiff never consented thereto.

[1-4] Judgment was rendered in favor of plaintiff for the sum of \$1,125 and costs of suit. As ground for reversal it is claimed that section 1941 of the Civil Code imposed upon the defendant investment company, as landlord of the building, the duty of keeping the leased premises in a condition fit for human occupation, and that in furtherance of this duty it had a right to enter upon the premises to do the work in question. It is further claimed that the lease of the company made with defendant Witkow contained a covenant that the lessor should not be responsible for any damage to persons or property upon the premises, and also that it might enter the same for the purpose of putting the building in a first class condition; that plaintiff took his sublease in subordination to these conditions in his immediate lessor's lease and subject to them, and was therefore bound equally with him by the conditions. We do not consider there is any merit in these claims. It is an established rule that any disturbance of a tenant's possession by a landlord or by some one acting under his authority, whereby the premises are rendered unfit for occupancy for the purposes for which they are demised, or the tenant is deprived of the beneficial enjoyment of the premises, amounts to a constructive eviction if the tenant so elects and surrenders his possession. *Veysey v. Moriyama*, 184 Cal. 802, 195 P. 662, 20 A. L. R. 1363; *Agar v. Winslow*, 123 Cal. 587, 56 P. 422, 69 Am. St. Rep. 84. It is not necessary that there should be an actual ouster to constitute such eviction. 15 Cal. Jur. p. 684, § 93. Conceding the right in the landlord to have entered the premises to put them in a safe condition, this authority did not warrant it in making the extensive improvements which it did. A right of entry for one purpose will not justify the performance of acts for another purpose; and the making of the improvements in question without the consent of plaintiff, beyond question constituted a trespass. *Dwyer v. Carroll*, 86 Cal. 298, 24 P. 1015. Here the evidence shows that the only improvement necessary to insure the safety of the building was the repair of four of the wooden pillars, an improvement which could be accomplished in a short space of time. This was all that the city inspector had ordered. The company therefore had no right to disturb plaintiff's possession beyond that reasonably necessary to comply with the demand, and, having done so, it was bound to compensate the tenant for the loss he suffered

by reason of being compelled to abandon the leased premises for the unexpired term.

In estimating this damage it was proper to consider evidence concerning the enforced removal to another place of business and also evidence regarding damage which resulted from being deprived of the use of the premises abandoned, which would include actual profits from the established business. *Hawthorne v. Siegel*, 88 Cal. 159, 25 P. 1114, 22 Am. St. Rep. 291; 15 Cal. Jur. 824. Such proof was properly presented and considered. Plaintiff's lease had twenty months more to run and he was doing business in excess of \$2,000 per month, of which about \$400 was gross profit, and his expenses were small. From a consideration and review of the entire case it clearly appears that the extensive improvements made by defendant company were not required or compelled by the public authorities. The contention that, in any event, Witkow cannot be held liable for the acts of his codefendant investment company is without merit. From his own testimony it appears that it was at his request that the partition wall was constructed which cut off plaintiff's space from the rest of the premises, and that he did so for the purpose of getting rid of plaintiff.

The judgment should be and it is hereby affirmed.

We concur: KNIGHT, J.; CASHIN, J.

83 Cal. App. 69

CALIFORNIA STEARNS CO. v. TREADWELL et al. (Civ. 4527.)

District Court of Appeal, Second District, Division 2, California. May 12, 1927.

1. Fraud §11(1) — Misrepresentation as to year model of automobile held material and actionable as "statement of fact."

False representation that automobile was 1922 model held material and actionable as a false "statement of fact," not to be considered as a mere expression of opinion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Statement of Fact.]

2. Fraud §66—Finding held to indicate that, had court found specifically, it would have found reliance on misrepresentation inducing purchase of automobile.

Trial court's finding that automobile buyers did not know that automobile was not 1922 model as represented held to indicate that, if the court had found specifically, it would have found that they relied upon the statement and were thereby induced to make the purchase.

3. Judgment §248—Admission of damage in answer to cross-complaint for deceit held binding on court.

Admission of \$300 damage in answer to cross-complaint alleging fraudulent misrepresentation

in sale of automobile held binding on court.

4. Appeal and error §916(1) — On appeal from judgment, not recognizing admission of damage made in answer, presumption is that no testimony was introduced contradicting such admission.

On appeal from a judgment which failed to recognize that the answer to defendant's cross-complaint admitted damage to the extent of \$330, held presumption was that no testimony was introduced contradicting the admission.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by the California Stearns Company against A. W. Treadwell and another. Defendants brought a cross-action. Judgment for defendants on the complaint, from which a separate appeal was prosecuted. Judgment for plaintiff on the cross-complaint, and defendants appeal. Modified, and, as modified, affirmed.

See, also, 256 P. 242.

Wright & McKee and Treadwell, Tompkins & Clark, all of San Diego, for appellants.

I. Henry Harris, of Los Angeles, for respondent.

THOMPSON, J. An action was commenced by the plaintiff against defendants, to recover from defendants \$2,000 of the purchase price of a Stearns automobile, and judgment went for the defendants. A separate appeal was prosecuted by the plaintiff from that part of the judgment denying it relief. The defendants and appellants A. W. Treadwell and E. L. Treadwell filed a cross-complaint alleging that, at the time of their purchase of the Stearns automobile for the sum of \$2,770, made up of \$2,000 in cash and a used automobile valued at \$770, it was represented that the automobile being purchased was a 1922 year model; that in truth it was not a 1922 model, but a 1921 model; that plaintiff was well aware of the fact that it was a 1921 model; that defendants and cross-complainants relied upon the representation; and that, by reason of its purchase due to such reliance and inducement, they were damaged in the sum of \$620 or the difference in the value and selling price of the two models. After the overruling of a general demurrer interposed by the plaintiff, it filed its answer to the cross-complaint, in which it denied that the representation was falsely made with intent to deceive or that plaintiff relied thereon. denied that the selling price or the value of the car sold and delivered was \$2,150 or other than \$2,350, and denied that defendants were damaged in any sum in excess of \$330. Responsive to these issues the court found that plaintiff falsely represented to the appellant A. W. Treadwell that the automobile was a 1922 year model; that it was "a 1921 year

model Stearns automobile, remodeled and refitted so as to bring it up to 1922 specifications"; that, while cross-complainants examined the automobile, "they did not know that it had originally been a 1921 model; that the price for which plaintiff was selling said 1921 year model Stearns automobile, brought up to 1922 specifications," and the value thereof, was \$2,350; and that the price paid for the automobile by cross-complainants, aside from accessories and extras, was the sum of \$2,350; and that cross-complainants had not been damaged in any sum. Judgment was entered for defendants upon the complaint and answer and for plaintiff and cross-defendant upon the cross-complaint and answer thereto. The appellants prosecute this appeal upon the judgment roll alone from that part of the judgment which declared that they take nothing by their cross-complaint.

[1] As reasons for a reversal, they urge that the court failed to find upon a material issue, to wit, whether cross-complainants relied upon and were induced to purchase by the misrepresentation found by the court to have been made, and also that the answer of plaintiff and cross-defendant admitted damage to appellants in the sum of \$330, which relief was denied to appellants by the judgment. In reply to this the respondent urges that the cross-complaint does not state facts sufficient to constitute a cause of action, in this, that the cross-complaint fails to show wherein the misrepresentation was material or damaged the cross-complainants. That the misrepresentation was material we think satisfactorily appears from the allegations heretofore epitomized to the effect that the selling price and value of the two models differed in the sum of \$620, and brings the case within the rule announced in the cases of *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 P. 351, and *Jones v. Grieve*, 15 Cal. App. 561, 115 P. 333.

[2] With respect to the first contention of appellants, the court found that appellants "did not know that it" (the automobile) "had originally been a 1921 model." This indicates that, if the court had found specifically upon the issue, it would have found that appellants did rely upon the statement and were induced thereby to make the contract of purchase, so that we can agree with the appellants' language that, "had plaintiff's answer to the cross-complaint denied instead of admitted damages, the omission by the trial court to find as to the reliance and inducement might not have been of sufficient moment to warrant any disturbance of the judgment. * * *

[3, 4] The real question to be settled here, then, is whether the court was bound by the admission in the answer. The answer plainly admits that appellants were damaged in the sum of \$330, and also that the value of

the car actually delivered was \$2,350, and, in fact, the prayer asks that cross-complainants take nothing by their cross-complaint "other than the sum of \$330." The pleader himself was impressed with the fact that his admission was sufficient to entitle appellants to relief in the sum admitted. Under these circumstances the only issue as to damage upon which the court could pass or find was concerning the damages, if any, in excess of \$330. As to this issue, of course, the finding of the court that there was no damage must be construed to mean that there was no damage in excess of \$330. Respondent insists that the presumption obtains that the judgment is regular and supported by the testimony adduced at the trial, but this same argument was disposed of in the cases of *Romer v. Wehner*, 61 Cal. App. 411, 214 P. 993, and *Welch v. Abbot*, 185 Cal. 731-754, 198 P. 626, contrary to respondent's views. It is there stated that the presumption is that no testimony was introduced to contradict the admission in the answer. The appellants were entitled to have and recover from plaintiff the sum of \$330, and the judgment should be modified accordingly.

The judgment is modified by allowing to cross-complainants A. W. Treadwell and E. L. Treadwell the sum of \$330, and, after such modification, is affirmed.

We concur: WORKS, P. J.; MURPHEY, Justice pro tem.

83 Cal. App. 74

BROWN v. BROWN. (Civ. 3267.)★

District Court of Appeal, Third District, California. May 12, 1927.

Hearing Denied by Supreme Court July 11, 1927.

1. Courts ⇐92—Dicta to effect that husband and wife after separation cannot contract as to disposition of property held not binding in subsequent case directly involving such question (Civ. Code, §§ 158, 159).

Dicta to effect that husband and wife, under Civ. Code, §§ 158, 159, after separation, cannot contract with each other concerning property interests, while worthy of consideration, is not binding on court in subsequent case in which such question was directly presented.

2. Husband and wife ⇐278(2)—Statute held not to prohibit husband and wife from contracting as to property after separation; "immediate separation" (Civ. Code, §§ 158, 159).

In view of Civ. Code, § 158, permitting husband and wife to contract, section 159, prohibiting them by contract with each other from altering legal relations except as to property and except where they agree in writing to "immediate separation," which means instantaneous, present act, something which has been completed, and not event to take place in future, involves public policy only as to maintenance of institution of marriage, and does not prohibit husband and

wife from contracting with each other after separation as to their property interests.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Immediate.]

3. Husband and wife ⚡278(5)—Mutual consent of husband and wife to contract after separation as to property interest held sufficient consideration (Civ. Code, §§ 159, 160).

Mutual consent of husband and wife to contract under Civ. Code, § 159, after separation governing their property interests was sufficient consideration under section 160.

4. Husband and wife ⚡278(5)—Waivers of wife in contract with husband after separation relating to her property interest held valid consideration for contract (Civ. Code, § 159).

Waivers on part of wife as to her property interest in contract after separation in pursuance of Civ. Code, § 159, held to constitute sufficient consideration for contract.

5. Husband and wife ⚡278(1)—Contract between husband and wife after separation dividing property held not void for continuance in effect until death of wife (Civ. Code, § 159).

Contract of husband and wife after separation in pursuance of Civ. Code, § 159, relating to division of property, was not void because it purported to continue in full force until death of wife.

6. Husband and wife ⚡280—Provisions in separation agreement as to disposition of property and for support of wife for life held not abrogated by subsequent absolute divorce (Civ. Code, § 159).

Subsequent absolute divorce held not to abrogate separation agreement between husband and wife pursuant to Civ. Code, § 159, settling property interests and providing for support of wife for life.

7. Appeal and error ⚡837(2)—Files and pleadings of another case between same parties, not introduced in trial court, cannot be considered on appeal.

In divorce suit in which defendant husband in cross-complaint set up separation agreement, to have brought proceedings in former case between same parties to court's attention it would have been necessary to introduce in evidence files and pleadings therein, and, such not being done at trial, such papers cannot be considered on appeal.

8. Evidence ⚡43(3)—Rule that courts take judicial notice of their records is limited to proceedings in same case.

Rule that courts take judicial notice of their own records is limited to proceedings in same case.

9. Appeal and error ⚡1071(1)—Apparent conflict between finding that separation agreement covenanted to pay wife income for maintenance and support and finding that it was property settlement held not reversible error (Civ. Code, §§ 158, 159).

Separation agreement between husband and wife providing for payment to wife of certain

income per month for her life, in which wife waived certain claims on husband's property, partook both of nature of property settlement and agreement for support and maintenance, sustainable under Civ. Code, § 158, or section 159, and fact that trial court in one finding referred to it as agreement for maintenance and support and in another as property settlement was not reversible error.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Suit by Sarah M. Brown against George H. Brown for a divorce. Decree granting defendant a divorce on his cross-complaint, and from part of the decree relating to a property settlement, defendant appeals. Affirmed.

Dozier, Kimball & Dozier, of San Francisco, for appellant.

F. P. Tuttle, of Oakland, Raglan Tuttle, of Auburn, and Donald McClure, of Oakland, for respondent.

PLUMMER, J. In this action the appellant was awarded an interlocutory decree of divorce upon his cross-complaint alleging extreme cruelty. The decree of divorce is not attacked. The only questions presented for consideration relate to a certain agreement entered into between the parties after separation and prior to the institution of this action.

The appellant, in his cross-complaint, after alleging the grounds upon which the interlocutory decree in his favor was rendered, sets forth the agreement just mentioned and alleges that said agreement is void in that it does not contain the written consent of the parties thereto to an immediate or other separation; that the written agreement attempts and purports to provide for the permanent support of the plaintiff by the defendant and to release the defendant and all of his property from any and all claims of inheritance and of marriage claims of plaintiff thereto, save and except that said agreement purports to provide a lien for the enforcement of these provisions for the support of the plaintiff, etc.

There is no allegation in the cross-complaint in reference to the agreement setting forth that the same was entered into either through mistake, fraud, duress, undue influence, or without a full and complete understanding of all its terms and provisions, nor is there anything in the cross-complaint tending to show that there was not a complete meeting of the minds and intentions of the parties entering into the same. The attack upon the agreement is based upon the allegations that it does not contain any stipulations providing for the immediate separation of the parties. The agreement itself, in so far as its provisions need to be considered, is in the following words and figures:

"This agreement, made and entered into this 19th day of March, 1923, by and between

George H. Brown, the party of the first part, and Sarah M. Brown, the party of the second part, witnesseth:

"Whereas, the parties hereto are living separate and apart and it is desirous that a settlement of property rights be had, it is mutually agreed as follows:

"That the party of the first part will pay to the party of the second part upon the execution of this agreement, the sum of \$250, and the further sum of \$150 per month from the date of this agreement, payable in advance, until the death of the party of the second part, said payments to be deposited in the Bank of Loomis, Loomis, county of Placer, state of California, each month to the credit of the party of the second part.

"It is further agreed and understood that the estate of the party of the first part shall be holden for said monthly payments until the death of the party of the second part; that to secure the payment of said \$150 per month, the party of the first part has, concurrently herewith, executed a deed of trust on lot 8 of the Light tract, containing 21.80 acres, situated in the south half of section 7, township 11 north, range 8 east, M. D. B. & M., as per map or plan of said tract now on file in the office of the county recorder of the county of Placer, state of California; upon the death of the party of the second part hereunder, the trustees named in said deed of trust, to wit, Raglan Tuttle, W. J. Prewett, and J. J. Callison, shall thereupon reconvey all title vested in them by and under said deed of trust, to the said party of the first part. * * *

"The party of the first part agrees to pay to Raglan Tuttle, the attorney for the party of the second part, the sum of \$150 in full compensation for his services in representing the party of the second part, and will also pay the costs thus far incurred, amounting to \$10.25.

"In consideration of the foregoing, the party of the second part agrees to join with the party of the first part in executing and placing of record an abandonment of homestead placed on the property of the party of the first part by the party of the second part on the 1st day of September, 1920, which homestead is found recorded in Book 'E' of homesteads, at page 399, and the party of the second part does hereby agree that she will not in the future cause any of the property of the party of the first part to be impressed or subject to a homestead placed thereon by herself.

"The party of the second part does hereby waive, renounce, and relinquish all claim by reason of the marriage relation or by the laws of inheritance, to any and all property of the party of the first part, save and except as herein in this agreement provided, and she does hereby waive all right of inheritance to the property of the party of the first part in favor of the other heirs of the party of the first part.

"The party of the first part does hereby waive, renounce and relinquish all claim to the property of the party of the second part and does hereby waive, renounce and relinquish all right of inheritance to the property of the party of the second part, and does hereby waive all right of inheritance to the property of the party of the second part in favor of the other heirs of the party of the second part. * * *

"It is mutually agreed and understood that at the time of the execution of this agreement, that

the parties hereto have actually separated and that this is an agreement entered into after actual separation.

"This agreement shall bind the heirs, executors, and assigns of the parties to the same.

"In witness whereof, the parties hereto have hereunto set their hands this 19th day of March, 1923.

George H. Brown.

"Sarah M. Brown.

"Approved by Raglan Tuttle, Attorney for Sarah M. Brown.

"Approved by Prewett & Chamberlain, Attorneys for George H. Brown."

This agreement was acknowledged by both of the parties thereto and on the same day filed for record by the appellant in the office of the county recorder of Placer county.

As a preliminary statement, it is set forth that the parties are living separate and apart and are desirous of settling their property rights, and in the conclusion it is further affirmed that the parties have actually separated and the agreement is entered into after actual separation.

Two sections of the Civil Code are involved in the consideration of this agreement, to wit, section 158, Civil Code, which reads: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts"—and section 159, Civil Code, which provides as follows: "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation."

Basing his argument on the latter section, it is urged that the agreement is invalid and is an agreement prohibited by the terms of the section, in that to uphold such an agreement there must be a statement contained therein that the parties have agreed to an immediate separation and that if the separation has already taken place, then, and in that case, the parties possess no power to enter into an agreement adjusting their property rights, or for the purpose of making provision for the support of either of them. To support this contention, the cases of *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; *Rottman v. Rottman*, 55 Cal. App. 625, 204 P. 46; *Sanguinetti v. Sanguinetti*, 51 Cal. App. 347, 196 P. 799; *Marshall v. Marshall*, 46 Cal. App. Dec. 1,¹ and a few others are cited.

With only a casual reading, it might appear that these cases establish the invalidity of the contract under consideration, but upon

¹ For opinion on hearing by Supreme Court, see 196 Cal. 761, 239 P. 36.

careful consideration, we think that the facts involved are so different that the ruling had in the principal case, to wit, the case of *Pereira v. Pereira*, and followed by the others, is distinguishable from that which should be had in the case at bar. In the *Pereira Case*, the agreement related to a future separation of the parties, to a future contemplated action for divorce, and provided that if at a subsequent time a divorce should be obtained, then, and in that case, a certain sum of money should be paid according to the terms of the agreement. The court refers to the two sections of the Civil Code, which we have here set forth, the one giving power either to the husband or wife to enter into any agreement with the other respecting property which they might do if not married, and the other concerning an agreement arranging for an immediate separation and making provision for support, etc., and then takes up the crucial point involved in the agreement under consideration, to wit, one relating to the payment of a certain sum of money in the event of the future dissolution of the marriage relation. The opinion then says, "The law does not countenance such agreements," and quotes from former opinions the following: "Any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, * * * is void as contra bonos mores," citing *Loveren v. Loveren*, 106 Cal. 512, 39 P. 802; *Beard v. Beard*, 65 Cal. 354, 4 P. 229; *Newman v. Freitas*, 129 Cal. 289, 61 P. 907, 50 L. R. A. 548—and then quotes from *Seeley's Appeal*, 56 Conn. 206, 14 A. 291, a paragraph from the opinion of the Connecticut Supreme Court giving the reasons why a contract having for its purpose the future dissolution of the marriage relation must be held void. The *Pereira Case* and those following the rule there laid down simply reiterate the well-established principle that the marriage relation can only be dissolved by a court of competent jurisdiction, and that agreements facilitating and having for their object the dissolution of the marriage relation are contrary to public policy. In the case of *Rottman v. Rottman*, 55 Cal. App. 624, 204 P. 46, we have an agreement entered into between husband and wife providing for a future contingency, or, as therein stated, the husband was placed in the position that he might at any time abandon the wife or commit any breach of the marriage covenant with impunity, except that respondent could secure a decree of divorce from him. "By the contracts he was granted complete immunity from any financial charge whatever, and that, too, whether he continued to live with his wife, either as a faithful or faithless husband, or whether he deserted her in whatever shameless a manner, and he was equally freed from liability to suit for separate maintenance, however flagrant his conduct." Irrespective of section 159, Civil Code, no other

conclusion could have been reached except that the contract was void as against public policy.

In the case of *Sanguinetti v. Sanguinetti*, 51 Cal. App. 347, 196 P. 799, no question of separation was involved, and the court held as follows:

"In view of the provisions of sections 158 and 159 of the Civil Code, a husband or wife without entering into an agreement in writing for an immediate separation may convey to the other all title and interest in the community property or the separate property of the other, and where a wife for a valuable consideration, and in the absence of any unfair advantage taken by the husband, waives and relinquishes to him all of her interest in the community property and in his separate property, she cannot thereafter declare a homestead on any of the property, although they continue to live together as husband and wife."

It is also pointed out in the *Sanguinetti Case* that while section 159 reads a husband, wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and their children during separation, "it is to be observed, however, that the clause permitting them to alter their 'legal relations' in reference to property is not connected with or modified by the provision relating to an agreement for a separation." The court then says:

"It might be a fair construction to hold that a contract for the support of either or of the children, in order to be valid, must be coupled with an agreement of separation, but to make this latter contingency a precedent condition for the validity of a contract for the disposition of the community property is to do violence to the language of the section. The law prescribes no such limitation. The plain terms of the statute authorize the husband or the wife to convey to the other all title and interest in either separate or community property."

The court in that case further says:

"As before indicated, in view of the duty imposed upon the husband by sections 174 and 175 of the Civil Code, there may be some doubt whether the waiver of support would be binding while the parties are living together, but that part of the agreement is not involved in this controversy, and it manifestly does not affect the legal integrity of the provisions in reference to the property."

[1] There is nothing in this case, nor in any of the cases cited, which would lead to the conclusion that it was in the mind either of the Supreme Court, or of the District Court of Appeal, to so interpret section 159, Civil Code, as to prohibit parties who have actually separated from entering into an agreement adjusting their property rights and making provisions for the support of either. This question was not before the court in any

of the cases cited, and therefore any language in any of the opinions which might lend force to such an argument, while worthy of consideration, is not binding upon this court, and where the question is directly presented, we must give the section that interpretation which we think the law impels and which we find supported in other jurisdictions, and in practically all the cases where the validity of the agreement has not turned on the question of being against public policy or contrary to good morals.

[2] All of the cases cited having to do with contracts entered into between husband and wife in relation to their property rights and making provision for the support of either, or of the children of the parties, which have been upheld, when the question of good morals is involved, while the parties are living together, are those which contain an agreement for immediate separation, that is to say, an instantaneous, present act, without delay, or without any time intervening. 31 C. J. 245. The immediate separation referred to in the section means an actual present fact, that is, something which has been completed, and not an event to take place in the future. The whole theory of the law has been to prevent the execution and enforcement of agreements which have for their purpose the severance of the marriage relation in the future and not to invalidate agreements where the separation has already taken place or is an instant fact. Section 159, Civil Code, does not by its terms, nor do we think by any reasonable intendment that can be given to the language there used, purport to prohibit the execution of agreements for separation or invalidate agreements entered into between husband and wife adjusting their property rights after the separation has taken place. If a contract providing for immediate separation is not invalid as contrary to good morals, we do not very well see how it can be legally concluded that a contract made after the actual separation is contrary either to good morals or to any provision of the Civil Code. Section 158 allows the parties to enter into agreements and contracts which they might, if unmarried, subject to the rules relating to confidential relations, etc. Section 159, Civil Code, in its prohibitory terms, seeks only to prevent the parties from altering their legal relations, to wit, the marital duties and obligations arising from the marriage contract, that is really what is aimed at, and then under certain conditions while that relationship is existing and there has been no separation, it is enacted that they may make agreements which may alter their legal relations as to property, provided the circumstances are such that the agreement is not one denounced by the statute as against public policy. The public policy involved is the maintenance of the institution of marriage. Thus, if the contract is made by parties already separated, it cannot be said to

be against public policy when an agreement providing for an immediate discontinuance of that relation is permitted by the Code. Irrespective of the interpretation that should be given to section 159, Civil Code, we are not without authority that agreements made after separation settling property rights and making provision for support are valid. In the case of *Wells v. Stout*, 9 Cal. 479, Justice Field, in an elaborate opinion, after referring to the cases in other states and to a number of English authorities, thus states the conclusion of the court:

"From these authorities, and others to the same effect [which] might be cited, it is clear that, by the settled law in the United States, such agreements are not invalid, because against sound principles of policy, and are upheld and enforced, when entered into through the intervention of a trustee, if followed by immediate separation, or, if separation has previously taken place."

In *Walker v. Beal*, 76 U. S. 743, 19 L. Ed. 814, the Supreme Court of the United States, considering an agreement settling property rights and providing for support, says:

"Deeds of separation between husband and wife, for the separate maintenance of the wife, through the intervention of a trustee, are legal; and equity will enforce them if made as to a separation immediately to occur, or that has already taken place."

In *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453, the Supreme Court of the state of New York, in considering an agreement of separation entered into between husband and wife, held as follows:

"Marriage is favored in the law, and, as a contract not to marry is against public policy and void, so, too, is a contract between husband and wife to be divorced, or in the happening of a future event to live apart. But, while a contract to separate in the future is void, it is now too well settled, both in England and this country, to admit of discussion, that after a separation has taken place a contract may be made, through the intervention of a trustee, which is effective to bind the husband to contribute the sums therein provided for the future support of the wife. 1 Bishop, Mar. and Div. §§ 637, 650; *Carson v. Murray*, 3 Paige [N. Y.] 483; *Magee v. Magee*, 67 Barb. [N. Y.] 487; *Pettit v. Pettit*, 107 N. Y. 677 [14 N. E. 500], 10 Cent. Rep. 265; *Calkins v. Long*, 22 Barb. [N. Y.] 97."

The case of *Marshall v. Marshall*, 46 Cal. App. Dec. 1, cited by appellant, cannot be considered as authority. A hearing in the Supreme Court was granted in that case. See 196 Cal. 761, 239 P. 36, where a different ruling was had and an agreement for the support of the children was upheld. In 9 Ruling Case Law, 524, § 344, the text-writer, in setting forth the law on the subject of agreements between husband and wife, states the rule in this language, "It may be stated

generally, therefore, that such agreements, when they contemplate a separation in present or the continuance of an existing separation are generally upheld by the courts both in England and in this country," citing a large number of cases, and, further, "there is no objection to the separation agreement on the grounds of public policy if at the time there was an actual separation caused by the misconduct of the husband. Still, it is generally held immaterial whether the separation has already taken place, or is to take place immediately after the agreement, if an immediate and continued separation was contemplated when the contract was executed, and it did take place immediately," citing authorities. Only one conclusion can be reached from the authorities cited, to wit: That if the separation has already taken place, it stands upon the same footing as where the agreement provides for the separation to take place in present.

In the case at bar, in its provisions, the agreement under consideration is analogous to the first California case which we have cited, in that a trust has been created for the purpose to effectuate the agreement and accomplish the purposes intended thereby, and the rule is uniform that such agreements are valid.

[3] The agreement in question was entered into by the mutual consent of the parties, it was approved by the attorneys representing the respective parties, and by virtue of section 160, Civil Code, is adequately supported as to consideration. It is there said, "The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section," referring to section 159, Civil Code.

[4] The agreement also contains waivers on the part of the wife, which would constitute a valid consideration.

[5] It is further objected that the agreement is void in that it purports to continue in full force and effect until the death of the respondent. This question, however, is decided adversely to the contention of the appellant in the case of *Higgins v. Higgins*, 121 Cal. 487, 53 P. 1081, 66 Am. St. Rep. 57, where it was held that an almost identical clause as the one contained in the agreement under consideration was valid. We quote the clause from the *Higgins* Case:

"The payment of said annuity to be a binding and continuing obligation upon the said H. M. Higgins and upon his executors, administrators, and assigns, and to constitute a lien upon his estate during his lifetime, and after his death during the lifetime of the said Emily J. Higgins."

The legal effect of this clause is no different from that contained in the agreement under consideration which creates a lien upon the property conveyed to the trustee, binding upon the heirs, executors, and assigns of the respective parties.

In the case of *McCahan v. McCahan*, 47 Cal. App. 173, 190 P. 458, the agreement held invalid provided for paying the costs of a divorce action. In *Beard v. Beard*, 65 Cal. 354, 4 P. 229, the subject of the divorce was controlling in the decision. Likewise, in *Newman v. Freitas*, 129 Cal. 289, 61 P. 907, 50 L. R. A. 548, and *Loveren v. Loveren*, 106 Cal. 512, 39 P. 801, the subject of divorce was involved. These cases were cited by appellant but are not applicable here.

[6] It is also urged that the subsequent divorce voids a previous agreement settling property rights or providing for support. This, however, is not supported by the authorities. Provisions in the separation agreement for the support of the wife during life are not abrogated by a subsequent absolute divorce. 9 Ruling Case Law, 536, § 356. The authorities there cited are numerous, and we do not need to set them forth herein.

There is nothing in the case of *Sargent v. Sargent*, 106 Cal. 541, 39 P. 931, which abrogates an agreement providing for the maintenance of either party until death. In that case, divorce was one of the contingencies under which by the terms of the contract its provisions were to terminate. The conditions being different, the agreement being different in its terms, the conclusion there reached necessarily was different from the conclusion that must be here had upon a contract differing in its terms as to its time of continuance.

[7, 8] Upon the hearing of this cause on appeal, the appellant produced and asked to have admitted as a part of the record, under a suggestion of a diminution thereof, copies of pleadings in a case numbered 6895, entitled *Sarah M. Brown, Plaintiff, v. George H. Brown, Defendant*, filed and dismissed in the office of the county clerk of Placer county, on the theory that the files in that proceeding were taken judicial notice of by the trial court in this action. In this, however, appellant is in error, as courts do not take judicial notice of the papers and files of other actions. As stated in *Sewell v. Price*, 164 Cal. 265, 128 P. 407, while courts take judicial notice of their own records, the rule is limited to proceedings in the same case. It is well settled that courts cannot in one case take judicial notice of other records in another and different case. 16 Cyc. 918; *People v. De La Guerra*, 24 Cal. 73; *Lake Merced Water Company v. Cowles*, 31 Cal. 214; *Ralphs v. Hensler*, 97 Cal. 297, 32 P. 243. In order to have brought the proceedings in a former case to the attention of the trial court in this case, it would have been necessary to introduce in evidence the files and pleadings sought to be admitted here as a part of the record. This not having been done, such papers constitute no part of the record in this, a distinct and separate action. The mere fact that the names are the same does not

make the actions any the less separate and distinct. Being made no part of the record in the trial below, such papers cannot be admitted here.

[9] The appellant further contends that there is a conflict between finding No. 8 in that it sets forth that in the agreement the appellant covenants to pay the respondent \$150 per month for her maintenance and support, and finding No. 10 in that in the latter finding the agreement is set forth and shows that it is a property settlement and not an agreement for maintenance and support. A reading of the agreement, we think, very clearly leads to the conclusion that the agreement partakes of both the elements of a property settlement and of an agreement for support and maintenance, and combines in its terms the provisions of both sections 158 and 159, Civil Code, and by the authorities which we have cited is sustainable under either section, and by a large number of the authorities sustainable as a trust agreement without the support of either section. The objection in this particular we think more technical than meritorious because whatever name the trial court may have given to the agreement in one of its findings, the setting forth of the agreement itself would show its full purpose without the purpose being named by the trial court, and if incorrectly named, such incorrect naming would be disregarded as surplusage.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

83 Cal. App. 240

CITY CONST. CO. v. KENNY. (Civ. 5804.)

District Court of Appeal, First District, Division 2, California. May 20, 1927.

Hearing Denied by Supreme Court July 18, 1927.

1. Municipal corporations $\S$ 475—Special assessment, payable in installments, is not void for exceeding 50 per cent. of value of land (San Francisco City Charter, art. 6, c. 2, § 33).

Assessment for street improvement held not void under San Francisco City Charter, art. 6, c. 2, § 33, because it amounted to more than 50 per cent. of value of land as assessed for municipal purposes, where assessment was payable in installments.

2. Municipal corporations $\S$ 475—Provisions of street improvement ordinance, taking away right to pay in installments for noncompliance, held valid (San Francisco City Charter).

Provision of ordinance for street improvement, that failure to comply with certain provisions would deprive landowner of right to pay in installments, held not invalid as contrary to provisions of San Francisco City Charter.

3. Municipal corporations $\S$ 444—Failure to receive mailed notice held not to bar proceeding to foreclose lien for street work, in view of ordinance.

In action to foreclose lien for street work, defendant's testimony that she did not receive mailed notice will not prevent recovery, where there was no evidence that notice was not mailed according to ordinance, which provided that mailing was nonjurisdictional, and that failure to receive notice should not affect validity of proceedings.

4. Municipal corporations $\S$ 465—Assessment for street improvement held not invalid for failure to set out district benefited by contemplated work.

Assessment for street improvement held not invalid for failure to set out district benefited by contemplated work, where it was not district assessment, in view of ordinance authorizing improvement.

5. Municipal corporations $\S$ 465—Assessment for street improvement held not invalid on ground that all lots were not assessed for each part of work done.

Assessment for street improvement held not invalid on ground that all lots included were not assessed for each part of work done, where proceedings were not taken under section of ordinance providing for district assessment, or for front foot method, but were taken under section providing for different methods, including combination of methods.

6. Municipal corporations $\S$ 488, 489(5)—Inequalities in assessment for street improvement will not invalidate assessment, in absence of appeal to board of supervisors.

Inequalities or injustices in spreading of assessment for street improvement will not be held to invalidate assessment, where landowner failed to appeal to board of supervisors.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the City Construction Company to foreclose a lien for street work against Catherine Kenny. Judgment for plaintiff, and defendant appeals. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant.

Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for respondent.

KOFORD, P. J. This is an appeal from a judgment foreclosing a lien on defendant's property for street work done under public contract and street proceedings had and taken under the provisions of the San Francisco street improvement ordinance of 1918, Ordinance No. 4720 (New Series).

[1, 2] It is claimed that the assessment is void in that it amounts to more than 50 per cent. of the value of the land as assessed for municipal purposes. San Francisco Charter, art. 6, c. 2, § 33. This charter provision, however, by its terms does not apply to any as-

assessment made payable in installments. Appellant states that her assessment was not made payable in installments. This we take to mean that, although the resolution of intention stated that the assessment may be paid in installments, yet, because of the failure of appellant to comply with the provisions of sections 33 and 34 of the ordinance, she no longer has the right to pay in installments. It is claimed that these provisions of the ordinance are invalid because contrary to the charter provisions. These points have been considered by the Supreme Court and decided adversely to the contention of appellant. *Fay Improvement Co. v. Hanlon*, 193 Cal. 709, 227 P. 482; *Eaton v. Hanlon*, 193 Cal. 715, 227 P. 484; *Federal Construction Co. v. Wolfson*, 186 Cal. 267, 199 P. 512, 29 A. L. R. 1008.

Something is said in appellant's brief to the effect that the city engineer had promised appellant not to assess her land for work done in the alley when she conveyed the right of way to the city. The testimony on this point is meager and equivocal. We do not understand appellant to claim that this was an issue in the case. It was not. No way is pointed out how it could be an issue in this foreclosure proceeding nor how such a promise, even if made and broken, could invalidate the assessment for the public work done.

[3] Although appellant testified that she did not receive a mailed notice, there was no evidence that none was mailed according to the ordinance. But it is expressly declared in the ordinance, section 4, that mailing is nonjurisdictional and that the failure to receive the same shall in no wise affect the validity of the proceedings.

[4, 5] Appellant advances two other grounds against the validity of the assessment: First, that the resolution of intention fails to set out the district benefited by the contemplated work as required by the provisions of section 5 of the ordinance. Second, that all the lots included in the assessment were not assessed for each and every part of the work done, contrary to the provisions of section 5 and also subdivision 12 of section 21, which both state how a district assessment shall be spread.

The answer to these contentions is that the proceedings resulting in this assessment were not taken under section 5, which provides for a district assessment. Neither were they taken under section 21, subs. 1 to 8, which provide for the front foot method of assessment. They were taken under the provisions of subdivision 11 of section 21, which provides for several different methods, including a combination of several methods.

It was not necessary for the resolution of intention to describe or set out the district benefited by the work, because this was not a district assessment in whole or in part and was not made under section 5. The resolution of intention declared:

"That the lots, pieces, or parcels of land, contemplated to be made chargeable for the costs and expenses of the proposed work or improvement, are situated wholly or in part within the following described district."

Section 4 provides what the resolution of intention shall contain in general. Section 5 provides what it shall contain in case of a district assessment. There is no special requirement for the resolution of intention where an assessment is contemplated to be made under section 21, subd. 11, but it is required that the notice of improvement shall state that the method of assessment will be determined and declared at the time of taking action on the resolution. This was done in this case. The resolution also complied with the general provisions of section 4. The authorities cited by appellant interpret the Vrooman Act (*Deering's Gen. Laws 1923, Act 8194*), provisions requiring the resolution to describe the district benefited. These may be germane for section 4, but not for section 21, subd. 11.

[6] The assessment was properly spread in accordance with the provisions of the ordinance. None of the lots mentioned in the resolution of intention escaped assessment considering the entire work as one unit. Considering the public improvement as three units assessed against three groups of lots, no lot in any group escaped assessment for any unit chargeable to its group. Authorities holding proceedings invalid for not assessing certain lots at all under the Vrooman Act are therefore not in point. When subdivision 11 of section 21 is followed, "then the costs and expenses of such work or improvement, or any portion thereof may be assessed and apportioned according to (assessed value) or according to (superficial area) or partly by each or any method * * * of this ordinance." The resolution of the board of public works, passed at the time fixed and according to the notice of improvement, exercised the power of determining the method of assessment by dividing the assessment into three parts. The main part was ordered assessed against all the lots fronting upon the street improved upon a uniform square foot basis; the crossings against property adjacent to the same upon the front foot basis in the manner usual for crossing work; the alley improvement work upon both sides of one-half block upon the square foot basis. The assessment was actually spread according to the resolution, and we see no irregularity in the method used. If there were any inequalities or injustices in the spreading of the assessment, that was a matter which appellant should have appealed to the board of supervisors under the provisions of section 27 and section 21, subd. 11, of the ordinance. Not having done so, such inequalities, if any, will not afterwards be held to invalidate the assessment. *Buckman v. Landers*, 111 Cal. 349, 43 P. 1125; *Federal Construction Co. v.*

Newhouse, 186 Cal. 284, 199 P. 519; Watkins v. Vaughn, 182 Cal. 55, 186 P. 753; McSherry v. Wood, 102 Cal. 647, 36 P. 1010.
The judgment is affirmed.

We concur: STURTEVANT, NOURSE, JJ.

83 Cal. App. 25

SCOTT v. SUPERIOR COURT WITHIN AND FOR LOS ANGELES COUNTY et al.
(Civ. 5557.)

District Court of Appeal, Second District, Division 2, California. May 11, 1927.

1. **Mandamus** $\hookrightarrow$ 189—Stipulation providing for filing of second amended petition in superior court held relevant on question of character of judgment entered therein.

Where petition for writ of mandate was denied by the superior court, in original proceeding for writ of mandate in the appellate court to be directed to the superior court, copy of stipulation providing for filing of second amended petition in the superior court, filed by respondent in support of its answer in the appellate court, was relevant and material as bearing on understanding of parties, and particularly as to trial court's intention as to character of judgment entered with reference to its finality.

2. **Mandamus** $\hookrightarrow$ 189—Copy of judgment of superior court and motion to strike held admissible on question whether amended petition was properly stricken as sham.

Where second amended petition for writ of mandate in the superior court was, on motion of respondent, stricken, in original proceeding in the appellate court for writ of mandate, copies of petition, of motion to strike, and of judgment were admissible as bearing on question whether amended petition may have been properly stricken out as sham.

3. **Mandamus** $\hookrightarrow$ 164(2)—Where petitioner made no motion to strike answer as half demurrer and half plea, law issues therein might be treated as surplusage (Code Civ. Proc. § 1088).

Even though criticism of petitioner for writ of mandate that answer was half demurrer and half plea were well founded, and therefore seeking decision on allegations of her verified petition under Code Civ. Proc. § 1088, in interest of justice, statements in answer which present issues of law might be treated as surplusage, and disregarded.

4. **Mandamus** $\hookrightarrow$ 164(1)—Answer in proceeding in mandate may raise both questions of law and fact (Code Civ. Proc. §§ 589, 1088, 1089, 1091, 1094, 1109).

In view of Code Civ. Proc. §§ 1088, 1089, 1091, 1109, and section 1094, which indicates that, in mandate proceeding, question of law may be raised in different manner than is provided in section 589, answer in proceeding in mandate may be used to raise question of law as well as of fact.

5. **Mandamus** $\hookrightarrow$ 189—Judgment sustaining demurrer to amended petition for writ of mandate denying remedy prayed for held final (Code Civ. Proc. § 1064).

Judgment of superior court sustaining demurrer to amended petition for writ of mandate, and ordering that petitioner take nothing, and be denied remedy prayed for, held final, within Code Civ. Proc. § 1064, and complete disposition of matter involved.

6. **Judgment** $\hookrightarrow$ 219—Judgment should be simple sentence of law on material ultimate facts admitted by pleadings or found by court.

A judgment should be a simple sentence of the law on material ultimate facts admitted by pleadings or found by the court.

7. **Mandamus** $\hookrightarrow$ 189—Judgment denying remedy prayed for held final, in view of stipulation that proceeding should be submitted for decision on amended petition.

Judgment that petitioner for writ of mandate take nothing, and be denied remedy prayed for, held final, in view of stipulation that proceeding should be submitted on amended petition, and that, on filing of last of briefs, the proceedings should be submitted for decision.

8. **Mandamus** $\hookrightarrow$ 189—Where judgment of superior court denying writ of mandate was final, petitioner had remedy by appeal (Code Civ. Proc. § 963; Pol. Code, § 1609).

Where, in proceeding by school teacher for writ of mandate to compel board of education to reinstate her as a permanent teacher, in view of Pol. Code, § 1609, final judgment was entered that petitioner take nothing, and that she be denied remedy prayed for, petitioner, under Code Civ. Proc. § 963, had remedy by appeal.

9. **Mandamus** $\hookrightarrow$ 162—It was within superior court's discretion to rule that second amended petition for mandamus was sham, and thereafter enter final judgment.

In proceeding for writ of mandate in the superior court, where demurrer was sustained to amended petition, it was within the discretion of the superior court to order second amended petition stricken from files, if it was of opinion that it was sham, and thereafter enter final judgment.

Original application by Izelle Emery Scott for a writ of mandate to be directed to the Superior Court within and for the County of Los Angeles and another, to require respondent to hear and determine a petition for writ of mandate to compel reinstatement of petitioner as a public school teacher. Writ denied.

William A. Alderson, of Los Angeles, for petitioner.

Everett M. Mattoon, County Counsel, and Pierce Works, Deputy County Counsel, both of Los Angeles, for respondents.

CRAIG, Acting P. J. The present proceeding is one by which it is asked that a peremptory writ of mandate be directed to the superior court of Los Angeles county. The

proceeding in the superior court was one of a similar character, by which it was sought to compel the board of education to reinstate the petitioner as a teacher in the public schools of the city of Long Beach.

The petition before us alleges that petitioner is a permanent teacher in the public schools of said city, as defined in section 1609 of the Political Code; that she was wrongfully dismissed from that position by the board of education of Long Beach, and that she thereafter began the proceeding in mandate above mentioned in the superior court of Los Angeles county; that an amended petition was filed in that proceeding, and a demurrer interposed thereto by the respondent board of education, which was on October 25, 1926, sustained, no other order being made; that there was then in effect a rule of the superior court allowing ten days within which to amend any of certain pleadings upon the sustaining of a demurrer thereto, unless otherwise ordered by the court; that the petitioner, relying upon this rule, on October 28, 1926, filed a second amended petition, which was, on motion of respondents, stricken from the files; that the ground of this motion was that the petition was filed without authority of law, without leave of court, and without notice to the respondent; that the motion to strike the second amended petition was granted on the 22d day of December, 1926, and thereupon judgment in favor of the respondent was entered by the court.

[1, 2] The answer raises certain issues both of law and of fact. Concerning matters of fact it is alleged that, at the time of the service and filing of the first amended petition in the superior court proceeding, it was stipulated that such proceeding should be submitted for decision upon the pleadings as filed, and that such decision should be final, subject to the usual right of appeal; that the order sustaining the demurrer was a final adjudication of the matter, and that it was made on October 20 and entered on October 25, 1926, and that the judgment in favor of respondent was signed on October 28, 1926, by a judge of the superior court, and was on that day forwarded to the county counsel for filing. The answer further alleges that the motion to strike the second amended petition was not only based upon the ground alleged in the petition, but also upon the further ground that such petition was sham, and an attempt to evade the ruling of the court upon the demurrer theretofore sustained to the first amended petition; also it is denied that the petitioner in filing her second amended petition in the superior court relied upon the rule allowing an amended pleading to be filed as heretofore recited, but alleges that on October 27, 1926, said petitioner prepared and served a notice of motion for leave to amend her first amended petition, which motion was later argued, sub-

mitted, and, on December 3, 1926, was denied. The respondent, in support of the allegations of its denials and allegations of its answer wherein it conflicts with the allegations of the petition, filed copies of certain pleadings and papers offered in the superior court proceeding, to which the petitioner objects on the ground that they are immaterial and irrelevant. One of these exhibits is a copy of the stipulation providing for filing of a second amended petition. This, we think, is both relevant and material as bearing upon the understanding of the parties, and particularly the intention of the trial court as to the character of the judgment entered with reference to its finality. Another exhibit which obviously is admissible upon the same issue is a copy of the judgment itself. Also a copy of the motion to strike is admissible as indicating the ground upon which the motion may have been granted, as are copies of the petitions as bearing upon the question as to whether or not the second amended petition may have been properly stricken out as sham.

[3, 4] At the outset the sufficiency of the answer is challenged because it is said to be half demurrer and half plea. An examination of the pleading in question shows that, in addition to joining issue upon certain allegations of fact contained in the petition and alleging others constituting new matter, it also raises issues of law. Although no motion to strike has been presented, we are asked to hold that the answer is wholly bad, and to disregard it, and to decide the case upon the allegations of the verified petition under section 1088 of the Code of Civil Procedure. Even if petitioner's criticism of the answer were well founded, we would not consider such harsh treatment as that sought by the petitioner to be consistent with the liberal tone of our law as applied to pleadings, nor as conducive to a judicial determination on the basis of exact justice. Some of the averments of the answer raising issues of law are in response to allegations in the petition stating conclusions of law. These and other statements in the answer which appear to present issues of law might be treated as surplusage and disregarded, were this necessary to preserve the rights of the respondent where, as here, the petitioner has made no such attack upon the answer as if resolved in her favor would permit of an amendment thereto. But the claim is earnestly made by petitioner that a proper answer in a proceeding in mandate cannot, if it is to be maintained as an answer, raise both questions of law and of fact. The respondent asserts with equal assurance that our Code of Civil Procedure in the chapter dealing with proceedings in mandate has expressly authorized pleading of both classes of issues in the one return of the respondent. The question is squarely presented, probably for the first time in this jurisdiction. It is,

we think, entitled to the expression of our opinion, although, as we have indicated, our decision might be based upon other grounds. Section 589 of the Code of Civil Procedure provides that an issue of law arises upon a demurrer to a complaint or answer or to some part thereof. But section 1094 of the Code of Civil Procedure clearly indicates that in mandate proceedings a question of law may be raised in a different manner than as provided in section 589 of the same Code. Section 1094, referring to proceedings in mandate, provides:

"If the answer raises only questions of law
* * * the court must proceed to hear or fix a day for hearing the argument of the case."

We think the language is susceptible of no other fair construction than that the answer may raise questions of law, and that it may also raise questions of fact. While it is true that generally the rules of practice are the same in proceedings in mandate as in civil cases, this being expressly provided in section 1109 of the Code of Civil Procedure, still that very section provides that such rules may not be identical, and anticipates exceptions where they are not the same, for it reads:

"Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title."

Apparently the pleadings of the parties in mandate constitute an outstanding exception to the rule above mentioned. Special provisions are made for such pleadings. These are contained in chapter 2, title 1, part 3, of the Code of Civil Procedure, and the whole scheme is set up in sections 1089, 1091, and 1094 thereof. From this it is apparently contemplated that the pleadings shall be as follows: A petition for the writ similar to a complaint in a civil action; an answer by the adverse party; and a demurrer or replication to the answer of the respondent. It is significant that, although express provision is made for the demurrer to the answer, no provision is made for a demurrer to the petition. If this were all, the conclusion that no demurrer to the petition was intended might be in doubt, for it might be contended that it could not well have been the intention of the Legislature to exclude all means of raising questions of law. But we find in section 1094 evidence that such was not intended, and that the necessity for a vehicle through which to present questions of law was not overlooked, for here we have a definite authority for the raising of this kind of an issue by an answer to the petition. We are not required in deciding the issues now before us to say that a demurrer to the petition in mandate is not permitted, but we do hold that the answer may be used to raise question of law as well as of fact, and that,

although the answer filed by the respondents here raises both, it is a good pleading in so far as objection upon that ground is concerned.

We now proceed to consider the merits of this proceeding as presented by the petition, the answer, and the exhibits which we have ruled are properly before us.

[5] The judgment which was rendered in the superior court provides that:

"* * * The court being fully advised in the premises, and the court having duly made and entered its order sustaining the demurrer to said amended petition as presented and embodied in the said return. It is therefore ordered, adjudged, and decreed that petitioner take nothing; that the issuance of a peremptory writ of mandate in the above proceeding be, and the same is hereby, denied, and that the alternative writ of mandate heretofore issued herein be, and the same is hereby discharged."

[6] Upon its face this is a complete disposition of the matter—a judgment as final in form as could have been rendered after a trial, and it is apparent that the court regarded the issue as joined by the demurrer to the amended petition. "A judgment in a special proceeding is the final determination of the rights of the parties therein." Code Civ. Proc. § 1064. It is "the decision or sentence of the law, given by a court or competent tribunal, as a result of proceedings instituted therein for the redress of an injury." *Stearns v. Aguirre*, 7 Cal. 443. Here the petitioner instituted a proceeding seeking redress and a certain remedy for an alleged injury. She sought a peremptory writ to compel the board of education of Long Beach to recognize her right as a regular teacher in the public schools and to reinstate her as such therein. The court, after being fully advised, and, of course, having assumed for the purposes of its decision the truth of every averment of her petition, decided as a matter of law that she possessed no such right, and therefore refused to render the redress which she sought. A judgment should be the simple sentence of the law upon material ultimate facts admitted by the pleadings or found by the court. *Rankin v. Newman*, 107 Cal. 602, 40 P. 1024, 41 P. 304; *Gregory v. Nelson*, 41 Cal. 280. Here the petitioner must be presumed to have pleaded the ultimate facts and the demurrer admitted them. The decision that petitioner take nothing, and particularly that she be denied the remedy prayed for, is a simple sentence of the law upon such admitted facts.

[7] If there were any doubt as to the intention of the court with respect to the finality of its judgment, the stipulation of the parties which was on file, and presumably in the mind of the trial judge when the judgment was rendered, we think clearly indicates that the parties had agreed that a final decision of the proceeding should be made when the court should pass upon the

demurrer to the amended petition; and it may reasonably be inferred that the court intended to act upon this stipulation and decide the proceeding. This stipulation provides " * * * that said petition may be filed and this proceeding shall be submitted on said amended petition; * * * that on the filing of the last of said briefs this proceeding shall be submitted for decision." And so we think the order of the court in question is surely a final judgment.

[8] This being so, the petitioner has a remedy by appeal. Code Civ. Proc. § 963. If the remedy by appeal provided by law is plain, speedy, and adequate, respondent insists that mandamus will not issue. This is undoubtedly the rule. 16 Cal. Jur. p. 787; *Aldrich v. Superior Court*, 135 Cal. 12, 66 P. 846; *People v. Superior Court*, 114 Cal. 466, 46 P. 383; *Sheerer & Co. v. Hutton*, 7 Cal. App. 524, 94 P. 849; *Gutierrez v. Superior Court*, 106 Cal. 171, 39 P. 530; *San Joaquin County v. Superior Court*, 98 Cal. 602, 33 P. 482; *Green v. Hebbard*, 95 Cal. 39, 30 P. 202; *People v. Pratt*, 28 Cal. 166, 87 Am. Dec. 110.

Upon this phase of the matter both parties refer to *Wood v. Strother*, 76 Cal. 545, 18 P. 766, 9 Am. St. Rep. 249. In the opinion in that case the Supreme Court has reviewed the decisions of this and other jurisdictions. Upon the proper scope of the writ of mandamus and the limitations upon its use the rule is clearly epitomized in the following statement:

"The propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final; and if not, upon whether the system of practice furnishes any other adequate remedy."

And again in this language:

" * * * If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way. If it was not intended to be final, but there is another 'plain, speedy, and adequate remedy,' the writ cannot issue; for it was not designed to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise, there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice."

The cases cited by petitioner in support of the contention that her remedy by appeal is inadequate, and that mandamus will lie in this instance, do not uphold that claim. A number of them were cases where the writ

was used to compel the trial court to render judgment, or take other affirmative action to which the petitioner was entitled, such as for a case to be dismissed, to have a commission issued to take a deposition, or to determine a motion to tax costs. We need not say more to distinguish these authorities from the proceeding before us.

[9] As we have said, an inspection of the exhibits, and particularly the copy of the notice of motion to strike petitioner's second amended petition in the superior court, shows that one of the grounds stated was that said petition was sham and an attempt to evade the ruling of the court on demurrer to the first amended petition. This fact was omitted from the petition. It should not have been left out of that pleading, for it is as conspicuous a part of the motion to strike as is the ground stated in the petition here, to wit, that said second amended petition "was filed without authority of law, without leave of court, and without notice to respondents, or any of them, as provided by law." The motion to strike was granted without specification by the court of the ground upon which its ruling was based. We need not here determine whether or not the second amended petition was objectionable on the ground stated in the motion. It is sufficient in that regard that both the first and second amended petitions were before the court. From our inspection of them we cannot say that, if the order was given upon the ground that the second amended petition was sham, in that it was not distinguishable in any material respect from the first amended petition to which a demurrer had been sustained, the ruling of the trial court in that regard would be an abuse of discretion. It was surely a matter well within its jurisdiction to pass upon the motion, and, if it was of the opinion that the pleading was sham, to order it stricken from the files, and thereafter to enter final judgment.

The stipulation heretofore discussed and the judgment thereon were certainly sufficient to take the proceeding out of the rule upon which petitioner relies, the operation of which is only of effect when not "otherwise ordered by the court."

Entertaining the views which we have expressed, it is not necessary to pass upon other points presented in the briefs. The application for a peremptory writ of mandate is denied.

We concur: THOMPSON, J.; JOHNSON, Justice pro tem.

83 Cal. App. 197

OGREN v. INNER HARBOR LAND CO.
(Civ. 4225.)

District Court of Appeal, Second District, Division 2, California. May 18, 1927.

1. Contracts ⚡303(2)—Statute excusing non-performance held not to cause abrogation of contract by operation of law (Civ. Code, § 1511).

Civ. Code, § 1511, excusing nonperformance of an obligation in certain cases, does not cause abrogation of contract by operation of law.

2. Vendor and purchaser ⚡112(1), 334(5)—Condemnation of lot, purchased under conditional sale contract, held to entitle vendee to rescind and recover down payment.

Where, after execution of conditional sale contract to convey a lot for specified price payable in monthly installments, vendor to furnish good and sufficient deed and certificate of title on full payment of purchase price, property was condemned by county flood control district in proceedings in which vendee was not a party, *held* that vendee was entitled to rescind contract and recover payment on price and was not required to accept vendor's offer to substitute for lot taken another of equal value.

3. Novation ⚡7—Vendor's offer to substitute another lot for condemned lot, covered by conditional sale contract, held merely offer of novation, and vendee was not required to accept.

Vendor's offer to substitute another lot for lot covered by conditional sale contract, which lot was condemned by county flood control district, *held* merely a proposed novation, and vendor could not compel vendee to accept such offer, since one may not compel another to contract with him.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Ernest Ogren against the Inner Harbor Land Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Daly, Daly & Todd and J. E. Pawson, all of Long Beach, for appellant.

Randall, Bartlett & White and Walter J. Little, all of Los Angeles, for respondent.

CRAIG, J. This is an appeal upon the judgment roll, wherein it appears that the facts necessary to a consideration of the case upon appeal may be stated substantially as follows: On or about June 24, 1913, the defendant executed a conditional sale contract with the plaintiff, therein agreeing to sell to the latter a certain lot in the Inner Harbor Tract of Long Beach, Los Angeles county, for the principal sum of \$900, \$90 of which was paid on said date, installments of \$10 each were to be paid each month, and the defendant agreed to furnish a good and sufficient deed and certificate of title upon full payment of the purchase price. Thereafter, and on

April 20, 1919, the Los Angeles county flood control district instituted condemnation proceedings against the appellant and others, but without joining the respondent, by virtue of which proceedings the district acquired possession on May 14, 1919, of a large tract of land, including the land in question. On October 6, 1919, appellant notified Ogren that, in order that he might benefit by certain proposed improvements in that vicinity, appellant would exchange a lot or lots of like value "for the lot or lots which you hold under contract in the county flood control right of way." Between the date of the contract and November 22, 1918, Ogren had paid on account of the stipulated purchase price the sum of \$751.68, and all taxes and assessments. He did not accept the appellant's offer to substitute other property, but on July 13, 1920, commenced this action praying for rescission of the contract and for the amount which he had paid thereon. The appellant interposed a general demurrer to the complaint, which was overruled. An answer was then filed and the case was submitted upon an agreed statement of facts. Thereafter the court rendered judgment in favor of the plaintiff and respondent.

The ground here assigned for reversal is that:

"Recourse is either against the district, or against the fund upon equitable grounds. Performance by defendant being excused by operation of law, no rescission will lie, and plaintiff cannot recover the payments under the contract; in fact, no action under the contract will lie, the same having been abrogated by operation of law."

[1, 2] The appellant cites no authority which supports this theory, and we are aware of none. The provision of section 1511 of the Civil Code referred to by it, to the effect that want of performance of an obligation is excused by operation of law, falls far short of being an authority for the proposition that an abrogation of the contract results by operation of law. Without doubt, appellant would be excused from specific performance of the contract, because it is beyond his power to specifically perform or to comply with its terms, but the respondent has sought no such impossible redress. It may be conceded that the respondent might have appeared in the condemnation proceeding, asserted his interest, and secured an allotment of his proportionate share, which the county flood control district was required to pay for the lot in question. However, he did not choose to do so.

We know of no case in this jurisdiction directly in point, but several decisions involve a determination of the relative rights of parties to a contract where performance has been excused through the intervention of an irresistible superhuman cause, such as is specified by

section 1511 of the Civil Code. Where buildings upon property contracted to be sold, but remaining in the possession of the vendor, are destroyed by fire, the latter cannot compel the vendee to complete the purchase, but the latter may rescind and secure the return of what he shall have paid on the contract. *Conlin v. Osborn*, 161 Cal. 659, 120 P. 755; *Smith v. Phoenix Insurance Co.*, 91 Cal. 323, 27 P. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191. To the same effect is *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325.

Kares v. Covell, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271, was a case similar in principle to the one before us. There the vendor had perfect title when he entered into an executory contract to convey, but subsequently and before conveyance was made lost title to a part of the premises by the widening of a street. It was there pointed out that a covenant for title applies to the time of conveying rather than to that of the contract for sale, and that under the circumstances there involved the vendee might elect to take what the vendor could convey and hold the latter answerable in damages for the balance, or to rescind the contract and recover back the amount paid. In that case, as here, the vendee chose to rescind, and was held to be entitled to that remedy.

[3] Appellant's only offer was to substitute other property. This amounted to nothing more than a proposed novation. That one may not compel another to contract with him is elementary and needs no citation of authority.

The judgment is affirmed.

We concur: WORKS, P. J.; MURPHEY, Justice pro tem.

83 Cal. App. 201

FINKELSTEIN v. COSGROVE. (Civ. 5454.)

District Court of Appeal, First District, Division 1, California. May 19, 1927.

1. Appeal and error §928(4)—Where record does not indicate who requested instructions complained of, judgment will not be reversed, since appellate court will presume appellant requested them.

A judgment will not be reversed on the giving or refusing of instructions where the record does not indicate at whose request they were given, since the appellate court will presume they were given at the request of the complaining party.

2. Appeal and error §934(1)—On appeal, every presumption favors the judgment.

On appeal, every presumption must be indulged in favor of the judgment.

Appeal from Superior Court, City and County of San Francisco; Walter E. Herzinger, Judge.

Action by Jacob Finkelstein against John E. Cosgrove. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 248 P. 704.

G. C. Ringole, of San Francisco (Samuel Hamburg, of San Francisco, of counsel), for appellant.

Sloss, Ackerman & Bradley and Sloss & Ackerman, all of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This appeal is from a judgment entered in favor of respondent upon the verdict of the jury. Appellant relies for a reversal of the judgment entirely upon alleged errors in the instructions of the court to the jury. It is not contended that the verdict of the jury is against the evidence.

Respondent has called our attention to the fact that the record does not indicate at whose request the instructions complained of were given and urges that appellant cannot be heard to complain of error in the instructions, since it is not shown that they were not given at his request, and cites us to a number of authorities to support his position. The latest expression in this state upon the question is *Bognuda v. Pearson*, 71 Cal. App. 105, 110-111, 234 P. 857, 859, in which the court uses this language:

"But there is still another obstacle in the way of reviewing the objections to the instructions in this case in the fact that there is nothing to indicate or show at whose request the instructions were given—whether at the request of the plaintiffs or the defendants. The presumption is, therefore, that they were given at the request of the defendants. *Gray v. Eschen*, 125 Cal. 1, 5 (57 P. 664); *Sutter Butte Canal Co. v. American Rice & Alfalfa Co.*, 182 Cal. 549, 553, 554 (189 P. 277). A party cannot predicate prejudice on erroneous instructions submitted by the court to the jury by his request."

In *Gray v. Eschen*, 125 Cal. 5, 57 P. 667, the same rule is announced:

"It is presumed that the proceedings in the court below were regular, and where error is claimed it is incumbent upon appellants to show it affirmatively. Applying the rule to the instructions given in this case, we must presume that each and every one of the instructions were given at the request of plaintiffs' counsel."

And in *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 37, 95 P. 1128, 1129, the court says:

"The statement sets forth about twenty folios of instructions, but nowhere is it shown which were given at the request of the plaintiff, which were given at the request of defendant, or which were given upon the court's own motion."

And, after quoting from *Gray v. Eschen*, supra, the court concluded:

"For this reason we cannot say the court erred in the giving of the instructions."

In *Skrocki v. Stahl*, 14 Cal. App. 1, 110 P. 957, it is held:

"Even if liable to the objections urged by appellant, we should have to assume that the criticized instructions were given at his request in the absence of anything in the record to show to the contrary."

And in *Sutter Butte Canal Co. v. American Rice & Alfalfa Co.*, 182 Cal. 549, 553, 554, 189 P. 277, 279:

"There is nothing, however, in either transcript [clerk's and reporter's] to show whether or not this instruction was given by the court of its own motion or at the request of the plaintiff or the defendant. As to the other instructions, each indicates whether or not it is given at the request of the plaintiff or defendant as set forth in the clerk's transcript. It is important for the record to show whether or not instructions complained of are given at the request of the party complaining, and this should be made clear by the judge. Code Civ. Proc. § 609. In default of such explanation a party complaining of such an instruction may find its objection precluded by the rule which favors the regularity of the proceedings of the trial court."

Appellant argues that, where the record fails to disclose at whose instance or request the instructions were given, the reviewing court may, if it so desires, presume that they were proposed by appellant—that this is only a presumption and may be disregarded; that in *Gray v. Eschen* the court indulged merely in a presumption that the instructions complained of were given at the request of plaintiff's counsel; that with respect to *Perry v. J. Noonan Furniture Co.* the language of the court was purely dictum, the judgment of the trial court being reversed upon another ground; that in *Skrocki v. Stahl* the appellate court did in fact consider the instructions and found them nonerroneous, and, similarly, in *Sutter Butte Canal Co. v. American Rice & Alfalfa Co.*, the court also examined the instructions and found they contained no error; that in *Shannon v. Calmus*, 70 Cal. App. 652, 234 P. 107, the court holds that irrespective of the defect in the record showing at whose instance or request the instructions complained of were given, such instructions were proper and justified the judgment of the trial court.

In the cases in which the instructions were considered, the court found it unnecessary to observe the presumption, and since the instructions were not prejudicial and did not call for a reversal, it was not necessary to give effect to the presumption in order to affirm the judgment. Our attention, however, is not called to any authority in which the court reversed a judgment in the face of this presumption. "Every intendment and

presumption not contradicted by or inconsistent with the record on appeal must be indulged, in favor of the orders and judgments of superior court." 2 Cal. Jur. 852.

[1, 2] There seems to be no question that in this state a judgment will not be reversed on the giving or refusing to give instructions where there is nothing to indicate or show at whose request the instructions were given—whether at the request of the plaintiff or the defendant; that, under the presumption that every intendment must be indulged in favor of the judgment, the presumption is that they were given at the request of the party complaining.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

83 Cal. App. 317

FOWLER et al. v. CARMEL CATTLE CO.
(Civ. 4669.)

District Court of Appeal, Second District, Division 2, California. May 23, 1927.

1. Appeal and error ⇐931(1)—All intendments favor judgment of court sitting without jury.

Where case is tried to court without jury, all intendments must be resolved in favor of judgment.

2. Appeal and error ⇐1011(1)—Conflicts in evidence held for court sitting without jury.

Where case is tried to court without jury, conflicts in evidence are for determination of trial court, and appellate court will not disturb its determination unless there is no substantial testimony in record to support judgment.

3. Waters and water courses ⇐158½(1)—Evidence held to support finding that lessor did not promise sufficient water supply, which failed.

In action by lessees for lessor's failure to supply water for irrigation, evidence held sufficient to support finding that there was complete failure of water supply through no fault of defendant, and that no promises or representations had been made that sufficient amount of water would be furnished.

4. Waters and water courses ⇐158(4)—Estoppel cannot be founded on lessor's promises to furnish water for irrigation which court on conflicting evidence found were not made.

In lessee's action for lessor's failure to supply water for irrigation, argument that defendant was estopped to deny truth of promises and representations that such water would be furnished held inapplicable, where trial court found on conflicting testimony that such promises and representations were not made.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action for damages for failure to supply water for irrigation by Charles D. Fowler

and another against the Carmel Cattle Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

James H. Farragher, of Los Angeles (Moore & Farragher, of Los Angeles, of counsel), for appellants.

Goodwin & Morgrage, of Los Angeles, for respondent.

CRAIG, J. On or about October 31, 1918, the defendant corporation executed a 5-year lease to the plaintiff and appellant Charles D. Fowler of certain farm lands in Kern county, all of which the latter agreed to plant to wheat, milo maize, beans, rice, or other crops, and to keep the same sufficiently irrigated whenever water should be available therefor. It was also provided in said lease that—

"Whereas, the land described in this lease is entitled to water for irrigation from the canal system of the Buena Vista Lake Association, and through canals and ditches heretofore constructed to and across said land and owned and controlled by Miller & Lux, a corporation, and Carmel Cattle Company, a corporation, now therefore it is a condition of this lease that said lessee is to receive the water for irrigation of the land described in this lease, to which said land is entitled, without cost to said lessee, other than the upkeep of the canal and ditch system on said land."

It was alleged in the complaint that the plaintiff Fowler, with the defendant's consent, assigned a one-half interest in the lease to plaintiff, Arant, and that the plaintiffs thereafter planted about 210 acres of said lands to rice; that prior to and at the time of signing the lease the defendant represented to the plaintiffs that it would "see that there was made and kept available, when reasonably needed under said lease, sufficient water from said source of supply and through said system to properly irrigate said leased lands"; that the defendant was entitled to 9.94 per cent. of the water in said canal system, and could have supplied a sufficient amount to irrigate the crop, but that it failed and refused to do so, and the crop was a failure, to the plaintiffs' damage in the sum of \$35,364.

Respondent answered, denying that it had at any time made any statements or representations with respect to a supply of water, or that it promised to furnish a sufficient or any amount of water, and alleged that the failure of the rice crop was due to the carelessness and negligence of the plaintiffs.

The case was tried by the court, without a jury, and judgment was rendered for the defendant, with costs, from which judgment the plaintiffs appealed.

Appellants first contend that the evidence was insufficient to warrant or support the findings and judgment, and argue that they were induced by P. H. Clark, a representative of the defendant, to lease the lands in con-

troversy solely by statements and promises alleged in the complaint, and that the defendant was estopped to deny the truthfulness of such statements.

The plaintiffs introduced evidence tending to prove that Clark had at various times assured them that there was plenty of water, and that he would see that they were furnished a sufficient amount. However, Clark and four other witnesses testified on behalf of the defendant that the latter did not at any time promise to furnish or represent that there would be sufficient water, nor suggest that the plaintiffs plant rice or any particular crop, but that the plaintiffs, and especially Fowler, stated that they were sure to get enough water to make a crop of milo maize, and that, if there should be a doubt as to their ability to irrigate a rice crop, they would let that wait another year; that Fowler was informed that plaintiffs would receive their share; that, while the water had theretofore been ample for the lands of the defendant, the sources of its supply in 1919 were practically dry, and rendered it impossible to convey any water to plaintiffs' crop. Clark testified that from the outlet canal to the leased premises it was about 30 miles, the ditches were very dry, and any small amount of water that might enter the canals would not flow that distance. The witness Tazoli testified that 40 or 50 acres of the rice crop was at first fairly good, but that the rest was poor, and that he did not think the crop would have matured if there had been sufficient water to irrigate it. It appeared that the defendant's leased lands were entitled to but 9.94 per cent. of the water at its source, and that, although with dredging Miller & Lux did succeed in obtaining a small amount of water, by pumping, yet about 10 per cent. of such available supply would have been of no consequence to dry lands 30 miles distant. One witness testified that "the water was lower in the lake than I had ever seen it; it receded, I should think, more than 2 miles from the outlet canal." Appellants sought to show that, had defendant also resorted to dredging and pumping, the drought might have been averted, but Clark testified that Miller & Lux had entire charge of the physical management of the water coming to and owned by the Buena Vista Association. As we have seen, their efforts in this respect were fruitless.

[1-3] All intendments must be resolved in favor of the judgment, and conflicts in the evidence are for the determination of the trial court. Appellate courts have no power to disturb its determination except where there is no substantial testimony in the record to support the judgment. *Valentini v. Gobbi*, 60 Cal. App. 289, 212 P. 718; *Mah See v. North American Acc. Insur. Co.*, 190 Cal. 421, 213 P. 42, 26 A. L. R. 123. We have here a sharp conflict in the evidence offered by the parties to this controversy, and upon the

record before us we think the trial court may well have concluded that there was a complete failure of the water supply, through no fault of the defendant, and that no promises or representations had been made that a sufficient amount of water would be furnished.

[4] The argument that, having made such promises and representations, the defendant was estopped to deny their truth, is inapplicable, because it assumes that they were in fact made. As we have seen, the trial court upon conflicting testimony, found to the contrary. There was an abundance of evidence adduced which strongly tended to show that the plaintiffs had no cause of action for damages against their lessor, and, the trial court having accepted it as true, we would not be justified in holding, upon the record presented, that it erred in so doing.

Certain rulings upon the evidence are also challenged, but from the views herein expressed, after carefully reviewing the whole case, we think they were not improper.

The judgment is affirmed.

We concur: WORKS, P. J.; JOHNSON, Justice pro tem.

83 Cal. App. 321

PEOPLE v. SHEARER et al. (Cr. 1440.)★

District Court of Appeal, Second District, Division 2, California. May 23, 1927.

Hearing Denied by Supreme Court July 21, 1927.

1. Conspiracy ⚡47—**False pretenses** ⚡49(1)—Evidence held to support conviction of obtaining, and conspiring to obtain, money by false pretenses.

Evidence held sufficient to support conviction of obtaining, and conspiring to obtain, money by false pretenses.

2. False pretenses ⚡26—Information for obtaining money by false pretenses for interest in business, of which seller was not owner, held sufficient.

Information alleging that defendants, with intent to defraud, knowingly and feloniously represented that they had for sale an interest in business, in which one represented as owner had no interest, and that prosecuting witness paid money on faith of such representations, which were made for purpose of inducing him to do so, sufficiently averred intent to defraud, fraud actually committed, false pretenses used, and accomplishment of fraud by means thereof.

3. Indictment and information ⚡71—Information need only state facts enabling person of common understanding to know charge, and court rightly to pronounce judgment (Pen. Code, §§ 950, 959).

Information need only state facts in such manner as to enable person of common understanding to know what is intended, and enable court to pronounce judgment of conviction according to right of case, under Pen. Code, §§ 950, 959.

4. Conspiracy ⚡51—One convicted of conspiracy to obtain \$400 by false pretenses was punishable as for grand larceny (Pen. Code, §§ 182, 487, 489, 532).

One convicted of conspiracy to obtain money in amount of \$400 by false pretenses, which is punishable as larceny by Pen. Code, § 532, and, under section 487, constitutes grand larceny, which, being punishable under section 489 by imprisonment in state prison for not less than one nor more than ten years, is a felony, became subject to punishment as for grand larceny under first penal paragraph of section 182.

5. Conspiracy ⚡51—Only punishment for conspiracy to commit felony is that prescribed in first penal paragraph of statute (Pen. Code, § 182).

Only punishment authorized on conviction of conspiracy to commit a felony is that prescribed in first penal paragraph of Pen. Code, § 182; "other acts described in this section," as used in second penal paragraph, referring to offenses which are not felonies.

6. Criminal law ⚡995(4)—Indeterminate sentence for conspiracy to obtain \$400 by false pretenses held not objectionable as leaving prison authorities to fix term (Pen. Code, §§ 182, 489).

Indeterminate sentence of imprisonment in state prison, on conviction under count charging conspiracy to obtain money in amount of \$400 by false pretenses, held as definite and certain as that under third count, charging crime of obtaining money by false pretenses, and not objectionable as leaving prison authorities to determine length of term; conviction being for felony, punishable under first penal paragraph of Pen. Code, § 182, as for grand larceny under section 489.

7. Conspiracy ⚡43(6)—Information for conspiracy to obtain money for interest in plant, none of which was owned by seller, held sufficient, though not alleging representation that seller owned interest.

Information charging conspiracy to obtain money by purporting to carry out sale of interest in plant, no part of which was owned by person introduced as seller, with fraudulent intent to deceive and defraud prosecuting witness, and alleging that defendants made false representations to him in furtherance of conspiracy, and cheated him out of his money thereby, sufficiently charged criminal conspiracy, though not alleging that conspirators, as part of conspiracy, knowingly or falsely, or with intent to defraud, represented that seller owned interest in plant.

8. False pretenses ⚡20—Whether crime is larceny or obtaining money or property by false pretenses depends on whether owner intended to part with possession only or with title also.

If owner, in placing his money or property in hands of one defrauding him thereof, intended to part with possession merely, and not to transfer title, crime is larceny, but, if title is intended to pass at time, offense is that of obtaining money or property by false pretenses.

9. False pretenses $\hookrightarrow$ 20—Defendants representing to prosecuting witness that he was buying interest in plant and taking his money as payment therefor held properly charged with obtaining money by false pretenses, not larceny.

Defendants representing to prosecuting witness that he was buying half interest in cleaning plant, and taking his money as payment therefor, having another make affidavit in purported seller's name that there were no debts, and using it as basis for immediate consummation of sale, held correctly charged with obtaining, and conspiracy to obtain, money by false pretenses rather than larceny by trick and device.

10. Criminal law $\hookrightarrow$ 372(6)—Evidence of similar transactions with others held admissible in trial for conspiracy by false pretenses, showing system.

In trial for conspiracy to obtain money by false pretenses, evidence of similar transactions with other parties who had had dealings with defendant held admissible to show criminal system of operation.

11. Conspiracy $\hookrightarrow$ 48—Instruction in conspiracy trial that common design may be shown by steady pursuit of same object, though separately or by different means, if leading to same result, held not erroneous.

Instruction, in trial for conspiracy to obtain money by false pretenses, that common design may be shown by conspirators' steady pursuit of same object, whether separately or together, or by same or different means, if all lead to same unlawful result, held not erroneous as giving jury to understand that defendant, though innocent, and acting separately with different means, must be convicted of conspiracy, if his acts lead to unlawful results, in view of instruction as whole and other instructions requiring proof of guilty participation of each defendant in criminal partnership.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

H. A. Shearer and R. J. Ellis were convicted of obtaining, and conspiring to obtain, money by false pretenses, and defendant Ellis appeals. Affirmed.

Paul W. Schenck, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

JOHNSON, Justice pro tem. The defendants Shearer, Thomas, and Ellis were jointly accused in an information charging them with certain offenses in four counts, all relating to the same transaction; the first charging grand larceny in stealing \$400 on October 6, 1925, from Albert Loiselle; the second charging conspiracy to commit grand larceny; the third charging the defendant with obtaining money by false pretenses in connection with the sale to Loiselle of a half interest in an automobile steam cleaning plant; the fourth with conspiracy to obtain money by false

pretenses in the same matter. The defendant Thomas was not tried with the other two defendants, but was a witness for the state, and the case against him was dismissed. By the verdict of the jury the defendants Shearer and Ellis were found guilty on the third and fourth counts of the information; the first two counts having been dismissed at the close of the case for the prosecution. Shearer having been placed on probation, the appeal is by Ellis alone, who appeals from the judgment against him and from the order denying his motion for a new trial. He received an indeterminate sentence of imprisonment in the state prison on both the third and fourth counts; the two sentences running concurrently.

[1] The appellant admits that the evidence showed a conspiracy in which Shearer, Thomas, and an individual called Jeffries took part; but it is contended that there is no evidence showing Ellis himself to have been guilty on either count. Appellant makes also certain technical objections to the information and to one of the court's instructions, which will be considered later. In a study of the evidence careful scrutiny has been made, pursuant to the request of appellant's counsel, of the typewritten record of the testimony, comprising 550 pages. While the evidence in its relation to appellant is in some ways circumstantial, yet much of it connects him directly with the offenses charged; and we are of the opinion that the evidence as a whole reasonably justified the inference of guilty participation on the part of appellant, and that the verdict against him is therefore not without adequate support.

The salient facts of the case are as follows: Ellis was a licensed broker, who for about four years had been carrying on business in Los Angeles as an investment broker engaged in negotiating sales of business interests. He had a number of salesmen working under him, each of whom, as he brought a transaction to completion, received from Ellis a share of the commission or profit realized. Shearer was one of Ellis' salesmen who gave attention particularly to transactions relating to "automobile washing and greasing stands"; and it was in connection with such a transaction that the offenses here under review were committed. The complaining witness, Albert Loiselle, had been a seaman in the United States navy, but was not in the service at the time of his dealings with Ellis' office, though he was again in the navy at the time of the trial. Loiselle was led to visit Ellis' office by a newspaper advertisement stating that a partner was wanted to buy a half interest in an automobile steam cleaning plant. On that visit Loiselle met Shearer, who introduced him to a man called Jeffries, whom Shearer

brought in from the outside, and who was represented to be the owner of a steam cleaning business and in search of a partner. The three then drove together to a plant situated at No. 4300 South San Pedro street, which really belonged to a man named Levy, who owned all the equipment and had a ten-year lease of the land. After a brief examination, Shearer, Loisel, and Jeffries returned to Ellis' office, whereupon Jeffries, without stopping, walked out at the rear entrance, leaving Shearer and Loisel together. Shearer then introduced Loisel to Ellis, stating that Loisel was going to buy a half interest in the cleaning plant, the price of which had been named to Loisel as \$400; and, as Loisel tells the story, Ellis' first question to him was as to how much money he had for a deposit. Loisel was not prepared at the moment to pay more than \$5, and this amount was paid over to Ellis, either directly by Loisel himself or by Shearer, after having previously received it from Loisel; the evidence being in conflict on this point. The deposit was delivered to Ellis about 11 o'clock in the morning, and early in the afternoon Loisel returned with \$400, as he had promised Ellis. He then paid this amount directly to Ellis, who at the same time repaid to him the deposit of \$5 previously received, and promised to hurry the completion of the necessary papers. In the course of the next couple of hours Ellis himself prepared, and had Loisel sign, a deposit agreement, offering to buy on the terms therein named, and stating that a deposit of \$5 had been made on account of the purchase price of \$400; also articles of co-partnership between Jeffries and Loisel, specifying that each of them should be entitled to an undivided half interest in the automobile cleaning business located at 4300 South San Pedro street. At the time when Loisel signed there was no signature by or in the name of Jeffries. Ellis made ready also a form of affidavit, in the name of Jeffries, according to the language of which Jeffries was to make oath that the business was free of debt, and that he so deposed to avoid waiting seven days after recording notice of intended sale, and in order to obtain immediate payment of the purchase price. To this form was appended a consent to the immediate payment of the money, which Ellis had Loisel sign, though there had not as yet been affixed to the affidavit the signature of any affiant or of any notary. In addition, Ellis caused Loisel to acknowledge receipt of one of Ellis' forms reciting that Loisel was acting on his own initiative and judgment, and not on any representations made by Ellis or his agents. This all took place on October 6, 1925.

After paying Ellis the \$400 and signing the papers which Ellis presented to him, and without any papers requiring the signature

of Jeffries having yet been signed, Loisel was directed to come to Ellis' office the next morning, October 7th, and go with Shearer to the plant. At about 6 o'clock in the afternoon of October 6th Thomas, who was an employee in the Los Angeles fire department, known to Shearer and, according to certain testimony, to Ellis also, presented himself at Ellis' office, posing as Jeffries, and there found both Ellis and Shearer. Ellis asked Thomas, "What is your share?" to which Shearer answered, "One hundred dollars." Thereupon Ellis, who insists that he believed Thomas to be really Jeffries, told Thomas that he would first have to sign some papers, and that one, the Jeffries affidavit, would have to be signed before a notary. Accordingly, Thomas signed, in the name of Jeffries, the partnership agreement, as well as the other papers already prepared by Ellis which called for the signature of Jeffries, and likewise, in the name of Jeffries, Thomas made oath to the effect that the business was free from debt. Thomas testified that he had been sent to Ellis' office by Jeffries to get the sum of \$100 for Jeffries, and that Jeffries had told him to sign his name to any papers necessary. When Thomas had completed the signatures, he received from Ellis \$100, and was accompanied by Shearer to where Jeffries was waiting, delivered the money to Jeffries, and left him and Shearer together. The rest of Loisel's money remained in Ellis' hands, except perhaps \$150, which was delivered by Ellis to Shearer, but the final disposition of which was not shown. During the day, and apparently after Loisel had paid his \$400 to Ellis, Shearer had procured from Levy, the owner of the cleaning plant, and not otherwise involved in the transaction, a lease of the plant for two years, running to Jeffries and Loisel, at a rental of \$75 per month; the lease specifying that the first and last month's rent was to be paid on execution of the lease. This lease had also been signed by Loisel at Ellis' instance before any other signatures were affixed. Levy insisted on the payment of the \$150 before he would sign the lease, and Shearer therefore gave Levy a check drawn by Shearer on an account in his wife's name. The check was dishonored, however, on presentation at the bank next day.

Loisel received none of the papers which had been signed on October 6th; but on the following morning he was taken by Shearer to the plant. Jeffries was there doing some cleaning, but stepped aside at Shearer's request to talk with Shearer, and a few minutes afterwards left, and was never again seen by Loisel. That same afternoon Levy, having learned of the dishonor of Shearer's check, ordered Loisel out of the plant, declaring that the lease was at an end because of failure to comply with the condition of payment of the first and last month's rent. Loisel

immediately went to Ellis' office, and on that visit, as well as on subsequent occasions, had interviews with Ellis and Shearer in which he demanded the return of his money, but without avail; Loiselle saying that on one occasion Ellis said to him, "You lost your money automatically, you might as well beat it." Finally the matter was brought to the attention of the district attorney, and resulted in the prosecution of this proceeding, in which Ellis and Shearer were adjudged guilty, both of conspiring to obtain, and of obtaining, money from Loiselle by false pretenses.

Believing from the evidence as a whole that the jury were justified in rendering a verdict against Ellis as well as against Shearer on both counts, we will proceed to consider the objections made to the information.

[2] The third count of the information alleges that Shearer, Thomas, and Ellis, with the intent to defraud Loiselle, knowingly and feloniously pretended and represented to Loiselle that they had for sale, and could sell, a half interest in the designated cleaning plant, and that Jeffries was the owner of a half interest therein, which he would sell to Loiselle for \$400. It is further alleged that "while" said defendants were seeking to induce Loiselle to pay \$400 as the purchase price of said half interest, Jeffries did not own any interest in said plant, but that it was the sole property of H. Levy. The information continues with certain averments customary in such cases, and among other things states that Loiselle was deceived by the representations, and paid his money on the faith of them, and in consideration of the grant then and there to him of an undivided half interest in the plant; and that the defendants made their false representations for the purpose of inducing Loiselle to deliver to them said \$400 in return for the pretended half interest.

[3] It is urged that the only time to which the false representations are relegated was "while" the defendants were seeking to induce payment by Loiselle, and that the information does not negative the representation that defendants did have a half interest for sale, and that Jeffries would sell a half interest; and, further, that there is no allegation that either Jeffries or Levy did not in fact do so. In addition it is urged, on the one hand, that, since it is alleged that Loiselle made his payment "in return and in consideration for a grant then and there to him of a one-half interest," it must be presumed that he received such grant; yet, on the other hand, appellant says there is no direct allegation that Loiselle actually purchased the half interest, and hence there is a failure of any causal connection between the alleged false pretenses and the payment

of the money. A reading of the third count discloses, however, to the ordinary mind that what defendants were pretending to sell was a half interest belonging to Jeffries, whereas in fact Jeffries had nothing to sell, and Loiselle was thus induced to pay his money to defendants for something that Jeffries did not own, and could not, and did not, deliver, and that defendants knew such to be the fact, and acted as they did with intent to cheat and defraud Loiselle out of the sum of \$400, of which defendants did in fact feloniously deprive him. There is a natural connection between the representations described and the parting with the money; and the information sufficiently sets forth the requisite elements by averring the intent to defraud, the fraud actually committed, the false pretenses used, and the accomplishment of the fraud by means of those pretenses. *People v. Wasservogle*, 77 Cal. 173, 19 P. 270. It is sufficient that an information contains a statement of the facts in such a manner as to enable a person of common understanding to know what is intended, and likewise to enable the court to pronounce judgment of conviction according to the right of the case. Sections 950 and 959, Pen. Code. It cannot be successfully maintained that the information in this instance did not sufficiently apprise the appellant and the court of the offense for which appellant was put to trial, and for which judgment was to be pronounced upon the verdict of guilty.

[4] Appellant likewise engages in a critical analysis of the fourth count, which is in much the same form as the third, except that it alleges that the defendants conspired to do, and in furtherance of their conspiracy did, the things there set forth, being the things done according to the averments contained also in the third count. In discussing the fourth count, a large portion of appellant's brief is devoted to a dismemberment of section 182 of the Penal Code. The portions of that section which particularly concern us are subdivision 1, under which the offense designated may consist of a conspiracy to commit any crime, whether a felony or a misdemeanor, and the first penal paragraph, prescribing the punishment for conspiracy to commit any felony. The conspiracy of which appellant was found guilty was one to obtain money, in the amount of \$400, by false pretenses. The crime of obtaining money by false pretenses is subjected to the same punishment as larceny by section 532 of the Penal Code; and under section 487 one taking property exceeding \$200 in value is guilty of grand larceny, which, being punishable under section 489 by imprisonment in the state prison for not less than one nor more than ten years, is a felony. It follows then that, when appellant was found guilty of a conspiracy to

commit such a felony as was charged, he became subject to punishment as for grand larceny under the first penal paragraph of section 182. *Doble v. Superior Court*, 197 Cal. 556, 241 P. 852.

[5, 6] It is contended, however, that the sentence under the fourth count left it doubtful whether it was the intention of the court to mete out punishment for a felony or only for a misdemeanor, and that it may not be left to the prison authorities to determine how long appellant's prison term should last. The trial judge might with propriety have specified that the crime of which the appellant was convicted was a felony. At the same time it must be borne in mind that, when there is a conviction upon a charge of conspiracy to commit a felony, as in this case, there is no other punishment authorized than that prescribed in the first penal paragraph of section 182, for the reason that "the other acts described in this section," as that phrase is used in the second penal paragraph, must be taken to refer to offenses which are not felonies. In this instance the judgment is just as definite and certain as if appellant had been charged with, and convicted of, a conspiracy to commit grand larceny. If the offense had not been grave enough to constitute a felony, and appellant had been found guilty of a misdemeanor only, he would have been brought within the purview of subdivision 4 of section 182; and the punishment would have been that prescribed by the second penal paragraph, which makes such a misdemeanor punishable by imprisonment not exceeding two years or a fine not exceeding \$5,000, or both. But, having been convicted of a felony as charged, appellant must bear the punishment fixed by the first penal paragraph, which is here the same as the punishment for grand larceny. Consequently, the sentence under the fourth count is just as definite and certain as that under the third count, which charged the crime of obtaining money by false pretenses; and the prison authorities are left in no quandary in respect of the sentence imposed under either count.

[7] Pursuing the discussion of the fourth count, appellant's counsel insists that that count does not sufficiently charge a criminal conspiracy, because there is not an allegation that as part of the conspiracy the conspirators knowingly or falsely, or with intent to defraud, made any representation that Jeffries owned a half interest in the cleaning plant; and because, also, there is no sufficient allegation of any overt acts. The count does allege, however, that no part of the plant was owned by Jeffries, and proceeds to state that the conspiracy charged was one to obtain money by purporting to carry out a sale from Jeffries to Loiselle with the fraudulent intent to deceive Loiselle and defraud him of his money. The infor-

mation then sets forth that, in furtherance of the conspiracy, the defendants did make their false representations to Loiselle, and did cheat him out of his money by such false pretenses. We think that the information in the fourth count, as well as in the third, sufficiently meets the legal requirements, and, if put to the test, would protect appellant from being subjected to another prosecution for either offense. *People v. Steelik*, 187 Cal. 361, 372, 203 P. 78.

[8, 9] Still another contention advanced on behalf of appellant is that, if any crimes were committed, they did not relate to obtaining money by false pretenses, but constituted respectively larceny by trick and device and conspiracy to commit larceny by trick and device. In distinguishing between the two classifications the determining factor is the intent with which the injured person places his money or property in the hands of the accused. If the owner intended to part with possession merely, and not to transfer title as well, the crime is larceny; but, if title is intended to pass at the time, then the offense is that of obtaining money or property by false pretenses. *People v. Edwards*, 72 Cal. App. 102, 113, 236 P. 944. It must be remembered in this case that Loiselle was given to understand that he was buying an undivided half of the plant, then and there; and Ellis purported to be representing the seller, and took Loiselle's money as payment for a half interest. Loiselle expected the papers to be ready for him when he returned on the afternoon of October 6th with his money. He was minded to sign at that very moment; and in fact he waited for Ellis to complete the papers, whereupon he affixed his signature at once. The evidence leaves no doubt that Loiselle was making no distinction between the title and the possession of the money; and that, when he put the money into Ellis' hands, he regarded it as money paid for a purchase thereby effected. On the other hand, there can likewise be no doubt that Ellis received the money as payment for a half interest in a business of which the pretended owner was Jeffries, whom Ellis was supposed to represent; and, instead of following the prescribed procedure by recording a notice of intended sale and waiting seven days, Ellis had Thomas make an affidavit in Jeffries' name that there were no debts, and used that affidavit as a basis for the immediate consummation of the pretended sale. When it came to application of the money, Ellis, within a few hours after he received it, parceled out \$100 to Thomas posing as Jeffries, and dealt with the residue pursuant to some private understanding between himself and Shearer. We conclude that the information correctly defined the offenses with which the defendants were chargeable.

[10] In the course of the trial, evidence of three other similar transactions with other parties who had had dealings with Ellis was received to show a criminal system of operation; and the admission of such evidence is now specified as error. In our opinion, however, such evidence related to transactions sufficiently near in time and similar in character to be receivable within the rule discussed and applied in *People v. Gray*, 66 Cal. 271, 274, 275, 5 P. 240; *People v. Ruef*, 14 Cal. App. 579, 604, 114 P. 48, 54; *People v. Arnold*, 17 Cal. App. 68, 74, 118 P. 729; and *People v. Cory*, 26 Cal. App. 735, 741, 148 P. 532.

[11] The only criticism directed at any of the instructions of the court relates to the final sentence in an instruction on the subject of conspiracy. Among other things, the court first told the jury that they must be satisfied beyond a reasonable doubt of the formation and existence of a conspiracy, and were to determine from all the facts and circumstances in evidence whether a conspiracy did in fact exist, and whether it was illegal in its inception or became illegal at any subsequent time. The court then proceeded to say:

"The purpose of the combination is usually known only to those who enter it, and their guilt can generally be proved only by circumstantial evidence. The common design is the essence of the fact, and this may be shown by the steady pursuit of the alleged conspirators of the same object, whether they act separately or together, or by the same or different means, provided all lead to the same unlawful result."

The criticism of this part of the instruction is that it gave the jury to understand that Ellis, even though innocent, and acting separately and using different means, must be pronounced guilty nevertheless as an alleged conspirator if his innocent acts led to the unlawful result of defrauding Loiselle. We cannot believe that, as the words of the court fell upon the ears of the jury, those words received the interpretation now put upon them by the ingenuity of counsel. The instruction from which the quotation is taken, when read as a whole, gives a correct statement of the law; and other instructions to which no exception is taken made it clear to the jury that under the charge of conspiracy there must be proof beyond a reasonable doubt of guilty participation in a criminal partnership on the part of each defendant before he could be found guilty.

The judgment against appellant and the order denying his motion for a new trial are affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

PEOPLE v. RICHARDSON. (Cr. 1316.)★

District Court of Appeal, First District, Division 2, California. May 23, 1927.

Hearing Denied by Supreme Court July 21, 1927.

1. Criminal law §1144(1)—That defendant convicted of robbery was legally committed by magistrate prior to filing of information held presumed on appeal, where record was silent.

Although it did not appear in the record on appeal that defendant, convicted of robbery, was legally committed by a magistrate prior to the filing of the information, held regularly in this respect would be presumed where the record was silent.

2. Criminal law §1044—Defendant not moving to set aside information because filed before his commitment by magistrate cannot raise point on appeal (Pen. Code, §§ 995, 996).

Under Pen. Code, §§ 995, 996, defendant convicted of robbery, not making motion at trial to set aside the information because it was not filed before his commitment by a magistrate, may not raise that point on appeal.

3. Criminal law §395—In robbery prosecution personal property taken from defendant's room at time of arrest held competent evidence though taken without search warrant.

In prosecution for robbery, articles of personal property taken from the defendant's room at the time of his arrest held competent and admissible evidence, though they were taken without a search warrant.

4. Criminal law §369(2)—Testimony of owner that automobile used in robbery had been stolen held admissible.

In prosecution for robbery, where an automobile was an instrumentality in its commission, testimony of the owner identifying the automobile and asserting it had been stolen held admissible, notwithstanding it tended to prove another crime for which defendant was not on trial.

5. Criminal law §1136—Appellant convicted of first degree robbery cannot complain because codefendant was only convicted of second degree robbery (Pen. Code, §§ 970, 1157).

Under Pen. Code, §§ 970, 1157, a defendant convicted of first degree robbery cannot complain because his codefendant was only found guilty of robbery in the second degree.

6. Criminal law §793—Instruction in double robbery prosecution that jury should consider each defendant separately held proper (Pen. Code, §§ 970, 1157).

Instruction to jury in robbery prosecution against two defendants that they should consider each defendant separately held proper, under Pen. Code, §§ 970, 1157.

7. Criminal law §813—Abstract Instructions concerning admissibility of evidence held properly refused.

Requested instructions which were merely abstract statements concerning the admissibility of evidence held properly refused.

8. Criminal law ☞665(2)—In robbery prosecution district attorney's request, after order excluding witnesses, that two officers be permitted to remain, held not error; no objection being made.

In robbery prosecution, after an order excluding witnesses, the district attorney's request that two officers be permitted to remain held not error or misconduct; no assignment or objection being made.

9. Criminal law ☞721(4)—Comment on defendant's failure to deny crime when accused held not "comment on failure to testify."

District attorney's comment at robbery trial on defendant's failure to make a denial when confronted with an accusatory statement under circumstances calling for a reply and affording an opportunity to reply held no error; not being a comment on defendant's failure to testify in his own behalf.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Comment.]

10. Criminal law ☞781(7)—Instruction in robbery prosecution that defendant's failure to reply when accusation called for reply might be taken as admission held proper.

Instruction in robbery prosecution that defendant's failure to reply when confronted with an accusatory statement under circumstances calling for a reply and affording a reasonable opportunity to reply might be taken as an admission held proper.

11. Criminal law ☞1206(1)—Indeterminate sentence law held constitutional (Pen. Code, § 1168).

Indeterminate sentence law (Pen. Code, § 1168), held constitutional.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Floyd Richardson was convicted of robbery, and he appeals. Affirmed.

Floyd Richardson, in pro. per.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KOFORD, P. J. Defendants were jointly charged by information, tried and convicted of the crime of robbery. Appellant was found guilty of robbery in the first degree and his codefendant (not appealing) in the second degree. The appeal is from the judgment and order denying a motion for a new trial.

The prosecuting witness testified that appellant and his codefendant driving a Chevrolet touring car crowded him into the curbing of the street upon which he was driving in his Ford car and that they then beat and robbed him by means of pistols. The defendants were arrested in their rooms two days later. A search of the apartment resulted in finding two pistols and also articles identified by the owner of the Chevrolet as

having been in the car when it was stolen shortly before the robbery.

[1, 2] Appellant, who appears for himself raises numerous points upon this appeal, many of which have been previously settled. The record on the appeal from this judgment does not show whether or not defendant was legally committed by a magistrate prior to the filing of the information. The record upon this appeal properly enough does not include proceedings prior to the information. It is claimed that the record must affirmatively show this or we must hold upon this appeal that the trial court was without jurisdiction. Const. art. 1, § 8. The point is not well taken. The superior court is a court of general jurisdiction, and there are many things which might affect its jurisdiction which are presumed where the record is silent. This is one of them. *Western Meat Co. v. Superior Court*, 9 Cal. App. 538, 99 P. 976. In order that this point may be raised on appeal it is necessary to make an appropriate motion at the trial. Pen. Code, §§ 995, 996; *People v. Bomar*, 46 Cal. App. Dec. 966, 967.

[3] The articles of personal property taken from defendants' rooms were competent evidence, even though they were taken without a search warrant at the time of defendants' arrest. *People v. Mayen*, 188 Cal. 252, 205 P. 435, 24 A. L. R. 1383.

[4] The owner of the Chevrolet car was permitted to testify that he was not operating it at the time and place of the robbery, that it had been taken without permission by some one just prior to the robbery, and that the articles of personal property found in defendants' room at the time of his arrest were in the car at the time of its disappearance. This is assigned as error in that it tends to prove another crime by defendant for which he was not on trial. The evidence was material and relevant upon the robbery charge, and it was not necessary to exclude it merely because it incidentally proved more. *People v. Booth*, 72 Cal. App. 160, 166, 236 P. 987. The jury was fully informed and instructed not to consider whether the defendant was guilty of any other crime or offense than the one charged.

[5, 6] The evidence was sufficient to justify a verdict of robbery in the first degree as to both defendants jointly tried. This appellant has no valid complaint arising from the fact that his codefendant was found guilty in the second degree. The jury had the undoubted power to make this distinction between the two defendants. Pen. Code, §§ 970, 1157. The court properly instructed the jury that they should consider each defendant separately.

[7] The court properly refused to give the three instructions requested by defendant. They were abstract statements concerning the admissibility of evidence.

[8] After an order had been made excluding witnesses the district attorney requested that two officers instead of one be permitted to remain in court and stated: "I want one right with me and another to remain in court. * * * Officer De Matei will testify later in the case, but I feel I want two officers connected with the case." Defendants' counsel stated, "Well; we won't object to that." The record is not clear as to whether the request was for the purpose of assisting with the evidence or for the purpose of exhibiting personal fear of the defendant as claimed by appellant. No assignment or objection being made, it was not error or misconduct.

[9, 10] The conduct and argument of the district attorney was within proper bounds. He did not comment on the failure of defendant to testify in his own behalf, but referred to his failure to make a denial when confronted, accused, and identified by the complaining witness. The court did not err in instructing the jury that if the defendant was confronted with an accusatory statement under circumstances calling for a reply and affording a reasonable opportunity to reply, his failure to reply may be taken as an admission, but that they should not consider the facts in the accusatory statement except to consider the defendant's conduct on being so confronted if he remained mute. *People v. Amaya*, 134 Cal. 531, 66 P. 794.

[11] Appellant attacks the constitutionality of the indeterminate sentence law (Pen. Code, § 1168). The constitutionality of the section in all the respects urged by appellant has been upheld in *People v. Hale*, 64 Cal. App. 523, 222 P. 148; *People v. Sama*, 189 Cal. 153, 207 P. 893; *In re Lee*, 177 Cal. 690, 171 P. 958; *In re Collins*, 198 Cal. 508, 245 P. 1089.

The judgment and order appealed from are affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

83 Cal. App. 249

CHRISMAN v. SOUTHERN CALIFORNIA
EDISON CO. (Civ. 4847.)★

District Court of Appeal, Second District,
Division 1, California. May 20, 1927.

Hearing Denied by Supreme Court July 18,
1927.

1. Contracts ⇨10(1)—Consideration of \$1 supplies mutuality of obligation to option contract for purchase of water (Civ. Code, § 1605).

Consideration of \$1 supplies mutuality of obligation to contract in nature of option to purchase water for irrigation, in view of Civ. Code, § 1605, defining good consideration.

2. Evidence ⇨21—It is common knowledge that where consideration of \$1 is mentioned in contract other considerations usually pass.

It is matter of common knowledge that where consideration of \$1 is mentioned in con-

tract other considerations usually pass between parties to agreement.

3. Contracts ⇨53—Trifling consideration will sustain contract if promisor is not otherwise entitled thereto.

Where promisor is not otherwise lawfully entitled to amount of consideration, it is sufficient to sustain contract, though of trifling amount; question of its adequacy being determined by contracting parties.

4. Contracts ⇨10(1)—Option agreement for purchase of water, although unilateral, is binding when supported by valuable consideration.

Option agreement for purchase of water for irrigation although in its nature unilateral is as binding on part of optioner as is a bilateral contract upon parties thereto, when supported by valuable consideration, whether such consideration is adequate in amount or not.

5. Contracts ⇨10(1)—Doctrine of mutuality of obligation is inapplicable to unilateral contract.

Doctrine of mutuality of obligation is inapplicable to unilateral contract, since such contract is not founded on mutual promises.

6. Waters and water courses ⇨254—Option for purchase of water for irrigation was no longer unilateral contract after demand for water, and plaintiff became liable to pay.

Option contract for purchase of water for irrigation, supported by consideration of \$1, binding defendant to deliver water on demand, was no longer unilateral on demand being made, and plaintiff became liable to take and pay for all water demanded.

7. Waters and water courses ⇨254—Contract to furnish water for irrigation held not void for uncertainty.

In action for failure to furnish water for irrigation, contract pleaded, providing that user of water agrees to pay for it at rate of 25 cents per inch each 24 hours, and defining inch as 13,000 gallons, held not void for want of certainty.

8. Waters and water courses ⇨263—Allegation of defendant's control or possession of water available for distribution held sufficient.

In action for failure to furnish water for irrigation, allegation that defendant owned water appurtenant to land described in amount sufficient to supply demand for irrigation held sufficient, as against motion for judgment on pleadings, to allege that defendant controlled or possessed appurtenant water available for distribution.

9. Waters and water courses ⇨263—Allegation of ownership of water appurtenant to land in amount sufficient to supply demand for irrigation implies water supply was developed.

Allegation of ownership of water appurtenant to land in amount sufficient to supply necessary and convenient demand for irrigation and in amount more than sufficient to supply such land pro rata of acreage in order of which such land was entitled to water neces-

sarily implies that such water supply had already been developed.

10. Waters and water courses ⚡263—Complaint held not demurrable for failure to show whether defendant assumed obligations of agreements to furnish water.

In action for failure to supply water for irrigation, amended complaint containing allegations as to agreements between predecessors in interest of plaintiff and of defendant, and as to defendant's purchase of predecessors' property and property rights, held not demurrable as being uncertain and unintelligible for failure to show whether defendant assumed obligations of agreements.

11. Waters and water courses ⚡254—Purchaser of water distributing system must continue to serve customers previously receiving service, although obligation was not expressly assumed.

Defendant company by purchasing all property and property rights of power company, including water appurtenant to land of plaintiff, purchased such water subject to any existing rights to use thereof, and purchased water distributing system with obligation to continue to serve customers previously receiving service therefrom even though such obligation was not expressly assumed.

12. Waters and water courses ⚡249—Right to water for irrigation is "right in real property."

Right to water to be used for irrigation purposes is right in real property.

13. Waters and water courses ⚡263—Complaint held to sufficiently allege distributing system sold to defendant was one used by predecessor in supplying water under plaintiff's contracts.

Complaint for failure to furnish water for irrigation, alleging agreement to furnish water by defendant's predecessor in interest and defendant's purchase of predecessor's property and property rights, including distributing system, held to sufficiently allege that distributing system sold to defendant was one used by predecessor in supplying water under such contracts.

14. Waters and water courses ⚡263—Evidence held to support finding that defendant purchased and owned water appurtenant to plaintiff's lands.

In action for failure to furnish water for irrigation, evidence held sufficient to support finding that defendant purchased and owned water appurtenant to plaintiff's lands, notwithstanding that use was reserved to benefit of purchasers of lands from plaintiff's predecessor in interest.

15. Waters and water courses ⚡263—Evidence held to support finding defendant purchased distributing system serving plaintiff's lands and assumed obligation under predecessor's agreements to furnish water.

In action for failure to furnish water for irrigation, evidence held sufficient to support finding that defendant purchased from pred-

ecessor in interest distributing system serving plaintiff's lands, and rights and obligations under predecessor's agreements to furnish water, notwithstanding that it did not expressly assume obligation to continue to serve customers previously receiving service.

16. Waters and water courses ⚡263—Evidence held to support finding that there was available to defendant sufficient appurtenant water for irrigation of plaintiff's land under agreement.

In action for failure to furnish water for irrigation under contract, evidence held sufficient to support finding that there was available to defendant sufficient appurtenant water to use in irrigation of plaintiff's land.

17. Waters and water courses ⚡254—One agreeing to deliver water for irrigation for 50 years had right to maintain and develop water supply.

Under agreement by defendant's predecessor in interest to deliver "all the water necessary and convenient for the irrigation of and being appurtenant to" certain lands for period of 50 years, it had right to develop and maintain existing water supply, since such contracts were not limited to flowing waters.

18. Waters and water courses ⚡263—Evidence held to support finding that defendant could develop sufficient water for irrigation at certain well site.

In action for failure to furnish water for irrigation, evidence held sufficient to show that defendant could have developed water at certain well site in amount sufficient to supply necessary and convenient demands for irrigation of plaintiff's land and more than sufficient to supply such land pro rata of its acreage, where defendant failed to show it had attempted to develop such amount of water without success.

19. Waters and water courses ⚡263—Defendant failing to furnish water for irrigation held not entitled to object to sufficiency of evidence of existence of appurtenant water.

In action for failure to furnish water for irrigation, defendant held not in position to urge objection that evidence was insufficient to justify finding that there was any appurtenant water, where predecessor in interest entered agreement providing that certain well site and all subterranean waters were appurtenant.

20. Waters and water courses ⚡263—Damages for failure to furnish water for irrigation held loss of crops, less cost of production and value of crops produced.

In action for failure to furnish water for irrigation, proper measure of damages held to be loss of crops as result of lack of irrigation, less cost of production and net value of crops produced, notwithstanding that plaintiff had 150 inches of water of his own, where defendant refused to distribute such water, since under circumstances such water was not available to plaintiff.

21. Waters and water courses ⇨263—Evidence of value of crop plaintiff might have raised held admissible in action for failure to furnish water for irrigation.

In action for failure to furnish water for irrigation, admission of evidence of value of crop plaintiff might have raised under irrigation *held* not error.

22. Waters and water courses ⇨263—Evidence that well site could have furnished sufficient water for irrigating plaintiff's land held admissible.

In action for failure to furnish water for irrigation, admission of evidence that certain well site could have furnished sufficient water for irrigating lands described in agreement sued on *held* not error, where such water was appurtenant to plaintiff's land and there was no testimony of demands by other owners for such water.

23. Waters and water courses ⇨263—Findings held to support judgment for failure to furnish water for irrigation.

In action for failure to furnish water for irrigation, findings *held* sufficient to support judgment for plaintiff as against contention that there was no finding with reference to what amount of water was necessary or convenient for irrigation of plaintiff's lands.

Appeal from Superior Court, Ventura County; Franklin J. Cole, Judge.

Action by Clarence L. Chrisman against the Southern California Edison Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Roy V. Reppy, E. W. Cunningham, and Robert M. Clarke, all of Los Angeles, for appellant.

Bowker & Sheridan and W. H. Barnes, all of Ventura, for respondent.

McLUCAS, Justice pro tem. Plaintiff brought suit for damages alleged to have been sustained by reason of the failure and neglect of the defendant to furnish necessary water for the irrigation of certain lands of the plaintiff. Defendant appeals from a judgment rendered for plaintiff.

Before any evidence was taken defendant moved for judgment on the pleadings and for dismissal of the action on the ground that the amended complaint did not state facts sufficient to constitute a cause of action in that the agreements attached to and made a part of the amended complaint are each of them void for want of mutuality and void for want of certainty. The obligation to deliver water under the four separate agreements sued upon is typified by the language used in the contract set up as Exhibit A attached to the amended complaint, and is as follows:

"That the party of the first part, for and in consideration of the sum of one dollar to it paid and of the covenants and agreements on the part of the party of the second part hereinafter contained, agrees to deliver through its distribut-

ing system, to the party of the second part, when demanded, on 15 days' notice, pro rata of the acreage, in the order of distribution to which the land is entitled to water, under the rules and regulations of the party of the first part, all the water necessary and convenient for the irrigation of and being appurtenant to the following described land."

The undertaking with reference to the taking of and payment for the water is as follows:

"The party of the second part hereby agrees to pay to the party of the first part for all water delivered to him from the distributing system of the party of the first part, at the rate of twenty-five (25) cents per inch of thirteen thousand (13,000) gallons of water each twenty-four (24) hours, all payments for the distributing of water to be made within thirty (30) days from and after the delivery thereof, in gold coin of the United States."

The agreement provides that it shall continue in full force for 50 years from January 1, 1906, and shall apply to and bind the successors and assigns of the respective parties thereto. Appellant asserts that the contracts lack mutuality in that the seller is obligated to furnish water, but there is no corresponding obligation on the buyer to take any water. The case of *Schimmel v. Martin*, 190 Cal. 429, 213 P. 33, is cited, where the court says:

"The contract is lacking in mutuality. Considered as a contract for the sale of personal property, as the parties to the action treated and considered it, and as the trial court in effect found it to be, there is clearly no mutuality in the absence of an agreement by the plaintiffs to buy the water offered for sale by the contract."

[1] But the foregoing case is to be distinguished from the case at bar in that no consideration whatever is mentioned in the contract then before the court. In the present case, a consideration of \$1 is named in the agreement. Consideration supplies mutuality of obligation to the contract. Section 1605 of the Civil Code defines a good consideration as follows:

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

[2-4] In the instant case there was a valuable consideration for the making and entering into the contract. It is a matter of common knowledge that where a consideration of \$1 is mentioned in a contract, other considerations usually pass between the parties to the agreement. A consideration of \$1 is ordinarily sufficient to support a contract at law. *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522. It has been decided that

an option given for 25 cents is not without adequate consideration. *Marsh v. Lott*, 8 Cal. App. 384, 97 P. 163. The benefit may be trifling, but if the promisor is not otherwise lawfully entitled to it, it is sufficient to sustain the contract as a matter of law. The law does not weigh the quantum of the consideration. 6 Cal. Jur. p. 169. If the amount named is not adequate the vendor should so determine in his own mind before he signs the contract, but, having signed it, he must live up to his agreement. Any other rule would make the contract worthless and mere waste paper. 6 Cal. Jur. p. 189; *Bird v. Potter*, 146 Cal. 286, 79 P. 970. The contract in the present case is in the nature of an option to purchase personal property. The rule seems to be that any money or other valuable thing, however small, moving from the optionee to the optioner for an option to purchase property at its adequate value, is sufficient to render the option binding upon the optioner for the time specified. An option agreement, although in its nature unilateral, is as binding upon the part of the optioner as is a bilateral agreement upon the parties thereto, when supported by a valuable consideration, whether such consideration is adequate in amount or not. *Braserton v. Vokal*, 53 Cal. App. 582, 200 P. 670.

[5, 6] As a unilateral contract is not founded on mutual promises, the doctrine of mutuality of obligation is inapplicable to such a contract. *Nevada Bank v. Steinmitz*, 64 Cal. 301, 30 P. 970; *Mathewson v. Fitch*, 22 Cal. 86. In the case at bar the complaint alleges an option given by defendant's predecessor in interest to plaintiff's predecessor in interest, agreeing to deliver water for irrigation purposes, when demanded, at a certain price, and that plaintiff made demand for said water for irrigation purposes as provided in said contract. Upon demand being made, the contract was no longer unilateral, and plaintiff became liable under the contract to take and pay for all the water necessary for irrigation purposes, as demanded. All that was required of plaintiff to exercise the option and accept the offer contained in the option contract was to make the demand for water as provided in the contract. In *Flickinger v. Heck*, 187 Cal. 111, 200 P. 1045, the court says:

"An option contract may be regarded as embodying an offer. When the optionee, or person to whom the offer is made, signifies his desire to accept in accordance with the terms of the option, the optioner, or person making the offer, becomes obligated to perform. This acceptance of the offer contained in the option contract is called 'election' and it gives rise to a subsequent contract between the parties to buy or sell, or perform whatever other acts have been specified in the option contract. *Pennsylvania Min. Co. v. Smith*, 207 Pa. 210, 56 A. 426. 'The particular act or acts which constitute an election may be fixed by the terms of the option, as also the time when, the place where, and the person to whom it shall be

made.' *James on Law of Option Contracts*, §§ 801, 817. The language of the contract itself controls as to what act or acts constitute an election. Under the terms of one option, election may consist of a tender of the property to be sold or purchase price to be paid; under the terms of another option, it may consist of a mere notice of election to purchase or sell, leaving payment of the price and delivery of the property as subsequent matters in performance of the executory contract raised by the election. *Breen v. Mayne*, 141 Iowa, 399, 118 N. W. 441; *Byers v. Denver Circle R. Co.*, 13 Colo. 552, 22 P. 951; *James on Law of Election Contracts*, § 817. If the tender of property or purchase price constitutes an 'election,' it must be performed in order to turn the offer contained in the option contract into a contractual obligation, and, if not performed as provided in the option contract, no subsequent contractual liability arises; if the tender is merely in performance of the contract created by a notice of election, it is controlled by the terms of that contract, and 'in the absence of anything in the contract itself, the obligation of the parties in the performance of the contract is governed by the law applying generally to bilateral contracts for the purchase and sale of property. * * * *Cates v. McNeil*, 169 Cal. 697, 147 P. 944."

In *Feisthamel v. Campbell*, 55 Cal. App. 774, 205 P. 25, it is said:

"An option agreement, supported by sufficient consideration, is an enforceable contract, notwithstanding its unilateral character, and the question of want of mutuality of remedy does not affect it. 'If mutuality, in a broad sense, were held to be an essential element in every valid contract, to the extent that both contracting parties could sue on it, there could be no such thing as a valid unilateral or option contract, or a contract evidenced by a subscription paper, or a contract to enforce a reward offer, or a guaranty, or in many other instances readily put in ordinary business affairs. * * * An option, supported by a consideration, furnishes another illustration of a contract which is valid, notwithstanding the lack of mutuality. It is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it.' 6 *Ruling Case Law*, p. 687, and decisions shown in footnote. See, also, *Pittsburgh Vitrified P. & B. Co. v. Bailey*, 76 Kan. 42, 90 P. 803, 12 L. R. A. (N. S.) 745."

Since the contract pleaded in the complaint was an option agreement supported by sufficient consideration, it was, in our opinion, an enforceable contract and was valid, notwithstanding the lack of mutuality.

[7] Appellant's contention that the contract pleaded is void for want of certainty is without merit. Under the terms of the contract, the user agrees to pay for water at the rate of 25 cents per inch each 24 hours, and an inch is defined as 13,000 gallons.

[8, 9] Appellant claims there is no allegation in the complaint that defendant had in its control or possession appurtenant water available for distribution under the agreements mentioned. The complaint alleges:

"That at all times herein mentioned said defendant was the owner of water appurtenant to

the land hereinbefore described in an amount sufficient to supply the necessary and convenient demand for the irrigation of said land, and in an amount more than sufficient to supply said land pro rata of its acreage in the order of distribution to which said land was entitled to water."

Since an owner is ordinarily entitled to control and possession, we think that the foregoing is a sufficient allegation, as against a motion for judgment on the pleadings, that the defendant had in its control or possession appurtenant water available for distribution under said agreements. As opposed to this allegation, defendant's authorities to the effect that an agreement to deliver water does not include an agreement to develop water are beside the point. It remains to be determined by the proof offered whether development of additional water was necessary. Ownership of water appurtenant to land in an amount sufficient to supply the necessary and convenient demand for irrigation of said land and in an amount more than sufficient to supply said land pro rata of the acreage in the order of which said land was entitled to water, necessarily implies that such water supply had already been developed.

[10-12] Defendant demurred specially to the amended complaint and each cause of action therein on the ground that they were uncertain and unintelligible for the reason that it cannot be ascertained whether the defendant assumed any of the obligations referred to in the agreements. The complaint alleges that plaintiff is the owner and in possession of certain lands; that certain agreements in writing were executed and delivered by and between the Ventura County Power Company and plaintiff's predecessor in interest; that said agreements were duly recorded; that in and by said agreements the Ventura County Power Company agreed to furnish water to plaintiff's predecessors in interest for the purpose of irrigating said lands, as set forth in the agreements attached thereto and made a part thereof; that plaintiff was the owner of and entitled to all the benefits under said contracts; that defendant purchased of and from the Ventura County Power Company all of its property and property rights, including the water appurtenant to said land and all the water and water rights in and to the Ventura river, together with its distributing system, including said agreements between Ventura County Power Company and plaintiff's predecessors in interest; that defendant is the successor in interest of Ventura County Power Company in and to said water rights, distributing system, and the contracts referred to. We think that the demurrer was not well taken. When defendant purchased, as alleged, all of the property and property rights of Ventura County Power Company, including the water appurtenant to the land of plaintiff, it purchased said water subject to any existing rights to the use of said water. The right to water to be used for irriga-

tion purposes is a right in real property. *Schimmel v. Martin*, 190 Cal. 429, 213 P. 33; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 P. 858, 15 L. R. A. (N. S.) 359; *Copeland v. Fairview Land etc. Co.*, 165 Cal. 148, 131 P. 119. The purchaser of a water distributing system is under obligation to continue to serve the consumers previously receiving service therefrom, even though he does not expressly assume that obligation. *Hunt v. Jones*, 149 Cal. 297, 86 P. 686; *Telander v. Tujunga Water & Power Co.*, 43 Cal. App. 492, 185 P. 504.

[13] Appellant contends that it does not appear from the complaint that the power company ever had a distributing system by means of which water was delivered to plaintiff's land, or that this distributing system, if it existed, was sold by the power company to defendant. In other words, that there is nothing in the complaint to justify the inference or conclusion that the distributing system sold to defendant was the one used by the power company in supplying water under these contracts. We cannot agree with this contention. It expressly appears from the foregoing analysis that the complaint alleges that the power company agreed to furnish and distribute "all the water necessary and convenient for the irrigation of and being appurtenant to" said lands. The complaint further alleges that the defendant purchased from the power company all of its property and property rights of every nature, kind and character, together with its distributing system, including said agreements to distribute water. This necessarily included the distributing system which served the plaintiff under these contracts.

It appears from the evidence that on October 31, 1906, an agreement was made between the San Miguel Company and the Ventura County Power Company wherein it was recited that a resolution had been adopted on the same date at a meeting of the board of directors of the San Miguel Company, stating it to be the purpose of the San Miguel Company to improve by irrigation the lands now owned by it and described as the west one-half of the Rancho San Miguel in Ventura county, Cal.; and to that end it reserved and retained unto itself all the water and water rights lying beneath the surface of said lands for the purpose of distribution of said water to the said lands as appurtenant thereto; and to apportion and distribute such water as may be necessary for the irrigation from a common source of wells or works of such subdivisions of land as may be conveyed by the corporation from time to time, and for the benefit of all of said land. The resolution further recited that it was necessary to apportion and distribute to purchasers of parcels of said land the water to which they were entitled as appurtenant to the land purchased. The resolution provided that the San Miguel Company should sell to the Ventura County Power

Company such land as might be determined upon by the board of directors of the contracting corporations, "together with the wells now constructed and being upon said lands, reserving and retaining unto the San Miguel Company, and to its successors, assigns and grantees, all the right, title, property and interest in and to all the water and water rights lying and being beneath the surface of the land that will be conveyed by authority of this resolution, together with all the water flowing from and to hereafter flow from said wells, and to all the water that may flow from any and all wells that may hereafter be constructed upon said lands, as a water right appurtenant to all that certain parcel of land situated in Ventura county, Cal., known and designated as the west one-half of the Rancho San Miguel." It was further resolved that the San Miguel Company transfer to the Ventura County Power Company "all the pipe lines now constructed upon the land above described, with the electric motors, pumps, fittings and belongings, as now existing, granting to the Ventura County Power Company the right, and the Ventura County Power Company accepting the obligation, to distribute to the San Miguel Company, its successors, assigns and grantees, all the water appurtenant to the land as hereinbefore declared, when demanded for the irrigation of said land, under such agreements and conditions as will make the distribution of said appurtenant water fair and equitable to all the land herein described." The resolution further authorized the officers of the San Miguel Company to execute to the Ventura Company "a deed of the land purchased, or such agreement of sale as may be determined upon, and, further, to sell, assign, transfer, and convey all the right, title and interest to this corporation in and to the pipe lines, electric motors, pumps, fittings and belongings above named, upon the Ventura County Power Company executing a proper agreement that it will distribute the water appurtenant to the west one-half of the Rancho San Miguel, as hereinabove stated." Pursuant to the foregoing resolution, the agreement further provides, in consideration of the sum of \$10, and in consideration of a certain agreement of sale and purchase between the parties of certain land situated in the west one-half of the Rancho San Miguel, together with the wells constructed upon said land, and of the covenants and agreements therein set forth, "said agreement bearing even date herewith," the San Miguel Company does sell to the Ventura County Power Company all of the pipe lines now constructed upon the west one-half of the Rancho San Miguel, with the electric motors, pumps, fittings and belongings, with the rights of way for said pipe lines, as now situated upon said ranch, and the right of way for pipe lines along the roads now delineated upon the map of the land hereinbefore mentioned; also the right to lay water

conduits beneath the surface of the land. The San Miguel Company reserves unto itself, its successors and assigns, "all the right, title, property and interest in and to all the water and water rights lying and being beneath the surface of that tract of land known as the west one-half of the Rancho San Miguel, as hereinbefore described, together with all the water flowing from and hereafter to flow from the wells now constructed and being upon said ranch, and hereby declares such water and water rights appurtenant to the land above described." The San Miguel Company further granted to the Ventura Company "the right to distribute through pipe lines and conduits water from (for) the irrigation of said land, under such agreements, rules and regulations as will make the distribution of said appurtenant water fair and equitable to all the land herein described, whether as a whole or in subdivisions of whatever area, at such price as may be determined upon." The Ventura County Power Company agreed for itself, its successors and assigns, to "accept the property above mentioned, with the privileges and rights of way particularly described, and upon the conditions and reservations above set forth; and does, for itself, its successors and assigns, hereby agree that it will at all times distribute the water flowing from the wells above mentioned to the land hereinabove described for purposes of irrigation of said land, and as appurtenant thereto all the water flowing from said wells, as demanded by the holders of land within the boundaries above set forth, under such agreements, rules and conditions as will apportion the distribution of said appurtenant water fairly and equitably to all the land herein described, at such price as may be determined upon." The instrument concludes:

"To have and to hold all and singular the above-described property, rights of way and privileges, unto the said Ventura County Power Company, and to its successors and assigns, for the term of 50 years from and after the date hereof."

This instrument was recorded November 7, 1906, in the Ventura county recorder's office.

On November 1, 1906, the Ventura County Power Company entered into an agreement with the Buena Ventura Company whereby the power company, "in consideration of the sum of \$1 to it paid and of the covenants and agreements on the party of the party of the second part hereinafter contained, agrees to deliver, through its distributing system, to the party of the second part, * * * when demanded, on 15 days' notice, all the water necessary and convenient for the irrigation of and being appurtenant to the following described land, situate in the west one-half of the Rancho San Miguel, county of Ventura, state of California, being a part of subdivision No. 1 of said ranch, * * * and containing 42.46 acres of land." The power company "reserves the right to furnish to the party of the

second part, for purposes of irrigation of the land above described, the water appurtenant to said land from the wells or works situate and being on the west one-half of the Rancho San Miguel, or from any other source of water supply owned and controlled by the party of the first part, when water from such supply may be had." The party of the second part "agrees to pay the party of the first part for all water delivered to it from the distributing system of the party of the first part, at the rate of twenty-five (25) cents per inch of thirteen thousand (13,000) gallons of water each twenty-four (24) hours." The agreement was to continue in force for the term of 50 years from and after January 1, 1906, and was to bind the successors and assigns of the respective parties.

On November 20, 1906, an agreement similar in terms was entered into between the power company and C. L. Chrisman covering a portion of the west one-half of the Rancho San Miguel, containing 77.12 acres. On July 25, 1907, the power company entered into a similar agreement with Mark McLoughlin covering a parcel of land in the west one-half of the Rancho San Miguel, containing 140 acres. On August 1, 1907, the power company entered into another agreement with G. J. and Thomas Mullis, which in substance was the same as the other agreements, covering a parcel of land containing 25 acres in the west one-half of the Rancho San Miguel.

At the time of the execution of the agreement between the San Miguel Company and the Ventura County Power Company two wells were located on the west one-half of the Rancho San Miguel on a parcel of land containing 3.44 acres, referred to as the Beach well site. The Beach well site remained the property of the San Miguel Company until July 15, 1916, on which date it was conveyed to the power company. The conveyance was unqualified in terms, making no reservation of any water or water rights. This conveyance also included all pipe lines upon the west one-half of the Rancho San Miguel together with all necessary right of entry and of way to repair, renew, and maintain said pipe lines. This deed recited that it was made pursuant to a resolution of the board of directors of the San Miguel Company. The resolution was passed September 22, 1906, and authorized the officers of the company to sell all or any part of the west one-half of the Rancho San Miguel for such prices and upon such terms and conditions as they might deem proper for the benefit and advantage of the corporation. On November 19, 1917, the power company conveyed all of its property to the defendant for valuable consideration. Prior to the year 1920 the plaintiff had become the owner of the Buena Ventura tract and the Mullis tract, and was occupying the Chrisman tract under a lease. He had also entered into a contract to purchase the McLough-

lin tract and the McLoughlin agreement with the power company. Plaintiff also showed that he had received an assignment of the Buena Ventura and the Mullis agreements.

In the year 1920 the plaintiff planted lima beans on the Chrisman, Buena Ventura, Mullis, and McLoughlin tracts. The rainfall for the season of 1919-1920 had been short, and it was necessary to irrigate the lima beans in order to produce a full crop. On or about the 2d day of June, 1920, plaintiff caused written demands to be served upon the defendant, in which he claimed to be entitled to receive water under the Chrisman, Mullis, McLoughlin, and Buena Ventura agreements, and requested and demanded water for irrigation purposes to be delivered on the lands described in those agreements; the demand being for "all water necessary and convenient for the irrigation of the within described real property." The defendant furnished no water from the Beach well system to plaintiff in response to these demands. It did, however, furnish from the Mound system, from water not appurtenant to the lands herein mentioned, to the Chrisman tract of 77 acres an amount of water described by the plaintiff as 210 inches. Plaintiff stated that he should have had 1,200 inches more on the 77-acre tract, 2,400 inches on the McLoughlin tract of 140 acres, 500 inches for the Mullis tract of 25 acres, and 600 or 700 inches for the Buena Ventura tract of 40 acres. He testified that it would take at least 12 inches to the acre, if not more, at the very minimum. Plaintiff testified that in 1920 he had two wells on the west one-half of the Rancho San Miguel which would have produced a flow of 150 inches; that he offered to allow the defendant to take this water for the purpose of supplying his demands for water on the four parcels of land upon which he was raising lima beans, but that the engineer of the water department of the defendant company, sent by the vice president of the defendant to investigate and report on the matter, said that "he was afraid that might complicate matters with them, and it might make them under obligation to furnish it in the future, and they might recognize the contracts in question here by doing so."

The Beach wells were originally artesian flowing wells and had been in existence some time prior to the date of the execution of the agreement between the San Miguel Company and the power company. The flow from these wells is estimated to have been about 75 inches in 1903, but in 1908 and 1909, even when pumped, produced from 45 to 50 inches, according to the testimony offered by defendant. Plaintiff testified that he received water from the Beach wells when these contracts were first made, and that the last water received from the Beach wells was possibly in 1914 or 1915. James P. McLoughlin testified that water from the Beach wells was de-

livered on the McLoughlin tract for four or five years after the making of the contract. G. J. Mullis testified that water was furnished to the plaintiff as his tenant to the year 1908. C. F. Zapf, who was in charge of operation of the water properties of the power company and of the defendant, testified that he pumped water from the Beach wells in 1908, but that in 1909 a futile attempt was made to clean out the wells, and that to his knowledge no further attempt was made to get water from the wells. The meter readings of the electric meters of the power company show no consumption of electricity by the motor operating the pump at the Beach well site after August 25, 1909. According to Mr. Zapf, the supply of water at the Beach well site in 1908 was fairly good the first part of the season, but during June and July it gradually diminished and the wells were gradually sanding up. The books of the Ventura County Power Company show charges for the delivery of water to the owners of the lands covered by this suit in the years 1907, 1908, 1911, 1912, 1913, 1914, 1915, and 1916. After deliveries from the Beach wells had ceased, water was delivered by the power company and the defendant on the lands described in the agreement sued upon through the Mound water system.

Testimony was offered by the plaintiff tending to show that numerous wells had been drilled in the vicinity of the Beach well site, producing water more than sufficient to irrigate the plaintiff's land properly, although defendant's testimony tended to show that the water level would be affected by the pumping of other wells in the same district.

[14] Under this state of the record defendant asserts that the findings are not supported by the evidence in five different respects: First, defendant claims that it did not purchase nor at any time own water appurtenant to the plaintiff's lands. The record shows that defendant purchased the Beach well site from the power company, which had purchased the same from the San Miguel Company in 1916, ten years after the power company and the San Miguel Company had entered into an agreement providing for the distribution of this water over the west one-half of the Rancho San Miguel, which the San Miguel Company proposed to subdivide, and in which agreement the San Miguel Company reserved all of said water as appurtenant to such land. During the interim the land was subdivided and sold, and the power company entered into contracts with the buyers to distribute the water to the lands so sold. The power company could not escape its liability under these contracts by permitting the wells to sand up and the pipes to become in a disusable condition so that it was necessary to supply water from another source of supply, as it had the right to do under the agreements with the landowners,

and then accept an absolute deed to the well site and claim it was freed from all obligations to deliver water when there was a shortage of supply from the additional source so substituted. Defendant says that it is impossible for defendant to own water appurtenant to plaintiff's land. Defendant owned the Beach well site and the distributing system, subject to all the obligations of the power company to distribute the water to said lands. *Hunt v. Jones*, supra; *Telander v. Tujunga Water & Power Co.*, supra. Defendant thus had the obligation to distribute and owned the right of possession and control of said water appurtenant to said lands. It had the control and possession of these waters, although their use was reserved to the benefit of the purchasers of the land from the San Miguel Company, notwithstanding the fact that the San Miguel Company attempted to convey the well site to the power company by absolute deed in 1916.

[15] Defendant next attacks the findings on the ground that the evidence shows that the defendant did not purchase from the power company the distributing system serving plaintiff's lands, nor the power company's rights and obligations under the agreements sued upon, and is not the successor in interest of the power company. As already stated, the defendant purchased the Beach well site, and in so purchasing all the property of the power company, including the distributing system, the defendant was under obligation to continue to serve the consumers previously receiving service therefrom, although it does not expressly assume that obligation. *Hunt v. Jones*, supra; *Telander v. Tujunga Water & Power Co.*, supra.

[16, 17] Defendant further criticizes the findings in that the evidence shows that there was not available to defendant sufficient appurtenant water to use in the irrigation of plaintiff's lands. Plaintiff offered evidence tending to show the existence of a sufficient supply of appurtenant water for the irrigation of plaintiff's lands by showing the existence in 1920 of other wells in the vicinity of the Beach well site. Defendant now argues that defendant was under no obligation to develop water at the Beach well site for the reason that the only duty under the agreements made between the power company and the landowners was "to deliver through its distributing system" the appurtenant water. This brings us to the crucial question at issue, whether the power company, or the defendant as its successor, was obligated to develop water or to maintain the existing water supply. Under the terms of the agreements made between the land purchasers and the Ventura County Power Company, the power company (*italics ours*) "agrees to *deliver through its distributing system*, to the party of the second part, when demanded, on 15 days' notice, pro rata of the acreage, in the

order of distribution to which the land is entitled to water, under the rules and regulations of the party of the first part, *all the water necessary and convenient for the irrigation of and being appurtenant to the following described land*, situate in the west one-half of the Rancho San Miguel, county of Ventura, state of California." It will be observed that the water to be delivered under the terms of these agreements is not limited to the water from flowing or artesian wells. The power company could not possibly deliver "all the water necessary and convenient for the irrigation of and being appurtenant to" the said land without at least maintaining the existing water supply, either by sinking new wells or pumping, if necessary. Such was the construction placed upon the contract by the power company, as the evidence shows that the power company continued to pump the existing wells on the Beach site to and including the year 1909. Besides, water was furnished to the landowners under these agreements up to the year 1920, both by the power company and by the defendant company, without any denial on the part of either company of the obligation to furnish such water when demanded. True, this water was furnished from another source owned by the power company and the defendant, as such right had been reserved in the agreement, but this right to furnish water from another source was reserved by the power company under the terms of the agreement only "when water from such other source of supply may be had." This right to supply such other water did not destroy the obligation of the power company and the defendant company to supply from the original source at the Beach well site when no other source of supply might be had. Neither was the obligation to deliver water limited to water supplied from the Beach well site, but the agreement of the power company was to deliver all the water necessary and convenient for the irrigation of and being appurtenant to the said land. There is sufficient testimony in the record to justify the conclusion that there was a supply of water underlying the entire west one-half of the Rancho San Miguel which was appurtenant to said lands. In support of the argument that the agreement of the power company was limited to water flowing from existing artesian wells and did not extend to water that might be obtained by pumping, appellant refers to the agreement of October 31, 1906, made between the San Miguel Company and the Ventura County Power Company wherein the San Miguel Company sold to the power company, for a term of 50 years, all its pipe lines, together with the electric motors, pumps, fittings, and belongings, with the right of way for said pipe lines, reserving to itself all water and water rights lying and being beneath the surface of the west one-half of the rancho, "together with all

the water flowing from, and hereafter to flow from, the wells now constructed and being upon said ranch, and hereby declares such water and water rights appurtenant to the land above described." The power company agreed to accept the property so conveyed. There is no definite provision in this agreement requiring the power company to sink additional wells, or to do any pumping. All the parties in interest concede that the agreements made between the land purchasers and the power company should be construed in the light of the contract between the San Miguel Company and the power company, providing for the distribution of water to said lands. These agreements were all part of one whole transaction, and the land buyers are entitled to the benefits of the agreement between the San Miguel Company and the power company. A clear analysis of this agreement will disclose the intention of the parties to provide a water supply for the lands being sold by the San Miguel Company. The agreement recites a resolution of the board of directors of the San Miguel Company wherein it is resolved that (*italics ours*):

"It is the purpose and intention of the San Miguel Company to improve by irrigation" the west one-half of the Rancho San Miguel, and "to that end it has reserved and retained unto itself all the right, title and interest in and to *all the water and water rights lying and being beneath the surface of said land, for the purpose of distribution of said water to the said land as appurtenant thereto*, and to apportion and distribute such water as may be necessary to the irrigation, from a common source of wells or works, of such subdivisions of land as may be conveyed by the corporation from time to time and for the benefit of all of said land; and whereas, it has become necessary to apportion and distribute to purchasers of parcels of said land the water to which they are entitled as appurtenant to the land purchased; therefore, be it resolved, by the board of directors of the San Miguel Company that this corporation sell and convey to the Ventura County Power Company such land as may be determined upon by the board of directors of the contracting corporations, and at such price as may be determined upon, together with the wells now constructed and being upon said lands, *reserving and retaining unto the San Miguel Company, and to its successors, assigns and grantees, all the right, title, property and interest in and to all the water and water rights lying and being beneath the surface of the land that will be conveyed by authority of this resolution*; together with all the water flowing from and to hereafter flow from said wells, and to all the water that may flow from any and all wells that may hereafter be constructed upon said lands, as a water right appurtenant to all that certain parcel of land situated in Ventura county, California, known and designated as the west one-half of the Rancho San Miguel."

It was further resolved that the San Miguel Company sell and transfer to the power company—

"all the pipe lines now constructed upon the land above described, with the electric motors, pumps, fittings, and belongings, as now existing, granting to the Ventura County Power Company the right, and the *Ventura County Power Company accepting the obligation, to distribute to the San Miguel Company, its successors, assigns and grantees, all the water appurtenant to the land as hereinbefore declared, when demanded for the irrigation of said land,* under such agreements and conditions as will make the distribution of said appurtenant water fair and equitable to all the land herein described."

It was further resolved that upon the agreement of terms and receipt of the purchase price, the president or any vice president, and James R. Martin (secretary of both corporations) be authorized to execute and deliver to the power company—

"a deed of the land purchased, or such agreement of sale as may be determined upon, and, further, to sell, assign, transfer and convey all the right, title and interest of this corporation in and to the pipe lines, electric motors, pumps, fittings, and belongings above named, *upon the Ventura County Power Company executing a proper agreement that it will distribute the water appurtenant to the west one-half of the Rancho San Miguel, as hereinabove stated.*"

The agreement is made "*in pursuance of the resolution aforesaid,*" in consideration of the sum of \$10, and "*in consideration of a certain agreement of sale and purchase between the parties hereto of certain land situated in the west one-half of the Rancho San Miguel, * * * together with the wells constructed upon said land, and of the covenants and agreements therein set forth.*" The agreement provides that the San Miguel Company does sell and convey to the power company—

"all the pipe lines now constructed upon the west one-half of the Rancho San Miguel, with the electric motors, pumps, fittings and belongings, with the rights of way for said pipe lines, as now situated upon said ranch, and the right of way for pipe lines along the roads now delineated upon the map of the land hereinbefore mentioned; also the right to lay water conduits beneath the surface of the land, in such manner as not to interfere with the use of said land by the owner thereof, and such right is reserved by the party of the first part in conveying the land to the purchasers thereof."

The contract further provides:

"The party of the first part hereby reserves, withholds and retains unto itself, and to its successors and assigns all the right, title, property and interest in and to all the water and water rights lying and being beneath the surface of that tract of land known as the west one-half of the Rancho San Miguel, as hereinbefore described, together with all the water flowing from, and hereafter to flow from the wells now constructed and being upon said ranch, and hereby declares such water and water rights appurtenant to the land above de-

scribed. The party of the first part hereby grants to the Ventura County Power Company *the right to distribute through pipe lines and conduits water from (for) the irrigation of said land,* under such agreements, rules and regulations as will make the distribution of said appurtenant water fair and equitable to all the land herein described, whether as a whole or in subdivisions of whatever area, at such price as may be determined upon. The party of the second part hereby covenants and agrees to and with the party of the first part that it does for itself, its successors and assigns, *accept the property above mentioned, with the privileges and rights of way particularly described, and upon the conditions and reservations above set forth;* and does, for itself, its successors and assigns, hereby agree that it will at all times *distribute the water flowing from the wells above mentioned to the land hereinabove described for purposes of irrigation of said land, and as and appurtenant thereto all the water flowing from said wells, as demanded by the holders of land within the boundaries above set forth,* under such agreements, rules and conditions as will apportion and distribute said appurtenant water fairly and equitably to all the land herein described, at such price as may be determined upon. To have and to hold all and singular the above described property, rights of way and privileges, unto the said Ventura County Power Company, and to its successors and assigns, for the term of *fifty years* from and after the date hereof."

It can scarcely be denied that under the terms of the foregoing contract the power company was not only obligated to distribute the existing waters flowing from the wells on the land conveyed to it, but also, in order to accomplish the purpose as recited in the resolution embodied in said contract "to improve by irrigation" said lands, it is clear that the power company had the right to distribute all of said appurtenant waters, whether flowing or underground, and to sink new wells and pump old and new wells, as appears from the fact that it is recited in the resolution that the San Miguel Company reserves to itself, its successors, assigns and grantees *all the right to all water* that may flow from any and all wells that may hereafter be constructed upon said lands; in fact, the purpose and intention of the agreement between the San Miguel Company and the power company to provide an adequate water supply to said lands is so positive that it might well be contended, in the absence of any definite provision therefor, that the power company was obligated by the whole tenor of said contract to develop and maintain the water supply from the lands agreed to be conveyed to the power company. But without so deciding, we find that the contracts between the power company and the land purchasers were not limited to flowing waters but said contracts provide that the power company "agrees to deliver * * * all the water necessary and convenient for the irrigation of and being appurtenant to" said lands. The fact that the power company

did not see fit to insert a clause in these later contracts limiting its obligation for delivery of water to flowing waters only, together with the fact that the power company continued pumping the wells to and including the year 1909, point to the conclusion that the power company and the San Miguel Company recognized not only the right of the power company to maintain and develop a water supply, but also the implied obligation of the power company so to do. Under all the circumstances in the case it is impossible to conceive how the San Miguel Company and the power company intended to limit the source of supply to the then existing flow of artesian water. The term of the contract was for 50 years, and it was clearly the intention to provide irrigation from all appurtenant water, including the underground supply. We find no fault with the authorities cited by appellant, holding that flowing waters do not include pumped water, or additional water thereafter developed from underground sources; but we do not believe the agreements in this case were limited to flowing water as the wells then existed, or to water to flow thereafter from those wells. In the cases cited by defendant (*Mayberry v. Alhambra, etc., Co.*, 125 Cal. 444, 54 P. 530, 58 P. 68; *Jones v. Van Nuys*, 161 Cal. 158, 118 P. 541), the contracts sued upon were contracts to take "flowing" waters and "water hereafter to flow"; and it was rightly held that these words denote the natural flow and do not reasonably denote waters to be in the future artificially developed. In the case at bar there was no limitation to flowing waters in the contracts sued upon; but "all water necessary and convenient for the irrigation of and being appurtenant to" the lands described therein, "from the wells or works situate and being on the west one-half of the Rancho San Miguel," was included in the contracts sued upon.

[18] Defendant questions the sufficiency of the evidence to show that it could have developed water at the Beach well site either "in an amount sufficient to supply necessary and convenient demands for the irrigation" of plaintiff's lands, or "in an amount more than sufficient to supply said land pro rata of its acreage." We have examined the evidence offered by the plaintiff and believe this evidence sufficient to support the findings of the trial court. It was incumbent upon the defendant to meet this evidence by affirmative evidence showing that the defendant had attempted to develop such amount of water on the Beach well site and that such amount of water could not be developed.

[19] Defendant's next objection to the findings is that the evidence is not sufficient to justify the finding that there was any appurtenant water. Defendant is in no position to urge this objection, since the power company,

as its predecessor in interest, entered into the agreement with the San Miguel Company and accepted the provisions thereof, wherein it was declared that the Beach well site and all subterranean waters underlying the rancho were appurtenant thereto and for the benefit of all said lands. Subsequent purchasers would derive the benefit of this reservation as against the power company.

[20] Finally, defendant asserts that the evidence is insufficient to support the finding that plaintiff was unable to secure water from any other source for the purpose of irrigating his land, for the reason that plaintiff had water of his own, and therefore that the proper measure of his damages herein was not the damage to his crops. Plaintiff testified that he had 150 inches of water which he offered to deliver to the defendant if the defendant would distribute it to him, but that defendant's agent refused to distribute the water for the reason that the defendant company did not recognize an obligation so to do and did not wish to accept liability. Under these circumstances this supply of water was not available to the plaintiff. Hence the proper measure of damages is the loss of crops of plaintiff as a result of the fact that his crops were not irrigated, less the cost of production and less the net value of the crops actually produced. The plaintiff fulfilled the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible, as such duties are imposed by the law as declared in the authorities cited by the defendant.

[21] Appellant advances the objection that the court improperly admitted evidence of the value of the crop plaintiff might have raised under irrigation, and cites the cases of *Crow v. San Joaquin, etc., Irr. Co.*, 130 Cal. 309, 62 P. 562, 1058, *Pallett v. Murphy*, 131 Cal. 192, 63 P. 366, and *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 411, 149 P. 805, as authority for the rule that the proper measure of damages in such a case in this state is the difference in rental value of the land, with or without water. However, upon examination of these cases we find the rule so stated where the crops had not already been planted. In the case at bar the bean crop had been planted before the demand for water was made. In such case the proper rule of damages for the destruction of a growing crop is the rule followed by the trial court. In *Lowe v. Yolo County, etc., Water Co.*, 157 Cal. 503, 108 P. 297, it was held that the damages were measured by the net profits of what an alfalfa crop would have been for the season if properly irrigated. In *Auchmoody v. City of Manhattan Beach*, 53 Cal. App. 726, 731, 200 P. 803, damages were allowed for depreciation and destruction of growing crops by failure to deliver water. The court said, page 731 (200 P. 805):

"Appellant relies upon certain decisions which have held that where damages are claimed for

refusal to furnish water upon land the true measure of damages must be determined by ascertaining the difference between the rental value of the land with water and its rental value without water. *Crow v. San Joaquin Irr. Co.*, 130 Cal. 309, 62 P. 562, 1058; *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 411, 149 P. 805. These were cases in which the plaintiff attempted to prove that he would have raised certain kinds of crops and that he would have obtained certain profits therefrom if he had received the supply of water to which he was entitled. As was said by the court in *Pallett v. Murphy*, 131 Cal. 192, 63 P. 366: 'Evidence as to the value of a possible crop that might be grown with the use of water would be as purely speculative as could well be imagined.' But in the present case the losses incurred consist in the depreciation or destruction of value of property actually in existence. These losses were capable of ascertainment by direct evidence, and were not at all speculative in their nature. Under these circumstances, the loss of chickens which died, and the loss of the growing crops which were destroyed, were of such a nature that recovery can be had therefor. *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 P. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779."

In *Rystrom v. Sutter Butte Canal Co.*, 72 Cal. App. 520, 249 P. 53, it was held that the damages to growing crops are to be ascertained by first determining from the evidence the market value of the probable yield of the growing crop if the water had been furnished as agreed, and then deducting therefrom the reasonable cost of marketing and producing such crop, and also deducting therefrom the net market value of the crop actually produced. The foregoing rule for ascertaining the damages to growing crops was followed in *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 212, 214, 90 P. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779; *Stewart v. Erskine-Bolst*, 66 Cal. App. 461, 471, 472, 226 P. 644; *Chambers v. Belmore I. & W. Co.*, 33 Cal. App. 78, 82, 83, 164 P. 404; *Barlow v. Frink*, 171 Cal. 165, 152 P. 290; *Harrison v. Spring Valley H. G. Co.*, 65 Cal. 376, 4 P. 381; *Telander v. Tujunga Water & Power Co.*, 43 Cal. App. 492, 497, 185 P. 504; *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 211, 143 P. 253.

[22] Appellant's objection that the court improperly admitted evidence that the Beach well site could have furnished sufficient water for irrigating the lands described in the agreements sued upon is not well taken. This water was appurtenant to plaintiff's land, and there is no testimony in the record of demands being made by other owners for such water.

Appellant's statement of the respects in

which the judgment is not supported by the findings is based primarily upon the same reasons in respect to which defendant alleges that the complaint does not state a cause of action. Our ruling that the complaint does state a cause of action disposes of this objection.

[23] Appellant further objects that there is no finding with reference to what amount of water was necessary or convenient for the irrigation of the plaintiff's lands. No such allegation appears in the first three causes of action. On special demurrer, the fourth cause of action was amended to state the amount of water necessary for the irrigation of the lands described in said cause of action. Plaintiff testified that about 4,700 inches of water would have been required for irrigation. The court in making its decision indicated that the cost of production, including water, was being deducted from the total value of the crop that would have been grown under irrigation. The court in its findings stated that at all times mentioned in the complaint defendant was the owner of water appurtenant to said lands in an amount sufficient to supply the necessary and convenient demands for the irrigation of said lands and in an amount more than sufficient to supply said land pro rata of its acreage in the order of distribution to which said land was entitled to water; that defendant did not deliver any water for irrigation of the lands described in the first three causes of action, and that said lands were not irrigated; and that defendant delivered 210 inches only for irrigation of the land described in the fourth cause of action, which was not sufficient properly to irrigate said land; that said lands were properly cultivated and harvested; that there were grown and harvested from each of said parcels a certain quantity of beans and straw; that if defendant had provided the plaintiff water for irrigation of said lima bean crop at the time and in the quantity demanded, said parcels of land would have produced a certain greater amount of beans and straw; and that by reason of and as a result of the failure and refusal of defendant to furnish plaintiff water for the irrigation of said lima beans, the plaintiff was damaged in a certain sum as to each of said parcels. We believe the evidence sufficient to support the findings and the findings sufficient to support the judgment.

There being no prejudicial error, it is ordered that the judgment be affirmed.

We concur: CONREY, P. J.; YORK, J.

201 Cal. 267

BAUER et al. v. BAUER et al. (L. A. 9021.)

Supreme Court of California. June 1, 1927.

1. Courts $\Leftrightarrow$ 200½—Superior court sitting in probate may not try title to property between representative of estate and strangers thereto.

Superior court, sitting in probate, is without jurisdiction to try title to property as between representative of estate and strangers thereto.

2. Courts $\Leftrightarrow$ 200½—Superior court sitting in probate may determine title of representative of estate in individual capacity.

Superior court, sitting in probate, has jurisdiction to determine validity of claim of title to property by representative of estate in his individual capacity on settlement of final accounts.

3. Courts $\Leftrightarrow$ 472(4)—Superior court sitting in probate has exclusive jurisdiction of heir's action to establish trust in real property against executrix.

Superior court, sitting in probate, held to have exclusive jurisdiction of action by heirs against executrix to establish trust in real property, alleged to have been retained by her as her individual property.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Hamilton A. Bauer and others against Lily M. Bauer individually and Lily M. Bauer and another as executors of the last will and testament of Emile Bauer, deceased, to establish trust. Judgment sustaining a demurrer to the complaint and dismissing the action, and plaintiffs appeal. Affirmed.

See, also, 196 Cal. 757, 239 P. 49, 40 A. L. R. 1457; 199 Cal. 98, 248 P. 507.

Hamilton A. Bauer, of San Francisco, for appellants.

Devlin & Devlin, of Sacramento, amici curiae.

J. W. Morin and Morin, Newell & Brown, all of Pasadena, for respondents.

Hubbard & Johnson and T. W. Hubbard, all of San Francisco, amici curiae.

SEAWELL, J. By reason of the importance of the issues presented by this appeal, and the bearing that our conclusion would have upon the administration of estates of deceased persons and the duties and rights of executors and administrators thereof, we deemed it expedient to grant a petition for a rehearing in this cause, in order that a most thorough investigation and consideration of the questions might be had. The opinion rendered upon the first presentation was prepared by the late Mr. Justice LENNON and concurred in by all the members of this court

participating therein. A petition for rehearing was filed and, for the reason above stated, was granted. The case has since been elaborately argued orally and carefully briefed by counsel in the case, and also by amici curiae, and submitted for our consideration. After full and careful consideration we find ourselves brought to the adoption of the conclusion reached upon the first presentation of the cause. We are of the view that such cases as *In re Burdick*, 112 Cal. 387, 44 P. 734, *Estate of Hall*, 154 Cal. 527, 98 P. 269, *Stevens v. Superior Court*, 155 Cal. 148, 99 P. 512, *Estate of Fulton*, 188 Cal. 489, 205 P. 681, and numerous other cases, bearing more or less directly upon the question, which might be cited to the same point, sustain the conclusion reached in the first instance. A few cases have been cited, which seem to give some color to the appellants' claims; but they are entirely overcome by what appears to us to be the better considered line of cases. The latter are also more in consonance with a logical interpretation of the various Code sections establishing our system of probate procedure and tend to bring litigation to a close.

We are satisfied that no constitutional right was invaded by the decision first handed down by this court, and that the rule announced would have the effect of preventing a state of confusion which would inevitably follow if appellants' views should be declared to be the law. Our former opinion, which was set aside upon petition for rehearing, and which we adopt as the law of the case, follows:

"This appeal is from a judgment made and entered on October 16, 1925, in favor of the defendants after the making of a certain order by the trial court sustaining a demurrer without leave to amend and granting a motion to dismiss said action.

"The complaint of the plaintiffs herein, after alleging the qualifications of certain of said plaintiffs to maintain this action, proceeds to aver that on the 25th day of October, 1921, Emile Bauer, deceased, was the owner and in possession of a certain piece of real estate situate in Pasadena, Cal.; that on said date there was in the safe deposit box of said Emile Bauer a deed to said property which he had theretofore subscribed and by which said deed, in consideration of love and affection, he had granted to Lily M. Bauer, the defendant herein, said property; that said Lily M. Bauer, on or about the 26th day of October, 1921, took said deed from said safe deposit box without the knowledge of said Emile Bauer and without his having made any delivery of said deed to her, and caused the said deed to be recorded; that said Emile Bauer died on the 4th day of June, 1923, in the city of Pasadena, leaving his last will and testament, which was, on or about the 12th day of July, 1923, duly admitted to probate, and said Lily M. Bauer and one Lloyd C. Bauer were granted letters testamentary as the executrix and executor named therein; that the plaintiffs herein are legatees of said Emile

Bauer under said will; that during the month of September, 1923, said Lily M. Bauer sold said real estate for the sum of \$12,000, which she then received and has since retained and claims the same to be her individual property; that said Lily M. Bauer and Lloyd C. Bauer, as executrix and executor, respectively, of said estate, have refused to include in the inventory of said estate the said property, or any portion thereof, or the money derived from the sale thereof; that by reason of the failure and refusal of Lily M. Bauer and Lloyd C. Bauer, as the executrix and executor, respectively, of said estate, to include the said property and money in said estate and in the inventory of the estate, the said plaintiffs, who are legatees under the said will of said deceased, are being deprived of their respective shares and interests in said state as fixed by the terms of said will; that said Lily M. Bauer and said Lloyd C. Bauer, as the executrix and executor of said estate, are acting in collusion with each other in refusing to maintain any action against Lily M. Bauer in her individual capacity to recover for said estate said property or the proceeds thereof. The prayer of said complaint is that said defendant be adjudged to be a trustee for the benefit of the plaintiffs herein and of said estate in respect to the said sum of \$12,000 derived by her from the sale of said real estate and for such other and further relief as may be meet in the premises.

"To the foregoing complaint the defendant Lily M. Bauer presented her demurrer upon the general ground that the complaint did not state facts sufficient to constitute a cause of action against said defendant and upon the further ground that it appears therefrom that there is another action pending between the parties for the same cause, to wit, a proceeding in probate, and upon the further ground that the court has no jurisdiction of the subject-matter of this action, the exclusive jurisdiction of the same resting with the court in probate, and also certain grounds of special demurrer which it is not necessary to consider. The said defendant also presented at the time of the filing her said demurrer a notice of motion to dismiss said action upon the ground that there is another action pending between the parties in reference to the same subject-matter, to wit, the estate of Emile Bauer, deceased, No. 62632, in probate, and upon the further ground that the court has no jurisdiction of the subject-matter of this action. Prior to the hearing had upon said motion the plaintiffs presented a motion to said court for permission to add the names of Lily M. Bauer and Lloyd C. Bauer, as executors of the last will and testament of Emile Bauer, as parties defendant in said action.

"The hearing upon the demurrer and also upon each of the foregoing motions came on for hearing before the court on the 13th day of October, 1925. Whereupon it was stipulated between the parties that the last-named motion of the plaintiffs might be granted, joining Lily M. Bauer and Lloyd C. Bauer in their official capacities as parties defendant, and that the demurrer of Lily M. Bauer theretofore filed might stand as the demurrer of each and all of said defendants. The demurrer and motion to dismiss said action were then presented and submitted to the court for decision, and thereafter and on October 14, 1925, the trial court

made its order sustaining said demurrer without leave to amend and also made its further order dismissing said action. The judgment followed from which this appeal has been taken.

"The main question presented upon this appeal is as to whether the court had jurisdiction of the subject-matter of the action, for the reason that there was pending in the probate court the proceedings for the administration of the estate of Emile Bauer, deceased, and that, this being so, the probate court was the proper forum for the presentation and determination of the issues sought to be tried in this action.

"The facts as they appear upon the face of the complaint herein show that whatever individual rights the defendant Lily M. Bauer claimed to the real estate described therein and to the proceeds thereof arose prior to the death of Emile Bauer. The question, therefore, presented by the complaint for determination, was whether or not the defendant was the owner, in her individual capacity, of said property. In short, the complaint seeks an adjudication of the title as between said defendant Lily M. Bauer and the estate of Emile Bauer.

[1] "It is undoubtedly the rule that the superior court, sitting in probate, is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. *Ex parte Casey*, 71 Cal. 269, 12 P. 118; *Estate of Haas*, 97 Cal. 232, 31 P. 893, 32 P. 327. This is necessarily so, for the reason that either the person initiating the attack or the person resisting the attack is lacking in privity to the probate proceedings.

[2] "It has, however, been held that when the title to property is claimed by a representative of an estate in his individual capacity the superior court, sitting in probate, is vested with the jurisdiction of determining the validity of such claim upon the settlement of the final accounts of such representative. *Stevens v. Superior Court*, 155 Cal. 148, 99 P. 512; *Estate of Fulton*, 188 Cal. 489, 205 P. 681; 2 *Woerner's American Law of Administration* (3d Ed.) note, p. 1007; 3 *Woerner's American Law of Administration*, p. 1769.

[3] "Appellants attempt to distinguish the cases cited by respondents upon the ground that the cases holding that the probate court has jurisdiction to determine the title to property claimed by the representative of an estate in his individual capacity were cases wherein the possession of the property was acquired by the representative by virtue of his official capacity. This may be conceded to be true of several of the cases cited by respondents. The case of *Stevens v. Superior Court*, *supra*, cannot, however, be so distinguished. The facts are practically identical. In that case the executor alleged that the testator had transferred certain money to him in his individual capacity prior to the testator's death and claimed the property as his individual property. Upon objections being filed to his final account upon the ground that said executor had failed, neglected, and refused to account for the sum of money claimed by him, he sought a writ of prohibition to prevent the superior court, sitting in probate, from determining the validity of his title. The writ was denied upon the ground that the probate court did have the power to determine the title. The court said:

"It seems clear to us that the probate court must necessarily have the power to incidentally try and determine such an issue between the executor or administrator and the estate in the matter of the settlement of his exhibits and accounts. * * * We think there can be no doubt that the superior court, sitting in probate, has jurisdiction to determine as against an executor the amount of money or property of the estate that has come into his hands, for the purpose of charging him therewith, and in determining that question to determine all issues necessarily incidental thereto."

"It is self-evident that this is not a case where extrinsic fraud practiced upon the probate court has conferred jurisdiction upon the superior court as a court of equity to interpose and furnish relief from a final order of the court in probate. *Silva v. Santos*, 138 Cal. 536, 541, 71 P. 703; *Aldrich v. Barton*, 138 Cal. 220, 71 P. 169, 94 Am. St. Rep. 43.

"The order of the trial court sustaining the demurrer without leave to amend and granting the motion to dismiss the action was therefore proper."

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

201 Cal. 770

HAMILTON A. BAUER, Charlotte Bauer, as Guardian of the Estate of Hambla C. Bauer (a Minor), Walter J. Dyer, as Guardian of the Estate of Beatrice W. Dyer (a Minor), and Ivy F. Linecum and Charlotte Bauer, Individually and as Legatees under the Last Will and Testament of Emile Bauer, Deceased, Plaintiffs and Appellants, v. Lily M. BAUER and Lloyd C. Bauer, as Executors of the Last Will of Emile Bauer, Deceased, Lloyd C. Bauer and Occidental Life Insurance Company (a Corporation), Defendants and Respondents. (L. A. 8866.)

Supreme Court of California. June 1, 1927.

In Bank.

Appeal by plaintiffs from a judgment of the Superior Court of Los Angeles County, Hugh J. Crawford, Judge, in an action to recover certain stock.

See, also, 196 Cal. 757, 239 P. 49, 40 A. L. R. 1457; 199 Cal. 98, 248 P. 507.

Hamilton A. Bauer, of San Francisco, for appellants.

Devlin & Devlin, of Sacramento, amici curiæ. J. W. Morin and Morin, Newell & Brown, all of Pasadena, for respondents.

Hubbard & Johnson and T. W. Hubbard, all of San Francisco, amici curiæ.

PER CURIAM. The preliminary statement made in *Hamilton A. Bauer et al. v. Lily M. Bauer et al.* (L. A. No. 9021) 256 P. 820, is applicable in all respects to the instant case. We therefore adopt the decision formerly rendered in this case, which was vacated upon the order

granting the petition for rehearing, as our decision in the instant case. It follows:

"This is an action on behalf of certain heirs and legatees of Emile Bauer, deceased, to recover to his estate certain stock of the Occidental Life Insurance Company, which plaintiffs allege was procured by Lloyd C. Bauer, one of the defendants, from Emile Bauer in his lifetime by fraud and undue influence. The principle involved in this case is identical with the principle involved in the case of *Hamilton A. Bauer et al. v. Lily M. Bauer et al.* (L. A. No. 9021) 256 P. 820. On the authority of that case, therefore, the judgment in this case is affirmed."

201 Cal. 771

HAMILTON A. BAUER, Charlotte Bauer, as Guardian of the Estate of Hambla C. Bauer (a Minor), Walter J. Dyer, as Guardian of the Estate of Beatrice W. Dyer (a Minor), and Ivy F. Linecum and Charlotte Bauer, Individually and as Legatees Under the Last Will and Testament of Emile Bauer, Deceased, Plaintiffs and Appellants, v. Lily M. BAUER, Union Oil Company (a Corporation), Union Oil Associates (a Corporation), and Lily M. Bauer and Lloyd C. Bauer, as Executors of the Last Will and Testament of Emile Bauer, Deceased, Defendants and Respondents. (L. A. 9022.)

Supreme Court of California. June 1, 1927.

In Bank.

Appeal by Plaintiffs from a Judgment of the Superior Court of Los Angeles County, Hartley Shaw, Judge, in an Action to Recover Certain Stock.

See, also, 196 Cal. 757; 239 P. 49; 40 A. L. R. 1457; 199 Cal. 98; 248 P. 507.

Hamilton A. Bauer, of San Francisco, for appellants.

Devlin & Devlin, of Sacramento, amici curiæ. J. W. Morin and Morin, Newell & Brown, all of Pasadena, for respondents.

Andrews & Andrews, of Los Angeles, for defendant Union Oil Associates.

Hubbard & Johnson and T. W. Hubbard, all of San Francisco, amici curiæ.

PER CURIAM. The preliminary statement made in *Hamilton A. Bauer et al. v. Lily M. Bauer et al.* (L. A. No. 9021) 256 P. 820, is applicable in all respects to the instant case. We therefore adopt the decision formerly rendered in this case, which was vacated upon the order granting the petition for rehearing, as our decision in the instant case. It follows:

"This is an action on behalf of certain heirs and legatees of Emile Bauer, deceased, to recover to his estate certain stock of the Union Oil Company and Union Oil Associates, which the plaintiffs allege was procured by Lily M. Bauer, one of the defendants, from Emile Bauer in his lifetime by fraud and undue influence. This case is identical in principle with the case of *Hamilton A. Bauer et al. v. Lily M. Bauer et al.* (L. A. No. 9021) 256 P. 820. On the authority of that case, therefore, the judgment in this case is affirmed."

83 Cal. App. 286

SHIRLEY v. SHIRLEY et al. (Civ. 5310.)

District Court of Appeal, First District, Division 1, California. May 26, 1927.

1. Limitation of actions $\Leftrightarrow$ 148(1)—Writing relied on to show agreement to pay debt barred by limitations must contain express promise or acknowledgment from which promise may be inferred (Code Civ. Proc. § 360).

Writing relied on as evidence to show agreement to pay debt barred by statute of limitations must contain express promise or acknowledgment from which present promise may be inferred, in view of Code Civ. Proc. § 360.

2. Limitation of actions $\Leftrightarrow$ 196(4)—In action on promise to pay debt barred by limitations, parol evidence held admissible to show that payment evidenced by one debtor's note was made by both debtors.

In action on promise to pay debt barred by statute of limitations, in which creditor had given receipt showing that one debtor's note had been received as part payment, parol evidence held admissible to show that payment was in fact made by both debtors.

3. Limitation of actions $\Leftrightarrow$ 148(4) — Writing, showing debtor regards barred indebtedness as subsisting, constitutes promise to pay barred debt.

Writing executed by debtor is sufficient to constitute promise to pay debt barred by statute of limitations, if it shows that writer regards or treats indebtedness as subsisting, since from acknowledgment of subsisting indebtedness law implies promise to pay based on consideration of old debt.

4. Pleading $\Leftrightarrow$ 18—In action on promise to pay debt barred by limitations, pleading, seeking to show that debtor signed indorsement, held demurrable for uncertainty.

In action on promise to pay debt barred by statute of limitations, allegation that debtor "then and there signed his 'Lake,'" and that it was agreed that time for payment was extended, and that indebtedness should continue, by which pleader sought to state that debtor sign indorsement, held demurrable, as being uncertain.

5. Limitation of actions $\Leftrightarrow$ 179(3)—Complaint, in action on promise to pay debt barred by limitations, held to state cause of action.

In action on promise to pay debt barred by statute of limitations, complaint, alleging that note given by one debtor was applied as payment, and that the other debtor signed indorsement on original note showing such payment, held to state cause of action.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Charles W. Shirley against R. R. Shirley and another. From a judgment of dismissal, entered on an order sustaining the demurrer of defendant Frank W. Lake, plaintiff appeals. Reversed, with directions,

James M. Robinson; of Los Angeles, and J. W. Robinson, of Seattle, Wash., for appellant. W. H. Thomas, of Los Angeles, for respondent Lake.

CASHIN, J. An appeal from a judgment of dismissal entered upon an order sustaining the demurrer of respondent, Frank W. Lake, to a complaint upon an alleged promise to pay a debt barred by the statute of limitations.

The original complaint, which appears to have been filed during the latter part of the year 1922, the date not being shown by the record on appeal, alleged that respondent and R. R. Shirley, on January 25, 1912, at Rockford, Ill., executed to appellant their promissory note for \$1,600, which by its terms was there payable one year after date, with interest; that between the date of the note and October 23, 1915, various installments of interest thereon were paid; that on November 6, 1919, there was executed by Shirley a new note for \$800, which was accepted by appellant as payment to that extent on the original note, and that Shirley paid at the same time the interest then due on the latter note in the further sum of \$133.34; that the payment on the principal evidenced by the new note was indorsed on the original note in words and figures as follows:

"Rockford, Ill., Nov. 6, 1919. Paid by R. R. Shirley on within note the sum of \$800 by new note for that amount."

It is further averred that—

The "said defendant Lake wrote upon the back of said promissory note the foregoing payments of \$800 and \$133.34, and that each of such payments were made for and behalf of each of the defendants, * * * that the said memorandum in writing written upon the back of said promissory note with pen and ink by said defendant Lake and then and there signed his 'Lake,' and it was then and there agreed between said plaintiff and defendant Lake that the payment of the principal of said note was then and there and thereby extended, and that said indebtedness so represented by said note was to continue to be paid at Rockford, Ill."

It sufficiently appears that it was the intention of the pleader to aver that respondent signed his name as part of the indorsement alleged.

Respondent's motion to strike certain allegations of the complaint was granted, and his demurrer which, in addition to grounds both general and special, alleged that the original note was barred by the provisions of section 337 of the Code of Civil Procedure and that the indorsement under the provisions of section 360 of the Code of Civil Procedure was insufficient to evidence a new promise, was sustained without leave to amend.

Appellant contends that the indorsement taken in connection with the attendant circumstances sufficiently evidence a new promise by respondent, and that the court erred in striking the allegations that the payment therein acknowledged was made on behalf of respondent and in sustaining the demurrer without leave to amend.

[1] The purpose of section 360 of the Code of Civil Procedure, as held in *Biddel v. Brizolara*, 56 Cal. 374, is to establish a rule not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved, and the writing relied on as evidence must contain an express promise or an acknowledgment from which a present promise may be inferred. As the rule is stated in *Clunin v. First Fed. Trust Co.*, 189 Cal. 248, 207 P. 1009, the acknowledgment from which the promise is to be inferred must be made to the creditor, and no writing is sufficient as an acknowledgment under section 360 of the Code of Civil Procedure, unless it contains some reference to the debt which, either by itself or with the aid of competent evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor for which the debtor is liable and willing to pay; the rule stated being approved and followed in *Searles v. Gonzalez*, 191 Cal. 426, 216 P. 1003, 28 A. L. R. 78, where it was held that, while the memorandum must express the essential elements of a contract with reasonable certainty, these may be gathered either from the memorandum itself or from other writings therein referred to.

In *Auzerais v. Naglee*, 74 Cal. 60, 15 P. 371, a receipt for a sum paid by the debtor Naglee upon an account rendered was indorsed thereon by the latter in the following words:

"Received Dec. 8, 1880, of Henry M. Naglee one thousand dollars on account of the within."

It was there held that a receipt in the handwriting of the debtor, referring to the debt, and containing his signature, was sufficient as a memorandum under the provisions of section 360 of the Code of Civil Procedure to bind the debtor.

[2, 3] While, according to the indorsement in the instant case, the payment evidenced thereby was made by Shirley, the debt was referred to therein, and it is alleged that the

receipt was in the handwriting of respondent and subscribed by him, and that the note was executed and accepted as a payment by both of the joint debtors. With the exception that the indorsement does not acknowledge a payment by respondent, the facts are in effect the same as those in the case last cited. The receipt, however, was but an admission by the creditor that a note executed by Shirley had been received as payment to that extent on the original note (*Jenne v. Burger*, 120 Cal. 444, 52 P. 706; *Cal. Packers Co. v. Merritt Fruit Co.*, 6 Cal. App. 507, 92 P. 509), and parol evidence would be admissible to show that the payment was in fact made by both of the debtors (*Hawley v. Badger*, 15 Cal. 44). Moreover, the indorsement and subscription of his signature by respondent were equivocal acts which, with the fact being shown that the payment was made by both, would be sufficient within the decision in *Auzerais v. Naglee*, supra, and the rule stated in the cases cited above, to support the inference of an admission of liability for an existing debt which he was willing to pay. As held in *Concannon v. Smith*, 134 Cal. 14, 66 P. 40, it is sufficient if the writing shows that the writer regards or treats the indebtedness as subsisting, and from the acknowledgment of a subsisting indebtedness the law implies a promise to pay based upon the consideration of the old debt.

[4, 5] While the complaint contained redundant matter which was properly stricken therefrom, and the allegation by which the pleader sought to state that respondent signed the indorsement was uncertain and subject to demurrer on that ground, it appears that the demurrer on the grounds of uncertainty and ambiguity was directed with that exception to the portions of the pleading which were stricken out. We think that the complaint, as filed, was sufficient to state a cause of action; that the order striking therefrom the allegation that the payment evidenced by the indorsement was made by both debtors was erroneous; and that appellant should have been permitted to amend by alleging that the memorandum was signed by respondent.

The judgment is reversed, with directions that appellant be permitted to amend his complaint in the above particulars within 10 days after the filing of the remittitur in the superior court.

We concur: TYLER, P. J.; KNIGHT, J.

83 Cal. App. 187

BROWN v. LAMB et al. (Civ. 4853.)

District Court of Appeal, Second District, Division 1, California. May 18, 1927.

1. Contracts —212(2)—Contract with no date for performance must be performed within reasonable time.

If no time is set in contract for the exact date of performance, the contract must be performed within a reasonable time.

2. Contracts —329—Date when performance of alternative agreement became due held time for suit.

Time of performance of alternative contract for interest in lease in consideration of \$1,000, or to return the sum of \$2,000 on or before certain date, in any event was date when performance of alternative agreement became due authorizing suit on such alternative obligation.

3. Usury —37—Contract for interest in lease in consideration of \$1,000, or with alternative of returning \$2,000 on certain date, held valid (Civ. Code, §§ 1671, 3300, 3302).

Contract whereby a certain interest in lease was to be assigned in consideration of \$1,000, with alternative of returning sum of \$2,000 on or before certain date, held valid in that sum advanced under contract was placed in hazard because of difficulty to determine value of interest in lease, under Civ. Code, § 1671, and damages could have been figured in amount allowed under contract, whether measured under sections 3300 or 3302; alternative agreement for the payment of \$2,000 being in nature of price for surrender of an investment.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by John F. Brown against Stacy C. Lamb and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Davis & Thorne, of Los Angeles, for appellants.

Courtney A. Teel, of Los Angeles, for respondent.

YORK, J. The facts involved in this appeal are as follows: On the 18th day of January, 1921, plaintiff advanced to the defendants the sum of \$1,000, and as evidence of said advancement, and in consideration therefor, defendants agreed, in writing, to give to said plaintiff a one twenty-fifth interest in a certain lease, or return to said plaintiff the total sum of \$2,000, either of which obligations were to be performed on or before October 1, 1921. That neither of these obligations have been performed by defendants.

The contract is as follows:

"Los Angeles, Cal., January 18, 1921.

"In consideration of \$1,000 to us in hand paid, we hereby agree to give to John F. Brown, one twenty-fifth interest in lease from P. B. Lehigh for working lime deposits of the Sheephead Lime Company, in San Bernardino County, Cal.,

or to return to said John F. Brown the sum of \$2,000 cash, on or before October 1, 1921.

"Lee Koeingheim.

"Stacy C. Lamb."

[1, 2] The complaint asked for what it designates as damages in the sum of \$2,000 by reason of the defendants' failure to perform the terms of the contract and agreement. The answer admits that the plaintiff "advanced" the sum of \$1,000 to defendants, and admits the execution of the contract, but denies that plaintiff has been damaged in any amount, or at all. The answer does not allege any prior tender of a one twenty-fifth interest in the lease held by defendants, but defendants in their answer tender a one twenty-fifth interest in a later lease, which they claim is on the same property, and set forth an affirmative defense wherein they allege that the demand of plaintiff for the payment of \$2,000 is in violation of the usury act. They admit the cancellation of the lease mentioned in the contract. If no time was set in the contract for the exact date of performance, the contract of course, would have to be performed within a reasonable time. *Brookings L. & B. Co. v. Manufacturers' Co.*, 173 Cal. 679, 161 P. 266. The time of performance or time to convey must have passed, at the latest, at the date when performance of the alternative agreement became due. After this period, in any event, plaintiff had the right to sue upon said alternative obligation to pay. *Beckwith v. Sheldon*, 168 Cal. 742, 745, 145 P. 97, Ann. Cas. 1916A, 963, and cases cited.

Civil Code of California, § 1449:

"If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party."

"Where the obligation is in the alternative, that is, to pay in money or in property, the sum stipulated rather than the market value of the commodity has been considered the true measure of damages." 13 Cyc. 168, par. 11.

[3] Therefore, in the case at bar, the court could have figured the damages in the amount allowed, whether measured under section 3300 or 3302 of the Civil Code of California. The plaintiff having advanced the sum of \$1,000 on a contract of that kind, he therefore by the very terms of the contract, put the whole sum thereof in hazard, for the reason that the contract could have been satisfied in full at any time before the 1st of October, 1921, by delivering to the plaintiff a one twenty-fifth interest in a lease from P. B. Lehigh for working lime deposits of the Sheephead Lime Company, in San Bernardino county, Cal., the value of which interest in said lease, "from the nature of the case,

it would be, impracticable or extremely difficult" to determine. Civ Code, § 1671. If its value was over \$2,000, the plaintiff might receive \$2,000 only. If under \$2,000, or if in fact of no value at all, he would have to be content with a one twenty-fifth interest in said lease. The trial court from the evidence could have and probably did consider that the \$2,000 agreed to be paid was in the nature of a price set for the surrender of an investment.

Therefore the judgment of the trial court is affirmed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

83 Cal. App. 345

ROBERTS v. ROBERTS. (Civ. 5764.)

District Court of Appeal, First District, Division 1, California. May 24, 1927.

1. Divorce ⚡255—Refusal of court to follow agreement relating to amount of maintenance did not prevent action thereon after divorce, where agreement's validity was otherwise sustained.

Conclusions of law in divorce decree holding maintenance agreement valid except as to clauses providing for incorporation of maintenance agreement in decree permitted action thereon after divorce.

2. Divorce ⚡255—Decree holding provision for incorporation of maintenance agreement in decree invalid held mere limitation on parties' power to control fixing of alimony.

Decree holding clauses in maintenance agreement for incorporation of amount agreed upon in decree void as against public policy held to invalidate agreement only in so far as parties were prevented from controlling court's action in fixing alimony.

3. Contracts ⚡111—Law favors marriage and will not sanction agreements for divorce.

Agreement for divorce or collateral contract permitting dissolution of marriage is void and will not be enforced, as law favors marriage.

4. Divorce ⚡249(3)—Court's authority to dispose of community property on divorce is unlimited.

In divorce actions, trial court has unlimited authority to make disposition of community property.

5. Divorce ⚡249(2)—Agreement of husband and wife settling property rights may be disregarded, where object is dissolution of marriage.

Court has jurisdiction to disregard spouses' agreement settling property rights as basis for divorce as contra bonos mores, where it has for its object dissolution of marriage.

6. Divorce ⚡249(2)—Court may sustain property settlement of spouses in contemplation of divorce, where free from illegal objects (Civ. Code, § 158).

Agreement entered into between husband and wife for settlement of property rights, under Civ. Code, § 158, in contemplation of divorce will be sustained, where free from illegal objects and influences.

7. Husband and wife ⚡280—Application for divorce did not invalidate property settlement agreement between spouses.

Property settlement agreement between husband and wife, where valid, was not abrogated or rendered ineffectual by subsequent application for divorce.

8. Divorce ⚡258—Husband and wife ⚡279 (6)—Payments to divorced wife should be credited to amount due under property settlement agreement and divorce decree.

Where divorced wife has concurrent remedies under property settlement agreement and divorce decree, payments made under one should be credited to amount due under the other.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Emilie Roberts against Elmore W. Roberts. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 253 P. 1112.

James Donovan, of Los Angeles, for appellant.

John L. McVey, of Oakland, for respondent.

KNIGHT, J. This is defendant's appeal from a judgment rendered against him in an action to recover money claimed to be due under a written agreement entered into between defendant and plaintiff as husband and wife.

The agreement in question was executed on August 26, 1924, about six weeks after the parties had separated, and provided, among other things, for a property settlement, including the payment to plaintiff by defendant of the sum of \$100 a month as maintenance. Shortly after the execution of said agreement, plaintiff commenced an action for divorce upon the ground of extreme cruelty, alleging in her complaint that there was no community property; that the property rights had been settled between them by the written agreement of August 26, 1924, as a part of which settlement defendant promised and agreed to pay her the sum of \$100 a month as maintenance; and she therefore asked that the decree of divorce which she was seeking embody a provision directing such payment to be made. One of the several defenses interposed by defendant was that said agreement was void, as contra bonos mores, but upon trial that defense was not

sustained, the court making findings upholding the legality of said instrument except as to two clauses thereof which will be hereinafter referred to. Thereupon an interlocutory decree of divorce was granted, but the court, refusing to be bound by the two clauses above mentioned, which related to the amount of maintenance which the parties had agreed should be allowed plaintiff in case of divorce, awarded plaintiff monthly maintenance in the sum of \$65 instead of \$100 as stipulated in said agreement. The interlocutory decree was entered on November 14, 1925, and no appeal was taken therefrom.

Subsequently, and on May 8, 1926, plaintiff commenced the instant action to collect the accrued payments claimed to be due under said settlement agreement, minus the amount of alimony granted by the court under the divorce decree, which the defendant had paid. Defendant urged as one of his defenses that the agreement upon which plaintiff's action was founded had been declared void by the decision in the divorce action, and that, therefore, its terms were not afterwards enforceable. The trial court expressly negatived this defense, and held affirmatively that the decision in the divorce action established that said agreement was "a valid, subsisting, and legal agreement between the parties thereto" except as to the two clauses above mentioned, and that no appeal having been taken, the decision and decree therein became final and conclusive against the parties in the present action "as to the questions involved herein respecting said agreement." Whereupon plaintiff was given judgment for \$910, of which sum \$700 represented the full amount of the monthly allowance called for under said agreement from the date of its execution up to the time of the entry of the interlocutory decree of divorce, the balance representing the difference of \$35 a month between the amount of the monthly maintenance fixed by said agreement and the amount awarded by the court and paid by the defendant in the divorce action, from the date of the interlocutory decree to the date of judgment herein; and the court further declared in its decision:

"That said plaintiff has concurrent remedies against defendant, one under said interlocutory decree for the payment of alimony and one upon said written agreement; that any moneys paid by said defendant to plaintiff for her maintenance and support over and above the sum of \$700, which was due upon said agreement at the time of the giving and making of said interlocutory decree of divorce, shall be credited both upon said judgment for alimony and upon said agreement."

[1] The principal question presented is whether the refusal of the trial court in the divorce proceeding to follow the two clauses of said agreement relating to the amount of

maintenance, upon the grounds therein stated, constituted an adjudication that the portion of the agreement now being sued upon was void as contra bonos mores. Defendant contends that it was, and, upon the assumption that the adverse finding on that issue in the instant action is not supported by the facts, has devoted much of his brief to a discussion of the question of the invalidity of that portion of said agreement upon the grounds mentioned.

The record in the divorce action discloses that the issue as to the validity of the entire agreement was brought squarely before the trial court for determination under the affirmative allegations of defendant's answer to the effect that said agreement was void as being against public policy, and the court found specifically against those allegations, its finding being:

"That it is not true that said contract is or that all the terms thereof are against public policy in violation of the express provisions of law relating to domestic relations between husband and wife or otherwise. * * *"

Following this finding, the court set forth said agreement in full, which, in part, provided as follows:

"Now therefore, the party of the first part (defendant) hereby agrees to pay to the party of the second part, as and for her maintenance and support, the sum of \$100 per month, and in addition thereto agrees to turn over and deliver to the second party" certain shares of corporate stock and household furnishings.

In its conclusions of law, however, the court quoted again the two excepted clauses of said agreement above referred to, which provided that "in any action for divorce which may be filed by either of the parties against the other, the court may award to the party of the second part [plaintiff] in the event that any decree of divorce is given or made in her favor, the sum of \$100 per month as and for maintenance and alimony, and may incorporate in any such decree the provisions of this agreement respecting the property rights of the parties hereto," said monthly maintenance to terminate if plaintiff should remarry; and with reference to these latter clauses found that the same were void as against public policy, *but that in all other respects the agreement is a valid, subsisting, and legal agreement between the parties thereto.* [Italics ours.] Thereupon, refusing to be bound by the provisions of the two clauses above mentioned, the court awarded plaintiff alimony in the sum of \$65 a month only. There was no finding whatever, however, as defendant seems to contend, that the agreement made by defendant to pay plaintiff the said sum of \$100 a month was void for any reason.

[2] From the foregoing we conclude that the trial court correctly held in the instant

action that its decision in the divorce proceeding definitely disposed of the question of legality of said agreement adversely to defendant's contention, and that in the absence of an appeal the decision and judgment therein has become final. The language used by the court, in the divorce action, in declaring the two clauses above referred to "void as against public policy," when reasonably construed in the light of the entire decision, means simply that so far as the enforcement of the terms of said two excepted clauses were concerned the parties could not presume to control by agreement the action of the court in fixing the amount of alimony in a divorce proceeding, nor to interfere with its powers in that respect; and to the extent that they had attempted to do so, those clauses of said agreement were void as against public policy.

[3-5] Any agreement for divorce or any collateral bargaining promotive of it is considered unlawful and void; and, furthermore, in divorce actions the trial court has unlimited authority to make disposition of the community property. *Newman v. Freitas*, 129 Cal. 283, 61 P. 907, 50 L. R. A. 548, citing *Bishop on Marriage, Divorce and Separation*, § 696; *Greenwood on Public Policy*, 490. Consequently, whenever an agreement is presented to and urged upon the court for acceptance as basis for a decree settling the property rights of the parties, the court necessarily has jurisdiction to consider the agreement and to disregard the same as contra bonos mores if it finds that the same has for its object the dissolution of the marriage or the facilitating that result, such as an agreement by the defendant in a pending action for divorce to withdraw his or her oppositions and to make no defense. *Newman v. Freitas*, supra; *McCahan v. McCahan*, 47 Cal. App. 174, 190 P. 458. The doctrine stated is founded upon the proposition that the law favors marriage, and cannot therefore sanction contracts intended to promote its dissolution by lending itself to their enforcement. *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Newman v. Freitas*, supra.

[6] But it is also the law that either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried (Civ. Code, § 158); and, therefore, if after scrutinizing the agreement entered into between them for the settlement of their property rights and the circumstances under which it was made, the trial court ascertains and determines that the same is free from the illegal objects and influences above mentioned, it may affirm the agreement (*McCahan v. McCahan*, supra), and the force given thereto derives its sanction from the decree made by the court with a knowledge of the facts (*Loveren v. Loveren*, 106 Cal. 509, 39 P. 801).

[7] In the divorce action here the trial court determined upon the evidence adduced before it, and after considering the text of the agreement, that said agreement was not entered into in violation of the policy of the law or contrary to good morals, and was therefore valid, but in the exercise of its power as a court of equity it declined to follow the two clauses thereof relating to the matter of fixing the amount of plaintiff's maintenance. It is apparent, however, that this latter action on the part of the court in no way affected its express general finding that otherwise said agreement was valid; and, being valid, its executory terms were not abrogated or rendered ineffectual by plaintiff's subsequent application for a divorce, and she was therefore entitled to enforce the same in the present action. *Carey v. Mackey*, 82 Me. 516, 20 A. 84, 9 L. R. A. 113, 17 Am. St. Rep. 500; *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453; *Pryor v. Pryor*, 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102; *Chamberlain v. Cuming*, 37 Misc. Rep. 815, 76 N. Y. S. 896; *Van Horn v. Van Horn*, 196 App. Div. 472, 188 N. Y. S. 98; *Clark v. Fosdick*, 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. Rep. 733; 9 R. C. L. 536.

[8] The portion of the decree declaring that plaintiff was entitled to concurrent remedies under both the agreement and the divorce decree, and that payments under the former of any sum over \$700 should be credited on both, is in conformity with the ruling in the case of *Newell v. Newell*, 28 Cal. App. 784, 154 P. 32. There the husband entered into an agreement to pay the wife \$75 per month as maintenance and subsequently a divorce was granted in her favor with a provision for the payment of \$75 per month as alimony. It was contended by the husband that the granting of such alimony by the court required him to pay \$75 a month under the decree, and that he was also obliged to pay an additional \$75 per month under the agreement. The court held this contention to be without merit, saying:

"Conceding that he may be bound by both the order and agreement to pay said sum, and upon default plaintiff might have concurrent remedies in enforcing payment, nevertheless the payment of \$75 per month would not only satisfy his obligation existing by virtue of the agreement made with plaintiff, but at the same time satisfy the obligation imposed upon him by the order and decree made in accordance with the terms of the agreement and pursuant to the prayer of the complaint."

For the reasons hereinabove stated, we are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

83 Cal. App. 190

PEOPLE v. KELLER. (Cr. 1353.)

District Court of Appeal, Second District,
Division 2, California. May 18, 1927.

1. Criminal law ☞543(2)—Evidence held to show due diligence to procure complaining witness, rendering testimony on former trial admissible (Pen. Code, § 686).

Evidence held to show due diligence, within Pen. Code, § 686, to secure attendance of complaining witness at second trial and to authorize reading in evidence of his testimony at former trial, in view of complaining witness' letter to district attorney evidencing eagerness to be present.

2. Criminal law ☞1144(12)—District Court of Appeal would assume sheriff inquired at address on subpoena for complaining witness.

The District Court of Appeal would assume sheriff inquired at address given on subpoena issued for the complaining witness and returned showing he could not be found.

3. Criminal law ☞543(2)—Showing of diligence to procure attendance of complaining witness need not be as extreme as otherwise, where letter indicated absence from state (Pen. Code, § 686).

The district attorney would not be required to make as extreme a showing of due diligence as would otherwise be necessary to render admissible in evidence, under Pen. Code, § 686, the complaining witness' testimony at former trial, where the witness in letter promising attendance had stated he was going out of state.

4. Criminal law ☞543(2), 1153(6)—Admitting testimony on former trial on showing of diligence is discretionary and not reviewable unless discretion abused (Pen. Code, § 686).

Determination that due diligence to secure attendance of complaining witness has been exercised to render admissible, under Pen. Code, § 686, his testimony on former trial is within trial court's discretion and will not be disturbed on appeal, in the absence of abuse of discretion.

5. Criminal law ☞547(4)—Reporter's testimony of accuracy of transcript of evidence on former trial held sufficient (Code Civ. Proc. § 1963, subd. 15).

The reporter's testimony that he dictated shorthand notes of complaining witness' testimony taken by him at former trial, carefully examined the transcript, and compared any doubtful portions with his notes held sufficient foundation for introduction, though reporter had not compared all of transcript; the burden being on defendant to show error, in view of Code Civ. Proc. § 1963, subd. 15, relating to presumption that official duty has been performed.

6. Criminal law ☞1036(7), 1169(2)—Any error in admitting transcript of testimony at former trial held harmless, in view of other testimony and lack of objection (Pen. Code, § 686).

Error, if any, in permitting reading, at second trial for larceny, of bank teller's testimony

respecting check cashed for complaining witness, over objection on ground of failure to show due diligence to procure him as required by Pen. Code, § 686, held harmless, in view of testimony's unsubstantial character and lack of objection that it was inadmissible for any purpose.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

Agnes Keller was convicted of grand larceny and she appeals. Affirmed.

Richard Kittrelle, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

WORKS, P. J. Some time ago an opinion reversing the judgment in this action was filed by us (254 P. 580). Thereafter, upon a suggestion of diminution of the record, a petition for rehearing was granted. Upon this hearing we have before us a record very different from that upon which our former opinion was based. Defendant appeals from the judgment.

Appellant was convicted upon a second trial. At the first trial the jury disagreed. The complaining witness was not present at the second trial, but the trial judge, over the objection of appellant, permitted the district attorney to read to the jury his testimony given at the earlier hearing. The objection of appellant was that the prosecution had not shown due diligence in an attempt to produce the absent witness, and the same point is now made here. Section 686 of the Penal Code provides, in part, that a defendant in a criminal action "is entitled: * * * to be confronted with the witnesses against him, * * * except that * * * the testimony on behalf of the people * * * of a witness * * * who cannot, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted."

On August 31, 1925, the cause having been tried and the jury having failed to agree upon a verdict, it was set for the second trial on September 15. When that date arrived the complaining witness was not present in court, and on motion of the district attorney the court ordered a bench warrant to issue forthwith for him, and the trial was continued to September 21. On the last-mentioned date a further continuance was granted to September 29, upon motion of the district attorney, supported by affidavit. The affidavit showed that on September 6 the prosecutor received from the complaining

witness a letter, dated at Los Angeles, September 5, in which he said:

"Your favor of the third instant received in reference to Keller case. I will be there with Mr. Cook if possible. I have learned he is in Yuma, Ariz. * * * I am going to Yuma Sunday morning to have a talk with Cook. * * * I also hope to locate a fellow by the name of Young who is a material witness for me. * * * I will be there in advance to read my former testimony over."

The letter also gave the district attorney information concerning several witnesses other than Cook, and ended, "Hoping to see you September 13, I am, Yours sincerely," with the signature of the complaining witness. Owing, apparently, to the state of facts disclosed by this letter, the district attorney caused no subpoena to issue for service in the county of San Diego before September 15, the date set for the second trial of the action. He did, however, take the precaution to have subpoenas, returnable September 15, issued and transmitted to the sheriffs of San Bernardino, Ventura, Kern, Riverside, Orange, San Luis Obispo, Santa Barbara, and Imperial counties. These were all issued on September 4. Returns on all but two of them were filed on September 14. One return was filed on September 15 and one on September 18. The returns were dated variously from September 9 to September 17, and showed that the complaining witness could not be found in any of the counties named. A subpoena was issued for service in San Diego county of September 15, returnable September 29, and on October 1 the sheriff made return that the complaining witness could not be found in that county. The return was filed on the same day.

In addition to the circumstances detailed above, when the district attorney was called upon at the trial to prove due diligence in his attempt to serve the complaining witness, he put a witness on the stand who testified that he was a detective sergeant in the San Diego police department; that he had made an investigation to determine whether the complaining witness could be located in the city of Los Angeles; that he went to that city on September 16 for that purpose, but that he began his investigation at a certain hotel in San Diego, where he ascertained from the register that the witness had checked out on the afternoon of September 3 and had left as a forwarding address the name of a certain hotel in Los Angeles; that he, the investigator, then went to Los Angeles, arriving there on the evening of the day he had examined the San Diego hotel register; that he immediately went to the hotel mentioned on the San Diego register and found from it that the complaining witness had registered there on the evening of September 3 and had checked out on September 5, leaving no forwarding address; that he remained in

Los Angeles four days, being engaged all that time in his investigation; that while he was there he went "to the newspaper offices in Los Angeles" and to the post office, but that he found no trace of the witness in that city except that he got some information, without stating the nature of it or from whom it was obtained, to the effect that the witness might be in Long Beach; that he then went there and "just made a search of the city," for he "had no specific place to go there outside of checking the post office"; that he did not go to the "newspaper offices at Long Beach"; and that he found no forwarding address at the post offices at Long Beach and Los Angeles.

[1] We think due diligence was shown in the endeavor of the district attorney to serve the complaining witness. It is only under unusual conditions that a prosecutor can justify his course in not causing the issuance of subpoena for service in the county in which an action is to be tried, if that has been the county of the residence of a witness, merely because he has promised to be present at the trial, but we think those conditions existed here. The complaining witness had already been through one trial of the cause, and his desire further to prosecute might reasonably be inferred from that fact and from the nature of the case, which will be disclosed later. Moreover, in addition to the quotations we have made above from his letter, the missive showed in other passages his evident eagerness to be present at the second trial.

[2] The testimony of the complaining witness, as read to the jury, showed that he was a newspaper reporter by occupation, and that at the time of the first trial, which had occurred as late as July or August, he was employed by a certain San Diego newspaper, and that he had been with the publication for three years. The subpoena which was issued on September 15 for service in San Diego county gave the office of this newspaper as the address of the witness, and we must assume that before making his return the sheriff of the county made inquiry at the office as to the whereabouts of the absentee. The investigator who went to Los Angeles on September 16 inquired about the witness at the newspaper offices there, but he did not make similar inquiry of the newspapers in Long Beach. This failure was an oversight, but we think it not of sufficient weight to interfere with a determination that due diligence was exercised.

[3, 4] After the complaining witness had failed to put in an appearance before the court on September 15, the district attorney was justified to some extent, taking what the witness had said in his letter about a trip to Arizona, in assuming that he had departed the state and had determined to remain without its borders. The trial court, of course, was entitled to take the same view. In such a circumstance, under the decided cases, a

prosecutor is not required to make as extreme a showing of due diligence as is expected of him when there is nothing to indicate a possibility that a witness has left the state. The determination of the question as to due diligence rested in the discretion of the trial court, and we think the discretion was not abused.

[5] The official stenographer, who took the testimony of the complaining witness at the first trial of the cause, was called to the witness stand for the purpose of laying a foundation for the reading to the jury of a transcript of that testimony. The reporter testified that a transcript handed him was his transcript of the testimony taken at the former trial; that he dictated to a dictaphone his shorthand notes of the testimony taken by him at the trial, which he caused to be transcribed by the regular transcriber, and that "afterwards I examined the transcript, this transcript, very carefully, and correcting any errors that appeared therein"; and that "I read the transcript over very carefully, and, in case where any doubt arose as to the correctness of it, I compared it with my shorthand notes taken at the trial." On cross-examination, the witness was asked if he compared the entire transcript of the testimony of the complaining witness with his shorthand notes. He answered, "Not entirely; no, sir." Appellant then objected to the reading of the transcript of the testimony to the jury, the objection was overruled, and the reading proceeded.

Appellant now contends that the ruling was error on the ground that it was necessary to have been shown that the reporter had compared the entire transcription of the testimony of the complaining witness with his shorthand notes. We know of no rule which required such a showing, and appellant cites no authority in support of her contention. There having been no evidence as to the length of time which intervened between the time when the reporter took the testimony in shorthand and the time when he read the transcript and compared it with his notes, although "not entirely," we think his testimony that the transcript shown him was a transcript of the testimony taken by him at the trial, and that he had corrected it, furnished a sufficient foundation for the reading of the testimony to the jury. The situation here presented is not one which comes within the rule as to the method of proving that an offered paper is a copy of an original lost or destroyed. The testimony of the complaining witness was matter which went through the mind of the reporter when he reduced it to shorthand, and again when he dictated from his notes. As it is incumbent upon an appellant to show error, we may assume that the reporter read and corrected the completed transcript, with such aid from his notes as he deemed necessary to his purpose, while the testimony of the witness was

still fresh in his recollection. The presumption of that "official duty has been regularly performed" (Code Civ. Proc. § 1963, subd. 15) aids to the conclusion at which we arrive. As having some bearing on the question here presented, see *People v. Buckley*, 143 Cal. 375, 77 P. 169.

[6] The larceny with which appellant was charged was testified by the complaining witness to have been committed not far from midnight between the 11th and 12th days of a certain month. The information charged that on or about the 11th appellant and another woman took from the complaining witness the sum of \$530. The testimony of the complaining witness, a man, was to the effect that he was despoiled of his money during a visit, upon which he arrived late at night, at a house in which appellant lived. At the former trial a bank teller testified that on or about the 10th or 11th of the month, at the bank at which he was employed, he cashed for the complaining witness a check for \$300, and that a \$100 bill was part of the money which then passed over the counter. The time of this occurrence was stated by the teller without reference to the books of the bank, or to other memoranda, or without reference to any other event which fixed the time in his mind. The complaining witness testified that the check was cashed for him three or four days before the 11th. The bank teller was not present at the second trial, and, over the objection that due diligence had not been shown in any attempt to procure his presence, his testimony at the first trial was read to the jury.

We think it unnecessary to decide the point now made, that the trial court erred in permitting the reading. In addition to his relation of the events directly surrounding the larceny, the complaining witness testified that prior to that occurrence he had marked two \$100 bills which were a part of the money taken from him. After the larceny two bills of the denomination named, marked as the complaining witness testified that he had marked his, turned up under circumstances which, according to some of the evidence, indicated that they had come from the possession of appellant. The testimony of the bank teller had a highly attenuated, if any, probative value. It contributed in a negligible degree to aid the story of the complaining witness that he had marked two \$100 bills, and that he had on his person \$530 when he called at the house of appellant. Of course, it furnished no proof whatever that any amount had been stolen from the complaining witness. No objection was made to the testimony of the teller except upon the ground that due diligence had not been shown in an effort to procure his presence in court. The testimony afforded no substantial corroboration of the evidence given by the prosecuting witness, and that it was read to the jury was a circumstance in the case

which is utterly innocuous, especially in view of the fact that no objection was made that it was inadmissible for any purpose.

It is contended that the evidence was insufficient to support the verdict, but it was so plainly sufficient that we think it not worth while to marshal the testimony which supported the case of the prosecution. There was a decided conflict in the evidence, undoubtedly, but with such a situation we have no concern.

Judgment affirmed.

We concur: CRAIG, J.; MURPHEY, Justice pro tem.

83 Cal. App. 283

HARRIS v. HENSLEY. (Civ. 4532.)★

District Court of Appeal, Second District, Division 2, California. May 21, 1927.

Hearing Denied by Supreme Court July 18, 1927.

1. Trusts ⚡372(3)—Finding that husband converted entire funds received from wife's separate property held not supported by evidence.

Finding that entire amount of funds coming into husband's hands from sale of wife's separate property was converted by him to own use held not supported by evidence, in divorced wife's suit to establish trust.

2. Trusts ⚡372(3)—Evidence held to show husband's use in business of wife's separate property was with her consent.

Evidence held to show that husband's use of wife's separate property in business conducted by him and copartner was with her consent.

3. Trusts ⚡86—Husband in presumed trustee for wife of her separate property used in his business.

Husband will be held trustee for benefit of wife to extent of use with her consent of her separate property in business conducted by himself and his brother as copartners, in absence of proof of wife's intention to make gift sufficient to overcome the presumption of trusteeship.

4. Trusts ⚡89(2)—Evidence held to sustain finding that wife's money entered into land purchased by husband.

Evidence held sufficient for finding that former wife's money, used and invested together with community interest in conducting and managing husband's business, became part of land subsequently purchased by him.

5. Trusts ⚡374—Divorced wife whose money was used by husband in business held not entitled to all realty acquired by him in course of years, notwithstanding impossibility of segregating interests.

Trial court's award to former wife of all real property purchased by divorced husband, as result of community interest and investment of her separate property in his business conducted for 8 or 10 years, held inequitable, notwithstanding her separate interest could not be segregated.

6. Trusts ⚡374—Purpose of law is not punishment, in proceeding to establish trust in divorced husband's realty, purchased with proceeds of business using former wife's money.

In proceeding to establish trust in favor of divorced wife in regard to property purchased by former husband with proceeds of business in which during marriage he invested her separate property, the purpose of the law is not to punish him in his capacity as trustee.

7. Trusts ⚡374—Divorced wife held entitled to principal of her money invested in husband's business and fair portion of profits.

Divorced wife held entitled to principal of separate property invested by former husband during marriage in his business, together with a fair proportion of profits acquired through its use under his direction.

8. Trusts ⚡374—Divorced wife held entitled to lien to extent of trust interest on realty purchased by former husband.

Divorced wife held entitled to lien on former husband's interest in real property purchased by him as result of her separate property invested by him during marriage in his business, where the original investment and its results could be fairly traced into the specific realty.

9. Trusts ⚡375(1)—Divorced wife held entitled to personal judgment for separate property received by former husband which could not be followed.

Divorced wife held entitled to personal judgment against former husband for proceeds of sale, with interest from date of sale of property purchased by him during marriage with her separate money, where the money received by him after divorce could not be traced into specific property.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Daisy Lee Harris against W. J. Hensley to establish a trust in real property. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Thomas Scott, Sr., Thomas Scott, Jr., Kaye & Siemon, and L. E. Nathan, all of Bakersfield, for appellant.

P. C. Rentfro, of Los Angeles, for respondent.

MURPHEY, Justice pro tem. The plaintiff and respondent and defendant and appellant were formerly husband and wife and were such at the inception of the transaction resulting in the pending litigation. They were married in Oklahoma in 1902, where they resided until 1906, when they came to California, where they resided until 1917, when they were divorced. The plaintiff was an American Indian, and as such succeeded with her children by defendant to certain land allotments in the state of Oklahoma. The property so allotted to plaintiff was manifestly her separate property. Early in the year

1911 the defendant and appellant disposed of his business interests in the city of Bakersfield and made a trip to Oklahoma, and while there, with the consent of the plaintiff, disposed of the land hereinbefore mentioned belonging to her, for which he received \$2,100 in cash and a lot and house at Tulsa, which he subsequently, and after the parties were divorced, sold for the sum of \$500. In addition to these sums he received several hundred dollars, the exact amount of which is uncertain, through the sale of some portions of the land allotted to their children. The marital relationship of the parties after the return of the defendant to California in the fall of 1911 was, to say the least, quite tempestuous. They lived together at times and lived separately at other times from that date up to the date of the divorce, which was granted some time in the year 1917. The circumstances and conditions under which they lived prior to 1911 is not disclosed by the record. The evidence clearly discloses that the plaintiff was completely dominated by the defendant. On the return of the defendant from his trip to Oklahoma, the family made a trip to the Northwest and on the return trip remained in Tacoma for a considerable period of time, where a lodging house business was purchased and conducted by them, whether profitably or unprofitably may not be accurately ascertained from the record. This business was sold and the parties returned to Bakersfield, Cal., their original place of residence in this state, where the defendant purchased a meat market business, taking in with him as his partner a brother. The bone of contention in this litigation centers around the capital invested in this enterprise, its source, and the circumstances and conditions surrounding the investment. It may be stated, in passing, that none of the money received by defendant for the sale of the plaintiff's property in Oklahoma was ever delivered directly to her; however, it is the contention of the defendant that this money was largely, if not totally, consumed in expenses in Oklahoma and to pay the expenses of the trip of the family to the Northwest and their return. There is no doubt, and the record we think fully establishes the fact, that at the time of the purchase of this meat market business in Bakersfield the defendant had no funds or other property belonging to him, and there is evidence in the record from which it may reasonably be concluded that the partner brother of the defendant was also broke. A cash payment of \$1,500 was made on the purchase price of the business and installment notes were given by the brothers for \$3,000 additional, payable at stated times in the amounts of \$500 at each payment.

[1] Assuming that the evidence before the court satisfactorily establishes the bankrupt condition of the brother, and in view of the undisputed fact that the defendant himself

had nothing, it may be reasonably and logically held that the initial cash payment of \$1,500 was made up entirely from the separate funds of the plaintiff. The trial court made no specific finding on this point, but does find that the entire amount of \$2,100 and \$500 was appropriated and converted by defendant to his own use. This finding is not supported by the evidence in the case. It clearly appears that a considerable portion of the original \$2,100 that came into the possession of the defendant as the result of the sale of plaintiff's separate property in Oklahoma was expended, with the consent of the plaintiff, on the trip that was made to the Northwest, and the evidence also discloses that the \$500 received from the sale of the Tulsa property did not come into the possession of the defendant until some six or seven years subsequent to the purchase of the Bakersfield meat market business. It is the defendant's contention that the money used as an initial payment on this property was borrowed by him from his brother, a contention that apparently had little weight with the trial court. This business enterprise was successful and profitable. The \$3,000 indebtedness against the property at the time of the purchase was entirely paid off and during the succeeding eight years the profits of the business were such that the defendant purchased the several parcels of real property described in the complaint, and which the plaintiff demanded should be impressed with a trust in her behalf to the extent of the entire interest of the defendant, and such was the holding and judgment of the trial court. It is manifest that the trial court paid little attention to the evidence of the defendant and was slightly impressed thereby. The brother of the defendant was not called as a witness. Notwithstanding the denials of the defendant, his conduct as a witness and the unconscionable contracts he extorted from his wife (as found by the trial court) may well have justified the trial court in discrediting him on all points wherein his testimony was in his own favor if the conditions were such that contradictory evidence could not be produced. The plaintiff seriously objected to the defendant's taking his brother in as a partner in the Bakersfield business.

[2, 3] This, however, was the only objection that she made to the purchase of the business and to the investment of her funds therein, and we are satisfied that the evidence amply justifies our conclusion that the use of the plaintiff's capital in the business conducted by the defendant and his brother was with her consent, and that by accepting and using this fund in his business he became a trustee to that extent for her benefit. As was well said by the Supreme Court of this state in the case of Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, at page 481; 111 P. 360, 363:

* * * "The mere acquirement of the possession of the wife's separate property by the husband and his subsequent management and control of the same, all with her consent, do not necessarily show an intent on her part to make a gift thereof to the husband, or to change its status to community property, but that the effect of these facts, without explanation, was to raise a presumption that it continues to be her separate property and that the husband takes it in trust for her; that it devolves on the husband who claims that it is a gift or loan, to prove the fact, but that this may be done by a showing of the nature of the transaction and the circumstances as well as by proof of an express agreement. 153 Cal. 5, 94 P. 94. These propositions are well supported by the authorities.
* * *

It may be said in this case, as it was in the *Ingersoll* Case, that the defendant was the husband of the plaintiff, that he received, invested, managed, and controlled her property in his own name and with her consent, and that under such circumstances a trust relationship arises unless there was some evidence of sufficient force and weight to overthrow this presumption. It may be said that in the case at bar there was no such evidence presented to the trial court, and there was no evidence whatever nor are there any facts or circumstances from which any inference may be drawn that it was the intention of the wife to give to the defendant the money owned by her and invested in the business. In view of the circumstances of this case, the humility of the wife, her complete subservience to the will of the husband, her entire want of knowledge of business affairs, "being such a fool," as stated by the husband, that he would not discuss money matters with her, we have no hesitancy in saying that this case falls squarely within the rule laid down in the *Ingersoll* Case. The court further says, in the *Ingersoll* Case:

"The fact that the trust money was in part commingled with the community property so as to destroy its specific identity does not necessarily destroy the trust as to that part, nor prevent its enforcement."

[4] In the case at bar, it may reasonably be concluded that the plaintiff's money, together with the community interest created by the activities of the defendant in conducting and managing the business, runs through and becomes part and parcel of the subsequent land purchases set out in the complaint in this action. It is, however, equally true that it would be impossible to accurately or probably at all segregate this trust fund.

[5-8] Upon this state of facts, the trial court awarded to the plaintiff all the property acquired by the defendant and comprising all the real property purchased from the

net proceeds of the meat market business. This we deem unjust and inequitable, and we know of no law to support this conclusion of the trial court, which, in effect, decrees to the plaintiff the net result of the defendant's services over a period of eight or ten years. In proceedings of this character it is not the purpose of the law, nor of courts of equity, to punish the trustee. The plaintiff is entitled to and should receive the principal of the trust fund and a fair proportion of the profits acquired through its use under the direction and business sagacity of the defendant. As the trust property involved in this litigation is the result of the capital invested by the plaintiff, and considering the community interest resulting from the services of the defendant until the marital relationship was severed by divorce, and the subsequent individual interest acquired by the defendant through his services in the management of the trust property, we feel that the ends of justice would be best subserved by awarding to the plaintiff such sum as the court shall definitely find was contributed by her as an initial payment on the business, together with what the court shall find to be a fair proportion of the accrued profits, and, in view of the fact that these amounts may be fairly traced into the purchase price of the several tracts of land described in the complaint, we are of the opinion that the plaintiff would be entitled to a lien on the defendant's interest in these tracts of land to secure the payment of the amount so found to be invested in the business.

[9] As to the \$500 secured from the Tulsa property by the plaintiff after the marital relationship of the parties hereto was severed, there is no evidence in the record from which it may be deduced that this money was used in the purchase of any of the tracts of land described in the complaint. That it is the separate property of the plaintiff there can be no doubt. That the defendant obtained the title to it in his own name through force and coercion is specifically found by the trial court, and the finding is amply supported by the evidence. We are of the opinion that the plaintiff is entitled to a personal judgment against the defendant for the amount of this money, with interest at 7 per cent. from the date of the sale of the Tulsa property by him, which date may be determined by the trial court in the further proceedings in this action.

The judgment of the trial court is reversed, with directions to proceed in accordance with the suggestions contained in this opinion and to take such evidence as may be necessary to determine the matters therein indicated.

We concur: WORKS, P. J.; CRAIG, J.

83 Cal. App. 227

CONOVER v. SMITH et al. (Civ. 5461.)★

District Court of Appeal, First District, Division 1, California. May 20, 1927.

Hearing Denied by Supreme Court July 18, 1927.

1. Corporations ⇨151—Agreement for division of profits, made in contemplation of incorporation, where others are not affected, controls corporation, and corporate fiction will be ignored, if necessary.

An agreement made by persons interested, in contemplation of incorporation, where the interests of others are not affected, controls the conduct of corporation's affairs, and corporate fiction may be ignored, if necessary, for the purpose of enforcing the portion of the agreement for a division of profits; corporation being a mere agency of the associates to carry out the agreement.

2. Contracts ⇨147(1)—Mutual intention at time of contracting controls.

A contract must be so interpreted as to give effect to mutual intention of the parties as it existed at time of contracting.

3. Contracts ⇨156—Specific provisions of contract control general ones on same subject-matter (Civ. Code, § 3534).

Where specific provisions of a contract and general provisions dealing with the same subject-matter are inconsistent, the specific provisions are controlling, under Civ. Code, § 3534.

4. Contracts ⇨153—Entire contract must be given effect, unless contrary to manifest expressed intent.

In interpreting a contract, all parts of it are to be given effect, if this can be done without doing violence to the manifest expressed intent of the parties.

5. Contracts ⇨152—Language of contract is read in ordinary and usual acceptance, unless contrary intent plainly appears.

In interpreting a contract, the terms are to be construed according to the ordinary and usual acceptance of the language, unless a contrary intent plainly appears.

6. Corporations ⇨151—Under contract for division of profits of corporation, giving defendant option to purchase plaintiff's stock at par or at option of plaintiff by returning investment with interest, plaintiff held entitled to par, plus proportion of profits earned but not divided as dividends; "par" (Civ. Code, § 1638).

Under contract made prior to incorporation between parties who became sole stockholders, providing that the profits made by the corporation were to be divided between first party and second party in proportion to shares of stock held by each as dividends on the stock, and that first party should have the right to purchase the stock of the second party at par, or at the option of the second party at the amount invested therein, together with 10 per cent. interest annually after deducting dividends received, on the exercise of the option to purchase, second party held entitled to insist on payment of par, plus a proportionate share of profits of corporation, though profits were not

yet divided as dividends, under Civ. Code, § 1638; "par" being the face value of the stock.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Par.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by W. Lloyd Conover against Stuart S. Smith and others to recover profits of corporation. From an adverse judgment, plaintiff appeals. Reversed and remanded, with directions.

Livingston & Livingston, and Sapiro, Levy & Hayes, all of San Francisco, for appellant.

E. L. Stockwell and Redman & Alexander, all of San Francisco, for respondents.

CAMPBELL, Justice pro tem. This is an action to recover profits made by a corporation in which appellant, W. Lloyd Conover, and respondent Stuart S. Smith were the sole stockholders. The action is founded on a contract executed by appellant and respondent Smith providing for the organization of the corporation and for the division of the profits between the parties on the basis of their respective stock interest. The trial court held against appellant on his claim for profits, and appellant has appealed. The appeal has been taken on the judgment roll alone.

From the findings of fact the following history of the case appears: Prior to May 1, 1920, respondent Smith was engaged in the business of dealing in road machinery. He needed capital. Accordingly he interested appellant, Conover, and, on May 1, 1920, a contract was executed providing substantially as follows: The organization of a corporation to take over respondent Smith's business; the transfer of the business to the corporation in exchange for the issuance to respondent Smith of 100 shares of stock of the par value of \$10,000 subject to a valuation of the net worth of the business; the purchase by appellant for cash of 20 shares of the stock at par or \$2,000; and an additional block of 80 shares at par value when further capital was required; the division of the profits of the corporation between appellant and respondent in proportion to the number of shares held by each, this clause, being article VI of the contract, reading:

"It is further understood and agreed that the profits made by said corporation are to be divided between the party of the first part and the party of the second part in proportion to the shares of stock held by each in said corporation as dividends on said stock."

Other material provisions of the contract have to do with the terms upon which respondent Smith acquired the interest of appellant, Conover, in the company. These provisions are contained in article VIII, and are as follows:

"It is further understood and agreed that the party of the first part (respondent Smith) shall have the right at any time before the amount of stock purchased by the party of the second part (appellant, Conover) equals the amount of stock purchased by the party of the first part, to purchase the stock of the party of the second part at par or at the option of the party of the second part at a price that will return the party of the second part the amount invested in said stock, together with ten (10) per cent. interest annually on the purchase price of said stock from the date of the purchase of said stock, after deducting dividends received on said stock from said corporation."

Pursuant to the contract, the corporation was organized under the name of Stuart S. Smith & Co., and appellant and respondent Smith became the principal directors and officers; the remaining directors were dummies, having no financial interest in the company. The board of directors authorized the sale and issuance of stock, and 100 shares were issued to respondent Smith in purchase of his business at the par value of \$10,000, and 70 shares—20 at one time and 50 later—were issued to appellant, Conover, for which he paid the par value of \$7,000.

The corporation engaged in business, and earned profits. The amount of the profits was not found; the amount being of no importance under the construction placed upon article VIII of the contract by the trial court.

On September 29, 1920, respondent Smith wrote appellant exercising his option to purchase appellant's stock, stating, "I have decided to exercise the option under my contract," and inclosed a check for \$7,191.66, describing it as "the amount of money invested by you, with ten per cent. interest." Appellant refused the check, returned it to respondent Smith, and demanded his share of the profits and that the par value of the stock be paid to him. Pending negotiations, as the controversy was over the question of whether appellant was entitled to his share of the profits earned by the corporation, or was obliged to take the amount he had invested, with 10 per cent. interest, it was agreed that appellant should transfer his stock to respondent Smith without prejudice to the position of either party. Upon these terms the payment of \$7,000 was made and stock transferred. The negotiations were of no avail, and this action resulted.

Appellant urges as grounds for reversal the following points:

"(a) The corporation was a mere form through which Conover and Smith, the sole parties in interest, did business. The law disregards the corporate fiction. Hence the corporation was bound by the provisions of the contract pursuant to which it was organized, and the covenant for division of profits was valid and enforceable not only as to the individuals, but also as to the corporation; (b) the fact that profits were earned by the business gives

Conover a complete right to the recovery of his share. The right has never been waived, lost, or abandoned. The transfer of Conover's stock to Smith was—by express agreement—without prejudice to Conover's claim to profits. (c) Conover exercised his option to receive as the purchase price of his stock the par value thereof. Therefore the alternative method of computing the price—investment plus interest, minus dividends—is utterly immaterial to the case."

[1] It seems to be the settled rule that an agreement made by the persons interested in contemplation of incorporation, where the interests of others are not affected, controls the conduct of the corporation's affairs, and that, if necessary to enforce the provision in the agreement for division of profits, the corporate fiction will be ignored. An agreement made by persons interested or who really represented the interests of those afterwards incorporated, and whose agreement was in anticipation of the formation of the corporation, and was carried out by it and recognized by it, bound the parties to the agreement. The corporation, under our system, following such an agreement would be the mere agency of the associates created for the sake of convenience in carrying out the agreement as between those who made the bargain. *Chater v. S. F. Sugar Refining Co.*, 19 Cal. 220, 240, 247; *Shorb v. Beaudry*, 56 Cal. 446; *Cornell v. Corbin*, 64 Cal. 197, 30 P. 629; *Hunt v. Davis*, 135 Cal. 31, 66 P. 957; *Wise Realty Co. v. Stewart*, 169 Cal. 176, 146 P. 534; *Hocking Valley Ry. Co. v. Toledo Terminal Ry. Co.*, 99 Ohio St. 35, 122 N. E. 35; *In re Wilson's Estate*, 85 Or. 604, 167 P. 580; *Griffin v. Brody* (Sup.) 167 N. Y. S. 725.

Equity will look through form to substance where corporations are but the mere instrumentalities through which the associates acted. *Wise Realty Co. v. Stewart*, supra.

Counsel for respondents do not question the principles upheld in the foregoing authorities. In their closing brief they concede that in a special contract such as the one in this case the corporate fiction should be ignored and the agreement of the parties should control. Both appellant and respondents agree that there is only one issue in the case, and that is the construction of articles VI and VIII of the contract.

The construction placed upon the contract by the trial court is that appellant is not entitled to any of the profits earned by the corporation, as no dividends had been declared prior to respondent Smith exercising his option to purchase appellant's stock under article VIII of the contract, and that appellant was entitled only to the return of the \$7,000 invested, together with 10 per cent. interest from the date of the payment for the stock amounting to \$288.88. With this construction we cannot agree.

It was contemplated that Smith and Conover would each have \$10,000 in the enterprise. Conover's investment, however, was to be gradually made as the corporation required additional capital. So the contract provided alternative terms upon which Smith could acquire Conover's interest. If at any time after the stock held by Conover should equal that held by Smith, and Conover desired to withdraw from the enterprise, he was entitled to do so, and to receive from Smith the book value of his (Conover's) stock, which would naturally include appropriate provision for appreciated value of the stock in trade, for good will and similar assets. In addition, the contract gave Smith the right to buy out Conover's interest. If Smith chose to do so after Conover's stock became the equivalent of his, he was to pay him the book value, plus 10 per cent. In point of fact Conover's stock never did equal Smith's, and therefore the controlling provisions of the contract are those which concern Smith's acquisition of Conover's stock prior to the time Conover's interest was equal to that of Smith.

Article VIII of the contract provides that, before the interest of Conover equals that of Smith, Smith shall have the right to purchase the stock of Conover at par or at the option of Conover at a price that will return Conover the amount invested, with 10 per cent. interest after deducting dividends received.

It will be observed that upon Smith's decision to buy Conover's stock he could do so by paying him par therefor; that is, the face value of \$100 per share for his 70 shares, totaling \$7,000. Conover, on the other hand, was given two methods of fixing the price; (1) taking par, \$7,000, and the earned profits not theretofore received, or (2) the amount invested, together with 10 per cent. interest, less dividends theretofore received.

The theory of this alternate is obvious. Conover, who was investing money in an enterprise in advance of going into it with the option given Smith to buy him out at will and which might turn out to be greatly against his (Conover's) wish, was given two alternatives to choose from in the event Smith exercised his option to buy. Conover would naturally choose the one which netted him the larger price. If the amount of earned profits was less than the interest, he would take his investment with interest and vice versa.

[2] If Conover chose to take par—which he did—the dividends or profits were not to be deducted. It is difficult to see how the contract permits of any other interpretation. The insertion of the words "or at the option of" between the description of the two alternatives demonstrates that they are completely separate and distinct and that the provision for the deduction of dividends is

concerned only with its immediate context. The logic of the situation confirms this view. "Par"—the face value of the stock—was the same amount invested, because under the contract Conover must originally buy at par. If Conover is not entitled to dividends under article VI, which provides that the profits made by the corporation are to be divided between Conover and Smith in proportion to their shares of stock, then Conover's option would mean: (1) \$7,000 "par" minus dividends; or (2) \$7,000, "amount invested," plus interest, minus dividends. The sole difference between the two alternatives would be that one includes interest and the other does not. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable. 6 Cal. Jur. 252. The parties here certainly did not intend the contract to be that, if Smith desired to exercise his option to buy Conover's stock, and no dividends had been declared or paid, he should say to him, shall I pay you \$7,000 with 10 per cent. interest for your stock, or will you have your \$7,000 without interest? "The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity." Civ. Code, § 1638.

The right of Conover to share in the profits of the corporation is governed by article VI of the contract that the profits are to be divided between the parties in proportion to the shares of stock held by each in the corporation as dividends on their stock.

The trial court decided that Conover was compelled to accept as the purchase price of his stock the amount he invested, plus interest, minus dividends, and, as no dividends had been declared, did not find as to the amount of profits earned by the corporation.

Respondents admit that, if Conover had received any profits during his connection with the enterprise, he would have been entitled, to receive them. Thus respondents say in their brief:

"If the venture prospered and Conover was bought out, he would receive back the amount of his investment, plus dividends previously collected."

Counsel for respondents argues that Conover's right to profits depends upon the declaration of a dividend prior to Smith's exercise of his option to buy Conover's stock; that paragraph VI provides that the profits made by the corporation should be divided between the parties in proportion to the shares of stock held by each "as dividends on said stock"; that there was no obligation on the part of the corporation to declare dividends until in the directors' discretion it was advisable to do so; that the paragraph in question adds nothing to the contract, for it is merely a declaration of the general law that dividends shall be shared by the stock-

holders in proportion to their shares of stock. According to the contention of respondents, if Conover had permitted the surplus to remain in the treasury as operating capital, or that Smith had successfully resisted Conover's effort to secure a distribution of the profits according to the contract, then Smith could destroy Conover's right to profits by electing to buy Conover's stock, and Conover would be forced to ask for his stock the amount invested by him, plus interest. Thus he would lose an amount which, if the business had been exceptionally successful, might be comparable with his investment, simply because the distribution of the profits which the contract required had not been enforced. Such a construction is not tenable, and does violence to the plain language of the contract.

[3-5] In support of their position that the specific language of the contract upon the "buy and sell" feature controls and general language used elsewhere, respondents cite us to Civil Code, § 3534, "particular expressions qualify those which are general," and to *Scudder v. Perce*, 159 Cal. 429, 114 P. 571, wherein the courts says:

"When general and specific provisions of a contract deal with the same subject-matter, the specific provisions, if inconsistent with the general provisions, are of controlling force. If, therefore, it is said that by the general provision accounts are to be taken and the properties of the partnership, including the book accounts, are to be divided between the partners equally, this must be considered as controlled by the specific provision that upon the payment of \$1,000 all assets of the partnership, including the book accounts, shall become the property of the defendant."

The case is not in point, as the facts do not parallel the instant case. The *Scudder-Perce* contract provided that, on dissolution of the partnership, Perce should pay Scudder \$1,000, and the Scudder should transfer to Perce his interest in the furniture fixtures, and good will of the property "and all gains of said business other than moneys earned and collected."

We are in perfect accord with what the court says in that case and with this language used in the opinion, which has special application here:

"The second consideration is that all parts of the contract are to be given effect if this may be done without doing violence to the manifest expressed intent of the parties and that the terms of a contract are to be construed

according to the ordinary and usual acceptation of the language unless an intent that they should be construed otherwise plainly appears."

[6] Here we have one article of the contract specially providing for the division of the profits. The profits had already been earned before respondent Smith exercised his option to buy appellant's stock, and appellant's right to these profits cannot be defeated because of the failure or refusal of the directors to declare a dividend in a corporation, which under the authorities cited, is a mere agency created for the convenience in carrying out the contract, and which is a mere corporate fiction. The other article provides that Smith shall have the right to purchase the stock of Conover at par or at the option of Conover at a price that will return him the amount invested, with interest, less dividends already received.

The contract is very plain, and each clause can be given effect without doing violence to the others. Article VI gives Conover the right to his profits in the enterprise earned up to the time Smith should exercise his right of purchase. When Smith exercised this right given him under article VIII, Conover was given the option of demanding par for his stock and retaining the profits, which at the time of the execution of the contract it must have been expected he would have collected before a demand was made upon him by Smith, exercising his right to purchase his stock, or, if it were more advantageous to him, he could demand the amount invested, with 10 per cent. interest, less the profits he had received. This clause was evidently inserted in the contract for Conover's benefit as a protection to him, should Smith desire his retirement from the business. The learned trial judge in his decision has reversed the conditions and given Smith the right to decide which alternative Conover must choose—has transferred the option from Conover to Smith.

We are of the opinion that appellant is entitled to his proportionate share of the profits earned by the corporation prior to respondent Smith exercising his right to purchase his stock.

The judgment is reversed and the cause remanded, with directions to the trial court to determine the amount of profits to which appellant is entitled, and to award him his proper share.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

83 Cal. App. 339

(256 P.)

RHEE v. L. K. SMALL CO. (Civ. 5321.)★District Court of Appeal, First District,
Division 1, California. May 24, 1927.Hearing Denied by Supreme Court July 21,
1927.**1. Factors ⇨1—Contract concerning production and marketing of lettuce held to create relation of principal and factor (Civ. Code, § 2026).**

Under Civ. Code, § 2026, contract for production and marketing of lettuce *held* to create relation of principal and factor, notwithstanding fact that factor was required to pack lettuce for shipment.

2. Factors ⇨23—Marketing contract held to require factor, although it made advances on crop, to obey instructions of principal (Civ. Code, § 2027).

Contract concerning production and marketing of lettuce to be delivered to factor to be packed and marketed on commission basis, although it created exclusive agency, *held* not to create one coupled with interest, and factor thereunder had duty to obey instructions of principal under Civ. Code, § 2027, although factor had made advances on crop.

3. Factors ⇨22—Factor held liable for loss proximately caused by its negligence or deviation from principal's instructions to sell to certain purchaser (Civ. Code, § 2027).

Law imposed duty on factor to use reasonable diligence in performance of undertaking to market lettuce crop, rendering it liable in damages for loss proximately caused by its negligence or deviation from instructions of its principal to sell to certain purchaser, in view of Civ. Code, § 2027, even though it acted prudently for what appeared to be principal's best interests.

4. Factors ⇨43—Evidence held to support implied finding that factor negligently failed to follow principal's instructions to sell to certain purchaser to principal's damage (Civ. Code, § 2027).

In action against factor on contract relating to production and marketing of lettuce, evidence *held* to support implied findings that factor negligently failed to follow instructions of principal to sell to party who made certain offer, contrary to Civ. Code, § 2027, to damage of principal.

5. Principal and agent ⇨79(5)—Ratification of agent's act is matter of defense, and burden of proof rests on one alleging it.

Although, as general rule, ratification by principal relieves agent from liability, and acts and silence of principal are evidence of ratification, ratification is not to be assumed, but is matter of defense, burden of proving which rests on one alleging it.

6. Trial ⇨142—Where inferences to be drawn as to whether principal ratified agent's act are such that men may reasonably differ, question is for jury.

Where inferences to be drawn from facts as to whether principal ratified agent's act are such that men may reasonably differ, question

is one for jury, especially where ratification is sought to be implied from conduct or deduced from acts of alleged acquiescence.

7. Factors ⇨43—Principal's complaint for factor's breach of marketing contract to sell to certain purchaser held sufficient.

In principal's action against factor for breach of contract relating to marketing lettuce, complaint, alleging bona fide cash offer for crop by offeror ready, willing, and able to pay, and that defendant neglected to accept offer as directed by plaintiff, causing loss, *held* sufficient.

8. Factors ⇨43—Damage for factor's breach of marketing contract held difference between principal's net profit, if offer factor refused contrary to instructions had been accepted, and net profits derived from later sale.

In principal's action against factor for damages for breach of contract for marketing lettuce, proper measure of principal's damages *held* difference between what net profits principal would have received had factor accepted offer as directed by principal, and principal's net profits from subsequent sale.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by B. U. Rhee against the L. K. Small Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

LeRoy M. Edwards, of Los Angeles, and James W. Glassford, of El Centro, for appellant.

Dayton L. Ault and C. Sherman Anderson, both of Calexico, for respondent.

CASHIN, J. An appeal from a part of a judgment entered on a verdict in an action to recover for a breach of contract by an agent.

Appellant corporation, which was engaged in the business of packing and shipping produce, entered into a written contract with respondent by which the latter agreed to plant 20 acres of lettuce and deliver the crop to appellant to be packed and marketed. The grower further agreed to pay, in addition to the cost of packing, a commission of 15 per cent. of the amount of the gross sales of all lettuce delivered and accepted for shipment. It was further agreed that appellant should make certain advances as the crop was delivered, and it appears from the testimony that money was advanced and seed furnished before the crop was grown. The contract also contained the following provisions: "The grower hereby appoints the above-named distributor (appellant) his exclusive selling agent for the selling and distributing of all lettuce owned and controlled by the grower for the season of 1922, * * *" and "the distributor agrees to use his best efforts and endeavors in the marketing of said lettuce in order to procure the best possible returns."

* * *

The complaint alleged that there was received from the Southwestern Fruit Company a bona fide cash offer for the crop as it stood in the field, which the offeror was ready, willing, and able and promised to pay; that plaintiff was willing to accept, and demanded of defendant that it accept the price offered, but that the latter refused and neglected to do so, and the offer was withdrawn; that, by defendant's failure to exercise reasonable care and diligence in marketing the crop, plaintiff was damaged in the sum of \$6,296.61.

These allegations were denied by defendant, which pleaded by way of counterclaim and cross-complaint causes of action arising out of two separate contracts for the delivery and sale of crops of cantaloupes under which it sought to recover the total sum of \$3,429.33. The jury awarded to each party the amount claimed, and the appeal is from that part of the judgment which was entered against the corporation. It appears from the testimony that the lettuce was grown as agreed, and within a few days before the time when ready for delivery an offer of \$8,000 for the entire crop in the field was made by a certain Japanese who was doing business under the name of Southwestern Fruit Company. Respondent testified that he wished to accept the offer, and so informed appellant's agent, but that the latter refused to sell for less than \$8,500, stating that the Japanese were not financially responsible. According to the testimony of the agent, respondent, who was then indebted to appellant, stated at the time the offer was made:

"You know I am heavily indebted to you people, and I would like to get straightened out on this thing, and at the same time it is a fair margin for you people to get your commissions. * * * We are willing to pay just the same."

The agent then raised the question as to the ability of the Japanese to pay, stating:

"In my opinion Fujimoto hasn't \$8,000, and I wouldn't trust him overnight. * * * I have every reason to believe we could not trust him. * * * The only way we will sell that lettuce is to get the cash here, and they pay \$8,500, and we will give them the lettuce."

The evidence was conflicting as to the ability of the Japanese to pay the price offered as well as to the terms of the offer, respondent testifying in the latter connection that the buyer offered \$4,000 in cash and the balance when the harvesting of the crop commenced, and the agent that payment was to be evidenced by a postdated check. After the rejection of the offer, the crop amounting to 2,872 crates was packed and sold by appellant, the gross returns therefrom being the sum of \$4,052.03.

It is undisputed that there was advanced and paid to respondent in cash the sum of \$1,751.33, and that, in addition, he was fur-

nished 67 pounds of lettuce seed valued at \$117.50, of which 15 pounds, of the value of \$37.50, was returned. He received the further sum of \$118.18 upon the completion of the sales; the net amount received by him from the crop being the sum of \$1,949.51. It was further shown that the cost of cutting and delivering the crop to appellant was approximately \$100. It is contended by appellant that the evidence was insufficient to show a breach, or that appellant was wanting in ordinary care and diligence in performing the contract; that the breach, if any, was ratified by respondent; that the verdict was unsupported; and that the court erred in instructing the jury.

[1-5] The relation between the parties was that of principal and factor (Civ. Code, § 2026; *Betts v. Southern California Fruit Exchange*, 144 Cal. 402, 77 P. 993), and this notwithstanding that appellant was required by the contract to pack the lettuce for shipment (*Winne v. Hammond*, 37 Ill. 99; *Bank of Elgin v. Kilbourne*, 127 Ill. 573, 20 N. E. 681; *Shaw v. Ferguson*, 78 Ind. 547; *State v. Thompson*, 120 Mo. 12, 25 S. W. 346; *Kellogg v. Costello*, 93 Wis. 232, 67 N. W. 24). The agency created by the contract, though exclusive, was not coupled with an interest (*Barr v. Schroeder*, 32 Cal. 609-617; *Roth v. Moeller*, 185 Cal. 415, 197 P. 62; *Chambers v. Seay*, 73 Ala. 372; *Woods v. Hart*, 50 Neb. 497, 70 N. W. 53), and it was the duty of the factor to obey the instructions of its principal, although advances had been made on the crop (Civ. Code, § 2027). The law imposed the further duty to use reasonable diligence in the performance of its undertaking, and it would be liable in damages for a loss proximately caused by its negligence or a deviation from the instructions of its principal, even though in the latter connection it acted prudently, and for what appeared to be the best interests of its principal. *Lem v. Wilson*, 27 Cal. App. 512, 150 P. 641; *Coyne Bros. v. Feazel*, 129 Ark. 163, 195 S. W. 391; *Cutter v. Powers*, 200 Mich. 375, 166 N. W. 1029; *Adams v. Robinson*, 65 Ala. 586; *Scott v. Rogers*, 31 N. Y. 676. In the instant case the evidence, though conflicting, was sufficient to support the implied findings that the Japanese was ready, willing, and able to pay the price offered, and that appellant negligently failed to follow the instructions of its principal, to the damage of the latter. It is urged by appellant that respondent, by continuing to perform the contract and by his acceptance of the net proceeds of the sale, ratified the refusal to accept the offer. While it is the general rule that ratification by the principal relieves the agent from liability, and the acts and silence of the principal are evidence of ratification, the fact is not one to be assumed, but is a matter of defense (*Bank of Westhope v. Messner*, 25 N. D. 263, 141 N. W. 999), and the burden of proof rests upon the one who alleges it (*Dean v. Hipp*, 16 Colo. App. 537,

66 P. 804; *Brown v. Estate of Funck*, 89 Kan. 601, 132 P. 202, Ann. Cas. 1915A, 174).

[6] And, where the inferences to be drawn from the facts are such that men may reasonably differ, the question is one for the jury, and this is especially true where ratification is sought to be implied from conduct or deduced from acts of alleged acquiescence. Ratification was not pleaded as a defense to the action, nor so far as appears was the question raised at the trial, and we cannot say that the only reasonable conclusion to be drawn from the evidence adduced supports appellant's contention.

[7, 8] We find no merit in the further claim that the complaint was insufficient or that the instructions of the court were prejudicially erroneous, but we are satisfied, in view of the evidence, that the verdict against appellant was excessive.

That respondent received in money and seed the sum of \$1,949.51 and incurred an expense of \$100 in harvesting the crop is undisputed. He concedes that in computing the damage appellant should have been allowed the commission amounting to \$1,200, which would have been payable had the sale been made to the Japanese. Had his instructions been followed, respondent would have received, after deducting the commissions, the sum of \$6,800. The return in fact was the amount first stated less the expense incurred, a net amount of \$1,849.51, and his damage was the difference, namely, \$4,950.49.

For the above reason, that part of the judgment appealed from is modified by deducting therefrom the sum of \$1,346.12, and, as so modified, is affirmed. It is ordered that appellant recover its costs on appeal.

We concur: TYLER, P. J.; KNIGHT, J.

CUNNING v. HUMBOLDT COUNTY. ★ (Civ. 3090.)

District Court of Appeal, Third District, California. May 18, 1927.

Hearing Granted by Supreme Court July 13, 1927.

1. Trial ⚡139(1)—Directed verdict for defendant may be granted only when there is no substantial evidence supporting verdict for plaintiff.

Court's right to direct verdict for defendant on evidence is same as right to grant nonsuit, which may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence all value to which legally entitled and indulging in every legitimate inference therefrom, there is no evidence of sufficient substantiality to support verdict for plaintiff.

2. Appeal and error ⚡989—That directed verdict is for party having burden of proof should be considered in determining propriety thereof.

That directed verdict is in favor of party having burden of proof is fact to be considered

in determining propriety of court's action, being sanctioned only in clearest cases.

3. Evidence ⚡83(7)—It will be presumed that peace officer, executed search warrant directed to him, and magistrate issuing it has power to enforce its execution (Pen. Code §§ 1523, 1528, 1530).

It is to be presumed that peace officer, to whom search warrant is directed, under Pen. Code §§ 1523, 1528, will do his official duty and execute warrant, under section 1530, and magistrate who issues it has ample power to enforce its execution.

4. District and prosecuting attorneys ⚡7(2)—District attorney has only discretion in first instance to determine necessity incurring expense in detecting crime and prosecuting criminal cases (Pol. Code, § 4307, subd. 2).

District attorney's right, under Pol. Code, § 4307, subd. 2, to incur necessary expenses in detecting crime and prosecuting criminal cases, is not arbitrary; statute merely giving him discretion in first instance to determine such necessity, which county board of supervisors, on presentation of claims for allowance, and superior court, in action brought after rejection of claims, must also pass on.

5. District and prosecuting attorneys ⚡7(2)—Whether expense of district attorney's employment of special agents to execute search warrants was necessary, so as to charge county therewith, held for jury (Pol. Code, § 4307, subd. 2; Pen. Code, §§ 1523, 1528, 1530).

Whether expense of employing special agents to execute search warrants was necessarily incurred by district attorney, so as to charge county therewith, under Pol. Code, § 4307, subd. 2, held for jury, in absence of evidence showing why execution thereof was intrusted to such agents instead of regular peace officers of county, under Pen. Code, §§ 1523, 1528, 1530.

6. District and prosecuting attorneys ⚡7(2)—Expenses of district attorney's employment of persons to perform other county officers' duties are not "expenses necessarily incurred by him" (Pol. Code, § 4307, subd. 2).

Expenses of district attorney's employment of persons to perform official duties, enjoined by law on other officers of county, are not expenses necessarily incurred by him, within Pol. Code, § 4307, subd. 2, making such expenses county charges.

7. District and prosecuting attorneys ⚡7(2)—Evidence that county provided automobiles for use of district attorney's employees held admissible to show that expense of hiring them was unnecessary (Pol. Code, § 4307, subd. 2).

In action by employee of district attorney against county for use of plaintiff's automobile in performance of services, evidence that county had provided automobiles for use of district attorney and his employees, and that he had been so informed, would be material as tending to show that expense of hiring them was not necessarily incurred, within Pol. Code, § 4307, subd. 2, making such expenses county charges.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Actions by John Cunning against the County of Humboldt. Judgment for plaintiff, and defendant appeals. Reversed.

John F. Quinn, of Eureka, for appellant.
H. C. Nelson, of Eureka, for respondent.

FINCH, P. J. Six causes of action are stated in the complaint. The first is based on plaintiff's claim for alleged personal services performed by him, as an employee of the district attorney of the defendant county, in the detection of crime and the gathering of evidence to be used in the prosecution of criminal cases, and for expenses incurred, and the use of plaintiff's automobile in connection with the performance of such services. The other causes of action are based on similar claims of other employees of the district attorney, which claims were duly assigned to the plaintiff. The period of time covered by the claims is the month of July, 1925. Plaintiff's claim is for "wages for July 1st to 31st, \$5 per day, \$155;" expenses for July, \$17.05; "mileage 1251, at 15 cents per mile, \$187.65." The assigned claims are as follows: George Wentworth: "31 days at \$5 per day, \$155;" expenses, \$26.10; "927 miles at 15 cents per mile, \$139.35." C. C. Hill: "27 days * * * at \$5 per day, \$135;" expenses, \$13; mileage 305, at 10 cents, \$30.50. W. Hill: "23 days * * * at \$5 per day, \$115;" expenses, \$24.60. L. G. Hannaford: "19 days * * * at \$5 per day, \$95;" expenses, \$32.60. Stephen Hash: "1,196 miles at 15 cents per mile, \$179.40." The claims were all duly presented to the board of supervisors for allowance as charges against the county.

Plaintiff's claim and that of Wentworth were allowed in the amounts claimed for services and expenses, but rejected as to the compensation claimed for the use of automobiles. The other claims were entirely rejected. The answer denies that any services were performed, expenses incurred, or automobiles used by the claimants, and denies that the employment or services of the claimants or the use of their automobiles were necessary or that the compensation claimed is reasonable. At the close of the evidence the court directed the return of a verdict in favor of the plaintiff for the full amount demanded in the complaint. This appeal is from the judgment entered upon the verdict, which the jury returned in compliance with such instruction.

[1, 2] The main question on this appeal is whether there is any substantial evidence which would warrant a verdict in favor of defendant or a reduction of the amount awarded the plaintiff. "It is now settled that the right of a court to direct a verdict is, with regard to the condition of the evi-

dence, absolutely the same as the right of a court to grant a nonsuit; and also that a court may grant a nonsuit only when, disregarding, conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." *Perera v. Panama-Pacific Int. Exp. Co.*, 179 Cal. 63, 64, 175 P. 454, 455. In that case the court had directed a verdict for defendant. Like a judgment of nonsuit, the directed verdict was against the party having the burden of proof. In this case it is in favor of the party on whom rests the burden of proof, a fact to be considered in determining the propriety of the court's action. "There is a distinction * * * between directing a verdict against and directing a verdict for the party having the burden of proof." 25 Standard Proc. 1063. Instructions directing verdicts in favor of the party having the burden of proof have been upheld in this state, but it has been said that "the practice is hazardous, and can be sanctioned only in the clearest cases." *O'Connor v. Witherby*, 111 Cal. 523, 528, 44 P. 227, 229.

The district attorney testified that during the month of July, 1925, he employed eight men, including the claimants, to do the character of work for which the claims involved herein are made; that during that month these men were employed "principally" in "securing evidence in the detection of crime in regard to the violation of the liquor laws," but that "very usually there was other work they did during that time"; that they were employed "to detect the commission of crime and to secure evidence for the prosecution of criminal cases" generally; that "a big part of their work" was "raiding" places where intoxicating liquors were manufactured or sold; that the men were paid at the rate of \$5 a day during the time they were actually working and the cost of their meals and their hotel expenses when away from their homes; that "they had to use automobiles, as their work took them all over the entire county"; that he agreed to pay each of them who used his own automobile at the rate of 15 cents a mile; that the supervisors had fixed that rate "for the use of what they termed 'dry squad cars'"; that from three to five of such employees would ride in each automobile; that the dangers of the work were such that it was necessary for the employees to travel in groups for their own protection; that "there wasn't a day or an hour outside of the time they had to sleep but what there was work there to do"; that "they would assemble in the morning and had their work outlined for them"; that "Mr. McKay is the county detective, and * * *

he attended to the immediate detail himself, divided them up in squads, and sent some in one direction and some in another, filing any requests that came in"; that "invariably if they were to enter buildings they had search warrants"; that "sometimes if they know in advance of a car and person bringing it, they obtain search warrants of the courts" to search automobiles; that "generally one man carries the search warrant and the others assist him, * * * searching and procuring the evidence"; that he "made no requests for their appointment as deputy sheriffs"; that "as a small accommodation" to the sheriff he would send one of the employees for a few minutes to take a prisoner from the county jail to "the justice of the peace, or bring him across to the courthouse"; and that he did not "know of any cars whatever that had been assigned to the use of the district attorney's office either during the month of July or any other month." All the claimants were deputized by the sheriff of the county, and they all wore deputy sheriff's badges. Hannaford testified that the work for which he claimed compensation was performed "mostly in liquor cases"; that he did not recall having done "any work on any other class of cases"; that he acted "as a member of the dry squad, going out on raids and securing evidence and detecting crime in connection with the prohibition enforcement law"; that he participated in many raids during the month of July; that he assisted in making arrests in some of the raids; that "a typical case is we arrest some one, we go out and a man working would have to put somebody under arrest and take the man in to the county jail and the balance of the squad would get in the machine and go back to the jail. That is the only assisting I did." Wellesly Hill testified that "some days we had as high as eight or nine or ten raids; other days we had only two or three"; that he had taken prisoners from the point of arrest to the county jail and from the jail to the courts and back "as a deputy sheriff employed by the district attorney's office"; that his claim "covers not only going out and hunting up some evidence as a detective, but in addition covers the time * * * occupied as a deputy sheriff in getting out a search warrant and going out and serving it" in making a raid, but that it was all done under the direction of the district attorney. Cunning testified that he took squads of employees on various trips in his automobile to make raids; that he charged for the time he occupied in getting the search warrants and going to the places where they were to be served; that "it was all in the day's work"; that in making searches under authority of search warrants he "many times" broke open doors to gain entrance; that he was a deputy sheriff "for convenience in my work"; and that he was

not paid as a deputy sheriff, but as an employee of the district attorney. Wentworth testified that the employees "never raided without a search warrant"; that "no raiding party is carried on without a search warrant held by some member of the squad"; that he assisted in breaking through doors "as a deputy sheriff and detective"; that during the month of July he assisted in making about seventeen arrests; that a part of his claim is for "taking prisoners * * * to the county jail," that prisoners were brought in on return from raiding trips, but that no extra charge was made therefor. Hash testified:

"I got \$5 a day. It did not make any difference whether I am getting a search warrant or taking a prisoner down to the jail, no matter what I am doing, I got \$5 a day, no more.

"Q. In the month of July was there any portion of your claim for time taken up in taking a prisoner arrested from the place of arrest to the county jail? A. Certainly, if I go out to Wildwood and get a prisoner I am not going to leave him out there. * * * If a prisoner is taken into town, I may take him to court and I get \$5 a day, no more and no less. * * *

"Q. And serving a warrant and doing those things * * * and taking prisoners to court or taking him from the place of arrest was just as much a part of the work you were supposed to do as getting the evidence? A. Yes, sir. * * * I don't get anything for being a deputy sheriff. I take my orders from the district attorney. * * * I am a deputy sheriff just for courtesy.

"Q. When you arrested people though, you arrested them not as a detective, but as a deputy sheriff? A. Yes; but I did not get any pay as a deputy sheriff.

"Q. Do you remember of any prisoner you took from the county jail to the justice's court in that month? A. Yes, sir; I took several. * * *

"Q. And you made your charge upon a mileage basis for taking yourself and the other employees out to where you were directed to go, and for coming back? A. Yes, sir; and bringing the prisoner back.

"Q. If you did not bring the prisoner, you got the same price as if you did? A. Just the same. * * * I am getting my \$5 a day no matter whether I am getting a search warrant or taking a prisoner or raiding. * * * I am getting fifteen cents a mile for my car if I haul one or if I haul six or seven, and if I haul the prisoner, it is not any different."

[3] It appears from the foregoing evidence that the services for which compensation is claimed were, to a considerable extent, the serving of search warrants and the making of searches thereunder. "A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate." Pen. Code, § 1523. It is issued by the magistrate "to a peace officer in his county, commanding him forthwith to search the person or place named, for the

property specified, and to bring it before the magistrate." Pen. Code, § 1528. "A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution." Pen. Code, § 1530. It is to be presumed that a peace officer to whom a search warrant is directed will do his official duty and execute the warrant, and the magistrate who issues the warrant is clothed with ample power to enforce its execution.

[4] The authority of the district attorney to employ the claimants is found in section 4307, subdivision 2, of the Political Code, which provides that "all * * * expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases" are county charges. "Of course, the right of a district attorney to incur expense is not an arbitrary one. All that the section [228] of the County Government Act (St. 1897 p. 452) [in the identical language of section 4307 of the Political Code] permits is to give to the district attorney, in the first instance, the discretion to determine whether it is necessary in the detection of crime, or the prosecution of a criminal case, to incur an expense chargeable against the county. Any such claim, however, must be presented to the board of supervisors for allowance, and that body reviews the action of the district attorney and determines whether the expense was a necessary one and acts accordingly. * * * Its determination that it was a proper and necessary expense is conclusive." *County of Yolo v. Joyce*, 156 Cal. 429, 432, 105 P. 125, 126. When the claims herein were rejected by the board of supervisors, however, "the foregoing considerations all became the subject of cognizance and determination in an action brought in the superior court." *Thiel D. Co. v. Tuolumne County*, 37 Cal. App. 423, 425, 173 P. 1120, 1121; Pol. Code, § 4078.

[5] Whether the expense was "necessarily incurred" by the district attorney was a question of fact for the determination of the jury. In the absence of evidence showing why the execution of the search warrants was intrusted to the special agents of the district attorney rather than to the regular peace officers of the county, it cannot be held that the necessity of employing such agents for that particular service is so conclusively established as to warrant a directed verdict.

[6] The expenses of employment by the district attorney of persons to perform the official duties which are enjoined by law upon other officers of the county are not "expenses necessarily incurred by him." The case of *Cunning v. Carr*, 69 Cal. App. 230, 234, 230 P. 987, 989, was decided in favor of the employees of the district attorney on the

theory that they were employed as sleuths or detectives "to perform services outside of the duties cast by law upon the sheriff or a constable." Of course no one would contend that a person so employed would forfeit his right to compensation by the mere incidental performance of some act which falls within the official duties of a sheriff or constable.

[7] Counsel for defendant made some slight effort to show that the county had provided automobiles for the use of the district attorney and his employees and that the district attorney had been so informed, but the attempt to make such proof was apparently abandoned. Evidence to that effect would be material as tending to show that the expense of hiring automobiles was not necessarily incurred. The other contentions of the appellant are not considered of sufficient importance or merit to require discussion.

The judgment is reversed.

We concur: HART, J.; PLUMMER, J.

83 Cal. App. 866

COACHELLA VALLEY STATE BANK v. WILSON. (Civ. 4845.)★

District Court of Appeal, Second District, Division 1, California. May 25, 1927.

Hearing Denied by Supreme Court July 21, 1927.

1. Appeal and error ⇐1010(1)—Trial judge's finding as to ownership of property in action for conversion held conclusive.

In action for conversion, finding by trial judge as to ownership of property, based on substantial evidence, is conclusive.

2. Sales ⇐482—Finding that plaintiff in trover acquired title to truck by assignment of conditional sales contract for value, subject to purchaser's rights to become owner on payment of amount due, held justified by evidence.

In action for conversion against sheriff, evidence justified finding that plaintiff, to whom conditional sales contract of truck and interest in truck was assigned on payment of amount due to owner of contract, acquired title to truck at time of assignment, subject to rights of purchaser to become owner of truck on payment of balance due under sales contract.

3. Appeal and error ⇐1010(1)—Findings of fact, made on evidence sufficient to support them, will not be disturbed.

District Court of Appeal will not disturb findings of fact, which are made on evidence sufficient to support them.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by the Coachella Valley State Bank against F. P. Wilson. Judgment for plaintiff, and defendant appeals. Affirmed.

(256 P.)

William Ellis Lady, of Los Angeles, for appellant.

Thomas T. Porteous, of Riverside, for respondent.

HAUSER, J. This is an appeal from a judgment in favor of the plaintiff in an action of conversion brought against defendant as sheriff. It appears that one Bellue bought an automobile truck on a conditional sales contract; that he failed to meet several of the installments when they became due, and as a consequence he was about to lose the truck; that thereupon he induced the plaintiff bank to help him out of his difficulty, which was done by having the assignee of the seller of the truck assign its interest in the truck and the conditional sales contract to the plaintiff. In addition thereto, Bellue gave to plaintiff his promissory note for the balance due on the truck, plus the amount of money paid by the plaintiff for an insurance policy thereon, for all of which Bellue deposited with and pledged to the plaintiff as collateral security for the payment of the note an automobile sales contract covering, not only the truck in question, but as well another truck described in the pledge. Thereafter, by virtue of a writ of attachment issued in an action brought by a third party against Bellue, the defendant herein as sheriff took possession of the truck which is the subject of this controversy. Judgment having been rendered in said action against Bellue, the truck was sold in execution of the judgment.

As is stated by appellant:

"The real question for determination in this matter is whether the title to the truck in question passed to Bellue or to plaintiff on or about the 29th day of August, 1921 (the date of the assignment to the plaintiff of the sales contract), and that whichever way that question is decided the entire case will follow."

The action was tried by the court without a jury, and among the findings of fact is the following:

"That on the 13th day of August, 1920, the said Gary South Coast Agency, Inc., sold, assigned, and transferred said contract and motor truck to the Merchants' Finance Company, and said Merchants' Finance Company, on the 29th day of August, 1921, sold, assigned, and transferred said contract and motor truck to the plaintiff, and plaintiff on the 29th day of August, 1921, became the owner of said motor truck, subject to the said contract of sale to said C. E. Bellue, and so continued to be and was, on the 7th day of June, 1922, and at the time the defendant took possession of same as hereinafter set out, the owner of said Gary truck described in paragraph II of plaintiff's complaint herein."

In support of such finding the record on appeal discloses that one of the witnesses, who was the cashier of the plaintiff bank, testified that in a conversation between Bel-

lue and him "Mr. Bellue stated that he was behind in the payment on his truck, and that the Merchants' Finance Company were threatening to take the truck away from him and compel him to forfeit what he had already paid on it, and he asked me if the bank would take over that contract and extend the time of payments so he could meet them. I told him that I would have to take the matter up with the board." Later the witness told Bellue that "we could take care of the matter for him." The plaintiff then procured an assignment to itself of all "right, title, and interest in and to the within contract, and in and to all moneys due and to become due and payable thereunder, and also all right, title, and interest in and to the property therein described." The consideration for the assignment was paid directly by the plaintiff to the owner of the contract, and Bellue thereupon executed the note, etc., in favor of the plaintiff. The witness further testified:

"The whole matter was thoroughly gone into at the time of signing the note. I explained to him [Bellue] that the bank was taking an assignment of the contracts, and taking a note in its usual course of business, and extending the time on the payment of the contract. * * * I told him how much was due on each contract, and that he would have to have the truck insured. He had requested that the policy that was on the contract be canceled, and we place a new one on it, and I figured out what it would take to cover the insurance, and explained the whole matter to him in detail. * * * I explained to him that we were taking this contract or assignment from the previous holders, and that the note was taken by the bank in its usual course of business, to extend the payment on the contracts. I also stated to him at that time that I was doing it in that way, so as not to change the existing contract rights in any way whatsoever."

It also appeared that at the time Bellue signed the note no money was paid to him; neither was any credit extended to him by the plaintiff; nor was any entry made in Bellue's account with the plaintiff, showing the deposit therein "of that sum of money." At that time a policy of insurance was "taken out" on the truck.

Bellue testified:

"I was needing money on account of sickness, and I went in [to the bank], and the only way I could get the money was to have the bank buy the contract over for security. * * * The bank agreed to buy the contract and pay for it. * * * The purpose was, the note was given to the bank, so they should have something to show. * * * I told them [the assignee of the contract] to send my contract to the Coachella Valley State Bank, and the bank agreed to pay for it and take the contract, and indorse the contract to the bank, which I suppose he did."

[1-3] Appellant attacks the conclusion on the facts reached by the trial court, and

argues that from the evidence the decision on the question of the ownership of the truck should have been that Bellue was the owner thereof. While from the entire record in the case, which includes the several documents relating to the transaction under consideration, it is possible that a finding of fact might have been made by the judge of the trial court in accord with the views urged by appellant, it is well-settled law that his decision in the matter, based upon substantial evidence, is conclusive in the premises. It sufficiently appears by the testimony of the cashier of plaintiff's bank, as well as by that of Bellue, that the trial court was justified in reaching the conclusion stated in the finding to which objection is made, to wit, that the plaintiff purchased the interest of the assignee of the seller of the truck, both in the sales contract and the truck itself, and was the owner thereof, subject only to the rights of Bellue to become the owner of the truck on the payment to plaintiff of the balance due on the sales contract, plus the premium on the insurance policy paid by the plaintiff for the insurance of the truck. It is not the function of this court to disturb findings of fact which are made on evidence sufficient to support them.

The sole point raised by appellant, as to "whether the title to the truck in question passed to Bellue or to plaintiff," having been decided on substantial evidence that the plaintiff was the owner of the truck, it follows that the judgment should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 403

SHERMAN v. REYNOLDS et al. (Civ. 4633.)

District Court of Appeal, Second District, Division 1, California. May 26, 1927.

1. Venue ⚡28—Residence can only be changed by union of act and intent.

As respects the venue of a transitory action, residence of defendant can only be changed by union of act and intent.

2. Venue ⚡68—Affidavit opposing change of venue, alleging that defendants agreed to hold possession of premises to grow and harvest crops, held to show defendants came into county for temporary purpose only (Code Civ. Proc. § 395; Pol. Code, §§ 52, 1239, subs. 1, 4).

Where defendants moved for change of venue on ground that they resided in another county than that in which action was brought, plaintiff's counter affidavit, alleging that contract sued on was for sale of vegetable, melon, and fruit crops, and that defendants agreed to take possession of premises for purpose of

growing and harvesting crops, held clearly to show that defendants removed to county in which land was located for temporary purpose only, entitling defendants to change of venue under Code Civ. Proc. § 395, and Pol. Code, §§ 52, 1239, subs. 1, 4.

3. Appeal and error ⚡1024(3)—In absence of substantial conflict in evidence, trial court's erroneous conclusion as to defendants' residence, as respects venue, will be reversed on appeal.

Ordinarily, the conclusion of the trial court on a motion for a change of venue will not be disturbed on appeal, where there is a substantial conflict in the affidavits or evidence on the question of defendants' residence, but, where there is no substantial conflict, erroneous conclusion of the trial court from affidavits on file will be reversed.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by L. H. Sherman against F. E. Reynolds and another. From an order denying defendants' motion for change of venue, defendants appeal. Reversed.

Andreani & Haines, Robert P. Carrey, and John L. Bisher, Jr., all of Los Angeles, for appellants.

Hickox, Crenshaw & Trude, of El Centro, for respondent.

McLUCAS, Justice pro tem. Appeal by defendants from a judgment denying defendants' motion for change of venue from the county of Imperial to the county of Los Angeles.

The complaint was filed June 29, 1923. It alleged three causes of action—the first was for vegetables and produce sold and delivered; the second for fruit and produce sold; and the third for labor performed. The last two claims were assigned to plaintiff. Defendants filed an affidavit of merits and written demand that the trial be had in Los Angeles county. In support of their motion for change of venue, defendants made affidavit that at the time of the filing and commencement of the action on June 29, 1923, the defendants and each of them resided in the county of Los Angeles, had so resided for some time prior to the commencement of the action, and have ever since continuously so resided and do now reside in the county of Los Angeles. Plaintiff filed a counter affidavit that on May 22, 1923, plaintiff and defendants entered into an agreement for the sale by plaintiff to defendants of certain vegetables, melons, and fruit then growing, and that the account sued upon is due under the terms of said contract; "that under the terms of said contract the defendants were to take and hold possession of said premises for the purposes thereof;" that on May 22, 1923, the defendants moved upon and took possession of

the premises and resided upon the same; that defendant Reynolds, together with his wife, lived on said premises up to and including June 19, 1923; that defendant Aschenbrenner, together with his wife, resided thereon up to and including July 12, 1923; that said defendants and each of them moved certain of their furniture and household goods upon said premises and did live upon said premises as their home during all of the time aforesaid. Defendant Reynolds filed a reply affidavit, stating that he did not at any time, and does not now, reside in the county of Imperial; that it is not true that defendant moved upon or resided upon the premises located in the county of Imperial; that defendant went to the county of Imperial on June 2, 1923, for the purpose of harvesting a crop on premises leased by him, and returned to the county of Los Angeles on June 10, 1923; that defendant again went to Imperial county for the purpose of harvesting said crops, but not for any other purpose, on June 13, 1923, and returned to Los Angeles county on June 18, 1923; that defendant did not move upon said premises or any premises in the county of Imperial for the purpose of establishing a residence, but only for the purpose of harvesting his crops; that defendant did not move upon or live upon said premises from May 22, 1923, up to and including the 19th of June, 1923, or up to and including the 12th day of July, 1923, or at any other time, but only visited the said premises for the purposes hereinabove alleged; that defendant did not move any of his furniture or household goods upon any premises in the county of Imperial, and did not live upon such premises. The record contains no affidavit of reply filed by defendant Aschenbrenner.

It will be noted from plaintiff's affidavit that the contract sued upon was for the sale of vegetable, melon, and fruit crops, and that "defendants were to take and hold possession of said premises for the purposes thereof." It is self-evident from reading this affidavit that the only purpose of the defendants in moving onto the premises was in order to harvest the crop which had been produced by defendants. Plaintiff claims that the facts alleged in his affidavit are sufficient to establish the residence by the defendants in Imperial county. The action was transitory, and under the provisions of section 395 of the Code of Civil Procedure, is required to be brought in the county where the defendants or some of them reside at the commencement of the action. In section 52 of the Political Code, residence is defined as the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. Subdivisions 1 and 4 of section 1239 of the Political Code read as follows:

"1. That place must be considered and held to be the residence of a person in which his * * * habitation is fixed, and to which, whenever he * * * is absent, he * * * has the intention of returning; * * *

"4. A person must not be considered to have gained a residence in any precinct into which he * * * comes for temporary purposes merely, without the intention of making such precinct his * * * home. * * *

[1-3] In *Chambers v. Hathaway*, 187 Cal. 104, 105, 200 P. 931, 932, it is said:

"Where a person has two dwellings in different places and resides a part of his time in one place and a part of the time in another alternatively, the question which of the two places is his legal residence is almost altogether a question of his intent."

Residence can only be changed by the union of act and intent. Upon an examination of the affidavit filed by plaintiff, we do not find any facts alleged therein which show intent of the defendants to change their residence; to the contrary, it is clearly apparent therefrom that defendants removed to Imperial county for a temporary purpose only, that of growing and harvesting a crop of vegetables, melons, and fruit which they had purchased, and that defendants were to take and hold possession of plaintiff's premises for that purpose only. Ordinarily the conclusion of the trial court on a motion for change of venue will not be disturbed on appeal, where there is a substantial conflict in the affidavits or evidence on the question of defendant's residence; but, where there is no substantial conflict, an erroneous conclusion of the trial court from affidavits on file will be reversed on appeal. *Younger v. Spreckels*, 12 Cal. App. 175, 106 P. 895. In this case it is said:

"Within the contemplation and meaning of the statute a person can have but one bona fide residence. Residence depends upon intention as well as fact; and in its ordinary acceptation it is the place where one remains when not called elsewhere on business, pleasure, or for other temporary purpose. The mere inhabitancy of a summer home or country house at certain seasons of the year or at certain times would not make the party inhabiting said house a resident of the county in which such house is situated. The material question is the *animo manendi*. Although one may abide at times in a place for pleasure or health or repose it does not become his domicile unless it be his intention to remain there. The place of residence within the meaning of the statute is the fixed home of a party as understood by himself and his neighbors and friends."

We think the conclusion of the trial court erroneous in the case at bar.

It is ordered that the judgment be reversed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 204

HARKER et al. v. SOUTHERN CALIFORNIA EDISON CO. (Civ. 3261.)★

District Court of Appeal, Third District, California. May 19, 1927.

Hearing Denied by Supreme Court July 18, 1927.

1. Appeal and error ⇨1170(3)—Overruling demurrer for misjoinder held not ground for reversal, where no prejudicial testimony was admitted which would not have been admissible in separate actions (Const. art. 6, § 4½).

Overruling demurrer, on ground of misjoinder, to petition of lessor and lessees of mining property for damages from fire caused by defendant power company's negligence was, if error, not ground for reversal, in view of Const. art. 6, § 4½, where no prejudicial testimony was admitted in favor of either plaintiff that would not have been admissible in actions prosecuted separately.

2. Appeal and error ⇨1170(3) — Overruling demurrer for misjoinder was, if error, harmless, where no judgment was rendered for coplaintiffs or on cross-action against them (Const. art. 6, § 4½).

Overruling demurrer, on ground of misjoinder, to petition of lessor and lessees of mining property for damages from fire caused by defendant power company's negligence was, if error, not reversible, under Const. art. 6, § 4½, where no verdict or judgment was rendered for lessees or on the defendant's cross-action against them.

3. Trial ⇨330(5)—Verdict for plaintiff against defendant, silent as to coplaintiffs and cross-action against coplaintiffs, held to support judgment for plaintiff.

Verdict for lessor against power company defendant, silent as to claim of coplaintiff lessees and defendant's cross-action against the lessees, was sufficient to support judgment for the lessor.

4. Appeal and error ⇨218(1)—Defendant failing to apply for correction of verdict, silent as to coplaintiffs and cross-action against them, could not complain on appeal (Code Civ. Proc. § 619).

Defendant who failed to make application to have remedied defect in verdict, which was silent as to claim of coplaintiff lessees against the defendant and defendant's cross-action against them, and who in notice of appeal questioned only the judgment on the verdict, could not complain in the court of appeal of the verdict's insufficiency, in view of Code Civ. Proc. § 619, authorizing correction of verdict.

5. Electricity ⇨19(6)—Negligence in grounding transformers causing fire held for jury.

Evidence in mine owner's suit against power company for damages from fire alleged to have been caused by negligent installation and maintenance of equipment, in that transformers were improperly grounded, held for jury.

6. Electricity ⇨19(6)—Evidence against power company for fire damage from inadequacy of fuses held for jury.

Evidence in mine owner's suit against power company for damages from fire alleged to

have been caused by inadequacy of fuses held for jury.

7. Electricity ⇨19(6)—Evidence against power company for fire damage from closing circuit breakers held for jury.

Evidence in mine owner's suit against power company for damages from fire alleged to have been caused by negligence in holding current breakers at substation closed after they had kicked out, thereby causing overloading of wires, held for jury.

8. Electricity ⇨19(4)—Evidence of condition of soil held competent on question whether compressor plant was properly grounded for electricity hazard.

Evidence of character and condition of soil, where compressor plant was situated, held competent on issue, in suit against power company for damages from fire, whether plant was properly grounded for electricity hazard.

9. Evidence ⇨6—Jury need not be told that July 29th is in dry season, in Tulare county, Cal.

That the 29th of July is ordinarily a considerable period of time after the dry season has begun in Tulare county, Cal., is a commonplace matter of which the jury need not be told.

10. Appeal and error ⇨1064(1)—Instruction that jury was not bound by testimony against inference from evidence held not prejudicial, where evidence was controverting only on inferences (Code Civ. Proc. § 2061, subd. 2).

Instruction that jury was not bound to decide in conformity with testimony of witnesses, and "against a presumption or inference which you may draw from the evidence," instead of words of Code Civ. Proc. § 2061, subd. 2, "against a presumption or other evidence," held not prejudicial error, where evidence was controverting not in character, but in inferences.

11. Trial ⇨234(7)—Trial court should follow language of statute in instruction on effect of testimony against presumption or evidence (Code Civ. Proc. § 2061).

Trial courts, in giving instructions provided for by Code Civ. Proc. § 2061, relating to effect of testimony against presumption or other evidence, would do well to follow exactly the language of the Code.

12. Negligence ⇨121(2)—Instruction applying doctrine of *res ipsa loquitur* is erroneous where specific acts of negligence are pleaded.

Instruction applying doctrine of *res ipsa loquitur*, where plaintiff pleaded and relied on specific acts of negligence only, and not on negligence alleged in general language, is erroneous.

13. Trial ⇨295(6)—Erroneous instruction applying doctrine of *res ipsa loquitur* under pleading of specific negligence held not reversible, under instructions as whole.

Error in giving instruction applying doctrine of *res ipsa loquitur*, where plaintiff, suing power company for damages from fire, pleaded and relied on specific acts of negligence, held not reversible, as other instructions repeatedly advised jury the specific negligence alleged must be proved to permit recovery.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Ernest W. Harker and another, a copartnership doing business under the firm name of Harker & Hoff, and B. L. A. Barngrover, against the Southern California Edison Company, for damages for destruction of property by fire, in which the defendant filed a cross-action against the plaintiffs first named. Judgment for plaintiff last named, and the defendant appeals. Affirmed.

R. V. Reppy and E. W. Cunningham, both of Los Angeles, and Farnsworth, McClure & Burke, of Vasalia, for appellant.

Eugene U. Blalock, of Porterville, for respondents.

PLUMMER, J. Action by plaintiffs to recover damages from the defendant on account of the destruction of certain property by fire alleged to have been caused by the negligence of the defendant. Plaintiff B. L. A. Barngrover had judgment and defendant appeals.

The complaint sets forth that the respondent Barngrover is and was at all times mentioned therein the owner of certain real property and the buildings thereon situated in the county of Tulare, state of California, commonly known and designated as the Porterville Magnesite Mill; that the plaintiffs Harker & Hoff were at the times mentioned in the complaint in the possession and occupation of the premises referred to, as the lessees of the plaintiff Barngrover, and were engaged in mining of magnesite on the real property described in the complaint; that the buildings and machinery on said property comprised a compressor plant and a blacksmith shop; the compressor plant, as well as the shop, was inclosed in the building; that the compressor plant and blacksmith shop, together with the machinery and equipment therein were in use on or about the 29th day of July, 1923, and had been in use for some time prior thereto in the operation of magnesite mining, and were so operated by the plaintiffs Harker & Hoff; that the machinery and the compressor plant were operated by means of electric motors, the motive power for which was electricity furnished under contract by the defendant corporation; that for the purpose of transmitting electric power from the main lines owned by the defendant to the motors operated by the plaintiffs, the defendant corporation had installed certain transformers on a platform adjacent to and adjoining the building heretofore mentioned belonging to the plaintiff Barngrover and used and occupied by the plaintiffs Harker & Hoff, as her lessees; that the defendant corporation was charged with the exclusive duty of keeping its transformers, power lines, fuses, and connections between said transformers and power lines belonging to the defendant in first-class condition and repair; that the defendant corpora-

tion was on the 29th day of July, 1923, and prior thereto, charged with the sole and exclusive duty of installing and maintaining such fuses above said transformers as would adequately protect the property and equipment belonging to the plaintiff Barngrover in said compressor plant and blacksmith shop against the high voltage carried by the defendant corporation on its power lines, from which the electric power to supply plaintiffs' needs was drawn; that said defendant corporation was likewise charged with the exclusive duty of installing and maintaining proper grounding agencies from the transformers to the earth as a safeguard and protection against possible short circuits, etc.; that in constructing and installing said transformers the defendant corporation was guilty of gross negligence and carelessness in that, (1) the transformers were improperly and insufficiently grounded to safeguard plaintiffs' property against a possible short circuit in defendant's power lines and equipment, and (2) that the fuses installed by the defendant between the defendant's transformers and their electric power lines were of such size and strength as to afford inadequate or no protection to plaintiffs' property against the high voltage carried by the defendant's main power lines; that the 29th day of July, 1923, a defect occurred in the equipment of the defendant; that said defect caused the breakers to kick out in the substation maintained by the defendant; that an employee of the defendant in charge of said breakers in said substation negligently and carelessly closed the breakers and held them closed for several minutes; that by reason of and because of said carelessness and negligence on the part of the defendant, defendant's agents, and employees, a fire was caused which consumed and destroyed the said compressor plant and blacksmith shop, together with the equipment and machinery therein, to the loss and damage of the plaintiff Barngrover in the sum of \$8,000 and to the loss and damage of the plaintiffs Harker & Hoff in the sum of \$3,000.

To this complaint the defendant demurred on the ground of misjoinder of parties plaintiff, and also on the ground that the cause of action belonging to the plaintiff Barngrover was her cause of action exclusively and the alleged cause of action on the part of Harker & Hoff belonged to them exclusively, and also that two causes of action were united without being separately stated. Other grounds of demurrer were alleged, which need not be mentioned. The demurrer was overruled and the defendant answered, denying all the allegations of the plaintiffs' complaint, and, in addition thereto, filed a cross-complaint against the plaintiffs Harker & Hoff wherein it alleged that the fire was caused by reason of the negligent operation of the compressor plant and that its property was destroyed thereby, to the damage of the de-

fendant in the sum of \$1,500, and prayed judgment in the sum of \$1,500 against the plaintiffs Harker & Hoff.

The cause was tried before the court sitting with a jury, and, upon the cause being submitted to the jury for determination, the jury returned the following verdict:

"Title of court and cause.

"We, the jury, in the above-entitled action, find a verdict in favor of plaintiff B. L. A. Barngrover, and against Southern California Edison Company, a corporation, in the sum of \$3,800."

From the judgment entered upon this verdict the defendant appeals and files its notice of appeal in the following form:

"Title of court and cause.

"Notice of motion to plaintiffs.

"You and each of you will please take notice that defendant, Southern California Edison Company, hereby appeals from the judgment and from every part thereof entered against it herein on the 17th day of December, 1924, in favor of the plaintiff B. L. A. Barngrover, in the sum of \$3,800 and costs."

Upon this appeal it is urged that the trial court committed reversible error in overruling the defendant's demurrer to the plaintiffs' complaint; also, that the evidence is not sufficient to support the verdict in that it fails to show that the fire was due to any negligence on the part of the defendant, or that the fire was the result of electrical causes; also, that the court erred in its instructions to the jury, necessitating an order of reversal.

A number of cases have been cited by counsel upon the question whether there was or was not an improper joinder of parties plaintiff in this action. Upon the part of the appellant, it is forcibly urged that the causes of action set forth are entirely and exclusively separate, and that, while the owner of the premises may have a cause of action and the lessees in the occupation and use thereof may also have a cause of action, their causes of action are not in any wise connected and the joinder thereof improper, irrespective of whether the court upon the trial of actions begun separately by the owner and by the lessees might or might not properly order them joined and tried as one, or at one time, for the reason that the evidence pertaining to the injury of one plaintiff would likewise be relevant and exactly the same testimony that would be introduced to support or controvert the claims of the other parties plaintiff. Upon the part of the respondent, it is urged that there is such a union of interest as entitles the owner and the lessee to join in one action for the alleged injuries suffered by the owner and lessee of the property, by reason of the alleged negligence of the defendant which caused the simultaneous injury. We do not follow the language of the respective parties, but simply summarize their contentions.

[1] Although the appellant in its brief asserts that the defendant was prejudiced by reason of the order of the trial court overruling its demurrer, there appears nothing in the record to substantiate this position. Our attention has not been called to a scintilla of evidence admitted in the trial court, admissible under the rules of evidence, tending to prove any of the issues that would not have been admissible in a case prosecuted for the alleged injuries by either the lessor or the lessee separately. No testimony, so far as we have been able to discover, was admitted in favor of either plaintiff in this action that would not have been admissible in actions prosecuted separately, save and except as to the value of the property destroyed. In one case it would be the value of the property destroyed as owned and leased by the plaintiff Barngrover, and in the other for the value of the use, or the value of the lease owned and possessed by the plaintiffs Harker & Hoff. Here, again, no question of prejudice is presented, as far as any suggestion that the damages awarded the plaintiff Barngrover are excessive.

[2] Under such circumstances, section 4½ of article 6 of the state Constitution directly applies, wherein it provides that no error of the trial court in its rulings as to any matter of pleading or error of procedure shall be sufficient to authorize a court to set aside a judgment, or grant a new trial, unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The application of this section of the Constitution to the case at bar is also enforced by the fact that no verdict or judgment was rendered in favor of the plaintiffs Harker & Hoff against the defendant, nor upon the cross-complaint filed by the defendant against the plaintiffs Harker & Hoff. The case in its ultimate analysis and final result is as though a separate action were begun and prosecuted by the plaintiff Barngrover against the defendant. For this reason, any ruling by this court upon the correctness or incorrectness of the order of the trial court in overruling the defendant's demurrer would be mere dicta as not being necessary to a decision of this cause.

[3, 4] Though not in the order of presentation, it is here pertinent to consider the form and effect of the verdict which appellant alleges to be insufficient. In the case of *Benson v. S. P. Co.*, 177 Cal. 777, 171 P. 948, the Supreme Court had before it a verdict which failed to mention all the parties. It was there held:

"A verdict against one of two defendants is not a verdict in favor of the codefendant as to whom it is silent, but as to the latter it is merely a failure of the jury to find upon the issues."

To the same effect is *Benjamin v. Stewart*, 61 Cal. 605. In the case of *Asebez v. Bliss*,

178 Cal. 137, 172 P. 595, it was held that under the provisions of section 619, Code of Civil Procedure, where a party failed to ask that the defect in the verdict be remedied, if any defect existed, the defect was waived, citing *Van Damme v. McGilvray Stone Co.*, 22 Cal. App. 191, 133 P. 995. This case is also cited in *Benson v. S. P. Co.*, supra. See, also, as to failure of a party to call the attention of the trial court to alleged defects and a failure so to do, *City of Guthrie v. Thistle*, 5 Okl. 517, 49 P. 1003, *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29, and *Bradley v. Bradley*, 45 Ind. 67, 72. Again, the appeal which the appellant has taken in this case, as appears from the notice of appeal which we have hereinbefore set forth, raises only the question of the sufficiency of the judgment in favor of the plaintiff Barngrover, and being so limited, we have only to inquire as to whether the verdict is sufficient in form and substance to support the judgment for said plaintiff. That the other plaintiffs were not awarded judgment and that the defendant was not awarded any judgment upon its cross-complaint are not questions tendered to us upon this appeal. We have only to do with the judgment in favor of the plaintiff Barngrover, and, whatever the defects of the verdict may be as to the other parties litigant, it is certainly sufficient to show that the jury intended to and did bring in a verdict in favor of the plaintiff Barngrover and against the appellant for a sum of money covering the damages sustained by her, nowhere alleged or claimed by appellant to be excessive, and, therefore, not prejudicial to the appellant in any particular, if the testimony authorized a finding of the jury that the fire was caused by the defendant's negligence. A mistrial as to the other parties litigant does not compel a new trial as to the plaintiff Barngrover. Under the California cases which we have cited, if the appellant desired that the jury should also find a verdict upon the losses and damages alleged to have been inflicted and sustained by the plaintiffs Harker & Hoff, it should have made a timely request to the trial court. Likewise, if it desired a verdict or finding of the jury upon its cross-complaint against the plaintiffs Harker & Hoff, it should have made appropriate application to the trial court, but, not having done so and only appealing from the judgment in favor of the plaintiff Barngrover, we must hold that it is too late to raise the question here.

As stated in the beginning, an analysis of the proceedings in this cause show that in the final conclusion thereof it must be held simply an action begun and prosecuted by the plaintiff Barngrover to judgment, to the same effect as though the plaintiffs Harker & Hoff had not been named in the complaint, and to the same effect as though the appellant had not in the action filed and presented a cross-complaint against the plaintiffs Harker &

Hoff. For the purposes of this appeal we think all of these matters may be considered as surplusage and the rights of the plaintiff Barngrover and the responsibility of the defendant corporation considered as though Harker & Hoff had never been joined as plaintiffs and as though the defendant corporation had never filed a cross-complaint against them.

[5-7] This brings us to a consideration of the merits of the controversy between the plaintiff Barngrover and the defendant. First, does the evidence sustain the verdict? Before answering this question by setting out the substance of the testimony, we may preliminarily state that the buildings, in which the machinery referred to was situated, were built upon a high hill or mountain, which apparently was devoid of moisture near the surface; that in the installation and operation of the appliances necessary and requisite for furnishing power to the electrical motors operating the compressor plant, ground wires were necessary to be installed to afford protection against a possible overload of the defendant's wires; that in order to install the proper ground wires it was necessary to have the wires in some manner connected with moisture. In the instant case, it appears that the defendant installed its ground wire by placing a metal plate some two or three feet in the earth and connecting its ground wire therewith. The testimony is to the effect that the main power line maintained and operated by the defendant carried a voltage of 11,000 volts; that before this electric energy was delivered to the plaintiffs it was reduced to 220 volts. It also appears that it was necessary in preventing the 11,000 voltage carried by the main line from being communicated to the secondary line, or the line carrying only the lesser voltage, fuses were installed; that for these fuses to operate efficiently they should not be of greater strength than would admit of their blowing out before the high voltage on the primary line could be communicated to the secondary line intended only for a lesser voltage. The complaint sets forth that the fuses installed by the defendant were of too great strength to afford protection, or, to express it in other words and to convey the meaning, that they were of sufficient strength to admit of the carrying of a dangerous voltage from the main line to the secondary line, or from the main side of the transformers to the secondary side of the transformers. The transformers installed by the appellant were situated upon a platform slightly elevated and arranged in pairs of three on each side of the platform. All of these transformers were not used at one time, however. The plaintiffs operated a 30 horse power motor in the operation of the compressor plant. It is the contention of the plaintiffs that the starters would have to be switched over to what is called a running position before the compressor plant could

be brought up to an 85 or 95 pound pressure; that it was necessary to maintain a pressure of this degree before the drills used in mining could be operated. It is the contention of the plaintiff that the fire started in the equipment owned and exclusively under the control of the defendant, by reason of defects therein, as alleged in the complaint, or, in other words, by reason of the installation of defective equipment. In the early stages of the fire there was only one witness, a gentleman by the name of E. S. Smith. This witness stated that he was going up to the compressor plant on the morning of the fire; that the first thing he saw was a cloud of smoke arising approximately 200 feet in the air; that when he got to the compressor plant house the roof of the compressor plant was on fire; that the transformers were afire and the electric pole was afire at the top; that he left his truck a short distance from the compressor house and went around the house into the tool shed; that he did not remember whether he first went into the tool shed or the compressor house, but that he thought he went into the tool shed first; that the walls of the compressor house were not on fire; that there was no fire inside; that the switchboard in the compressor house was not on fire; that the transformers were on fire and the electric pole was on fire; the electric pole was approximately 10 feet from the transformers. It may be here stated that the testimony shows the installation of fuses on the electric pole. The witness stated that he knew the whereabouts of the switchboard in the compressor plant; that he remained in the compressor house just a short time; that the partitions between the blacksmith shop and the compressor house were not on fire; that water was running through the compressor; that the compressor was not running at the time the witness entered the compressor house; that the transformers all lay on the ground after the fire; that they dropped away from the compressor house.

The plaintiffs' contention that the fire did not start in the compressor plant is supported by the cross-examination of one of the defendant's witnesses. We quote the following:

"Q. So in order for the fire to have started because of the handle of the switch being in the starting position, that switchboard must, necessarily, have been on fire before the transformer. Is that right? A. Not necessarily. The insulation on the wires could be on fire before the switchboard took fire.

"Q. It would be seen very readily? A. Yes, sir.

"Q. Then repeating my question again: For the fire to have started in the equipment of the plaintiffs, it would necessarily—this board from the insulation from above this starter would have been on fire before the transformers were on fire? A. Yes.

"Q. If the fire did not start there, then the

fire did not start in the plaintiff's equipment. Is that right? A. Yes, sir."

The testimony of the witness Smith just set forth was to the effect that the switchboard was not on fire, and that the switchboard in the compressor plant was not on fire, and that the transformers were at the time he entered the compressor plant buildings. There is also testimony to the effect that the transformers contained insulation and oil which would cause a very black smoke, as testified to by the witness Smith. There was also testimony to the effect that a short circuit tends to show either improper equipment of the defendant's appliances or of improper equipment of the plant. One of the witnesses, after testifying as to the possibility of an explosion in the transformers, testified as follows:

"Q. Isn't it a fact within your experience that transformers sometimes burn up without any defect occurring or without any short circuit occurring in the consumer's equipment? A. Yes, sir.

"Q. How can those fires be caused? A. The insulation of the transformer itself burning.

"Q. Couldn't that have happened in this case? A. Yes, sir.

"Q. And allow 11,000 volts to go into the starter? A. No; because I didn't see any evidence in there that it did get over there at all.

"Q. But it could do so? A. It could do it, sure.

"Q. You testified that the primary and secondary coils in one transformer were together? A. Yes, sir."

This testimony shows that one of the transformers was on fire on the inside; also, as we have said, it accounts for the color of the smoke being black. The burning oil in the transformers would necessarily give that color to the smoke.

Evidence was introduced by the plaintiff showing that on the morning of the fire and for a short time preceding, the compressor plant was running in a normal manner, that the drill being operated required an air pressure of at least 75 pounds. There was also testimony that the equipment of the compressor plant had been inspected a short time previous to the fire, just how long does not exactly appear, but the fact that the equipment was operating normally preceding the fire and that the plaintiffs' equipment was not on fire at the time the building was entered by the witness Smith, at which time the compressors were on fire and, also, a certain pole on which the wires were brought down to the compressor plant was on fire lays a sufficient basis for the jury to conclude that the fire was not the result of any defect in the electrical equipment of the compressor plant, even though the inspection referred to was made some little time preceding the fire. There is also testimony to the effect that approximately a month preceding the fire additional ground wires were put in connect-

ing the compressor plant with water pipes, and that this connecting with moisture constituted a proper equipment or installation of ground wires. It may be here stated that all the testimony shows that a ground wire, to be efficient and to afford protection, must be connected with moisture. The testimony shows that the strength of the fuses employed were 30 amperes; that some time previous to the fire the fuses had been blowing out and the heavier or 30 ampere fuses were installed. There was also testimony to the effect that where 30 ampere coils or fuses were in use, the circuit breakers would be normally set at 30 amperes. The circuit breaker is supposed to kick out when an overload occurs, or a defect occurs in the system. It would appear from the testimony and the jury would be justified in concluding that if the fuses or coils installed are too large, the circuit breaker would kick out before the fuses would give way, or blow up, as the expression is used in the testimony.

The witness in general charge of the defendant's substation on the morning of the fire testified as follows: That after he saw the fire up on the hill, he went to the substation; that it was about 8:02 or 8:03 a. m., in the morning, by the substation clock; that when he got to the door, a bell was ringing, which indicated that the breaker was out; that the bell rings when the breaker is out of order, attracting the attention of the operator; that the operator was in the back yard; when he came in he said it was the magnesite circuit (meaning the circuit connected with the plaintiffs' plant). The witness further stated that the breaker kicked out twice, the operator stating that the first time it kicked out was 8:01; that the breaker was pushed back in place; that a short circuit would cause the breaker to kick out; that the closing of the breakers would shift the 11,000 volts back on the line.

This witness did not know at what amperage the breaker was set; that they had arranged for setting breakers; that there was a special man from the department who set the breakers; that they had what was considered about 30 ampere current coils; that if a transformer was overloaded and the fuses did not blow out, the current would go back to the substation and usually kick out the circuit breaker; that when the breaker kicked out, there would be no alternating current on the line. The witness stated that he was pretty sure the breaker kicked out that morning, as he saw a record of the station afterwards; that he did not remember whether the breakers opened more than once. There was testimony that 30 ampere fuses would carry approximately 400 horse power; that 50 horse power was all that plaintiffs used at any one time. There was further testimony that 30 ampere fuses would support between 430 and 440

horse power; that the compressor plant was equipped with two motors totaling 80 horse power. This testimony was presented to the jury in order that it might conclude that the fuses were from 2 to 2½ times as strong as necessary. There was testimony to the effect that the maximum starting horse power used was from 125 to 150, and, that if both motors were used the demand would be from 185 to 210 horse power. From this it is argued, and it appears that the jury would be entitled to conclude, that if the fuses installed and maintained by the defendant between their main power lines and their transformers had been of the correct amperage, the minute a short circuit occurred they would have blown out and the full power of 11,000 volts carried on the defendant's main lines would have been completely cut off, but that, instead of the fuses blowing out, the breakers set at 30 amperes in the substation were caused to kick out and that if the fuses had not been so great they would have blown out before the kick occurred, that the overload would not have been carried, in which case there would have been no fire.

[8] As heretofore stated, the first occurred on the 29th day of July. The scene of the plant was on the top of a mountain. That whether a plate ground was used or a driven ground in order to operate properly, moisture must be reached. There was also testimony that defendant's equipment was of such a character that a ground was necessary for the proper protection of their own and plaintiffs' plants. In this connection the witness Hamilton, heretofore referred to as having general charge of the defendant's substation, testified: The character of the soil on top of the hill was a rocky formation, dry on the surface; that he did not know how far down it was dry; that he dug down two feet; that it was dry for the two feet; that so far as he knew it was dry all the way down; that he stopped digging at two feet because the handle of the shovel he was using was burned and it was not easy to dig; that when it got down two feet he found the wire imbedded in the earth; a No. 2-0 strand wire; that he did not take up the anchor plate; that he did not know that there was a plate there; that, as a matter of fact, he did not know how the transformers were grounded. There was further testimony that it was a serpentine green rock, the same alternating to a brown color on the top of the hill; that there were but a few inches of soil on the top; that it was absolutely barren rock; that the plate to which the ground wire was attached was down approximately two or three feet. This evidence as to the character and condition of the soil on the top of the hill where the plant was situated on the 29th day of July was competent for the jury to consider in de-

termining whether the defendant's plant was or was not properly grounded. In this connection we may revert to the argument of the appellant that the grounding system must have been efficient, else a fire would have occurred previously.

[9] This overlooks the well-known climatic conditions prevailing in the state of California and in the section of the country where the premises under consideration are located. The 29th day of July is ordinarily a considerable period of time after the dry season has begun in California, and we think from the facts stated that the jury had a right to consider that the location of the plant upon a high and dry hill would affect the character of the grounding system, and that as the moisture disappeared with the advance of the dry season, a grounding system depending upon a plate close to the surface, which would operate efficiently during the rainy season, would cease to be efficient when the soil became barren of moisture and the efficiency would lessen substantially with the advance of the dry season. These are commonplace matters which do not need to be told a jury and are elements entering into and to be taken consideration of in the installation of an effective grounding system. The evidence, so far as any exploration appears to have been made of the place where the defendant's grounding system was installed, is to the effect that there was no moisture, and we think justified the jury in coming to the conclusion that the plate to which the grounding wire was attached rested in dry ground.

There was also testimony to the effect that the motors in the plaintiffs' plant were not burned by electricity, but were burned by external heat. There was also testimony to the effect that by reason of the equipment maintained by the defendant the 11,000 volts were sent directly into the plaintiffs' starter; that this resulted from the primary and secondary wires coming into contact. There was also evidence to the effect that the wires from the transformers, which entered the plaintiffs' buildings, entered through the side, and that portion of the building which was first described as being on fire by the witness Smith, when he first reached the plant when it was on fire. There was also testimony to the effect that the starting switch or handle was in starting position in the plaintiffs' plant after the fire, and also that the springs which would hold the switch out of position were burned or weakened by the fire so as to permit the switch or handle to come back into a starting position. There was also considerable testimony introduced that the plate used by the defendant in its grounding system would be efficient if imbedded in moisture, but we have had our attention called to no evidence indicating the condition of the ground where the plate was

imbedded, other than that to which we have referred, which we think justified the conclusion of the jury that the grounding system maintained by the defendant was not efficient and did not afford proper protection. A great deal of technical testimony was introduced which we have not set out, from which the jury might have reached a different conclusion, unless very carefully scrutinized, for, as it appears to us, it was based largely upon assumptions such as if the ground plate were in moisture it would afford the necessary protection; if the coils were of the proper size they would blow out; if the kick out occurred in the substation the current would be off the line and remain off unless the breakers were closed. There appears to be some difference as to the time when the fire occurred, the witness who first visited the plant and discovered the fire testified that he started toward the plant at about 20 minutes to 8 and consumed some minutes before he came in sight thereof. On the part of the defendant the testimony as to the time is that of the person in general charge, who was told the time of the first kick out in the breaker by the operator in charge, and that at the time of the second kick out, which was 2 or 3 minutes after 8, the plant was on fire.

A great deal of testimony was introduced concerning the condition of wires, evidence that the plant burned down and theories advanced based thereon, but it would serve no useful purpose to recount the same here, as it does not affect materially the testimony which we have hereinbefore referred to, and, while no actual witness saw the beginning of the fire, we think the testimony taken as a whole justified the jury in coming to the conclusion that the fire resulted from the improper equipment, as alleged in plaintiffs' complaint. The evidence in this case is really not conflicting in the true sense of the word; the opinions, theories, and conclusions drawn from the evidence show only a difference. There is no conflict as to the size of the fuses, no dispute as to the 11,000 volts carried, as to what would happen if the 11,000 volts on the main line were transmitted to the secondary wires, no controversy as to ground wires being necessary to afford protection, although there was testimony that the plant would operate without ground wires. The testimony introduced by the defendant concerning fuses, coils, and ground wires in the plaintiffs' plant was shown to be of no value when the witnesses testified to the condition of certain wires found after the fire started, that he did not know whether they were the wires used by the plaintiff, which testimony was followed by a witness on the part of the plaintiff, who testified that the defective coils and wires used by the plaintiff were discarded coils

and wires and were not used at the time of the fire.

From the foregoing we must hold that the contention of the appellant that the evidence is insufficient to support the verdict on the question of negligence of installation, maintenance, and operation of the defendant's plant is not well taken.

[10] It is finally contended that the court erred in the giving of certain instructions to the jury, and that this error on the part of the court resulted in a miscarriage of justice. The instruction, given by the court at the request of the plaintiff, first called to our attention is as follows:

"You are not bound to decide in conformity with the testimony of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or inference which you may draw from the evidence satisfying your minds."

Subdivision 2 of section 2061 of the Code of Civil Procedure permits juries to be instructed on all proper occasions that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds against a less number, or against a presumption or other evidence satisfying their minds. The change in the instruction from the wording of the Code is in that following the word "presumption." In the instruction this language is used, "or inference which you may draw from the evidence satisfying your minds," instead of "or other evidence satisfying your minds." In support of this contention that the wording of the instruction as given to the jury is erroneous, appellant relies upon the case of *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, 187 P. 996, where it is said:

"Unless these presumptions were controverted by other evidence, the jury was bound to find according to the presumption. Section 1691, Code Civ. Proc. If controverted by other evidence the presumption itself is to be treated as evidence conflicting with the other evidence offered. Otherwise there would be no need of using the word 'other' in the Code section cited. Thus, the presumption of innocence of crime will support a verdict of acquittal in a criminal case though no evidence is offered to controvert the case of the prosecution. The rule differs as to an inference which can be drawn only from facts proved. Where evidence is offered controverting the inference which might ordinarily be drawn under the circumstances, the jury is bound to find according to the controverting evidence. The distinction is found in the Code. Section 1958 of the Code of Civil Procedure defines an inference as 'a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.' Section 1959 defines a presumption as 'a deduction which the law expressly directs to be made from particular facts.'"

[11] Assuming, without deciding, that the foregoing is a correct statement of the law relative to the use of the word "inference" in the instruction, and that the court should have followed the wording of the statute, instead of using the language which it did, it does not follow that any prejudice has resulted in this case. The evidence in this case is such, as we have hereinbefore stated, is controverting not in its character so much as in the inferences which may be drawn therefrom. This case presents a situation where the question is as to the inferences which may be drawn from the facts found, or from the facts testified to, rather than a determination of what set of facts is established by conflicting evidence. Under such circumstances, it does not appear that any reversible error can result or has resulted from the giving of the instruction, as worded by the court. It would be well, however, for trial courts in giving instructions provided for by section 2061 of the Code of Civil Procedure to follow exactly the language of the Code.

[12] Appellant also argues that the court erred in giving to the jury the following instruction:

"If you find from the evidence adduced in this case that the fire started at a point in the electrical equipment owned and controlled by the defendant, outside of the plant owned by the plaintiff Blanche L. A. Barngrover, and that the equipment in said plant owned by said plaintiff was in good condition at the time of said fire, a prima facie case of negligence on the part of the defendant is shown and the burden of proving absence of negligence is cast upon the defendant."

The point is raised against this instruction that it applies the doctrine of "res ipsa loquitur" in a case where the appellant relies upon specific acts of alleged negligence, and not upon an allegation of general negligence or of negligence alleged in general language. The respondent supports this instruction by citing the case of *Silva v. Northern California Power Company*, 32 Cal. App. 139, 162 P. 412. In that case the allegations in the complaint were to the effect that the wires, appliances, and apparatus referred to, connecting with and extending from the power line to the place where the wires entered the tankhouse belonging to the plaintiff and used by the defendant in supplying power prior to the fire referred to, defendant "negligently and carelessly allowed the same to be and remain, and by reason of said negligence they became, and were, in such condition as to admit a dangerous amount of voltage of electricity to said wires in said tankhouse and thereby to render them dangerous and unsafe with respect to causing fire to said tankhouse."

In considering the question of negligence as to the installation and maintenance of

the apparatus just referred to and of the office of insulators, the court said:

"The office intended to be performed by these circuit breakers and insulators on defendant's wires at the point of connection with the wires going inside, was to control the current or prevent its doing damage in passing into the building. It further appeared that after the wires fell to the ground the ends were brought together and caused a spark showing that the current was then passing from the transformer over these wires. It appeared that the wires were insulated where they passed through the walls of the building and were at the time in place, and, so far as known, in good condition. And the evidence was that the fire did not start elsewhere than on the outside and at the point of connection as already explained. The evidence was that the fire could not have been caused by any agency other than the electricity passing from the transformer. And as the fire started at a point on the wires admittedly owned by and in the control of defendant, we think sufficient was shown to make a prima facie case of negligence on the part of defendant and to cast upon defendant the burden of excusing its negligence."

In the case at bar the evidence is direct that there was no fire where the wires entered the side of the building covering the plaintiffs' compressor plant; it is also direct that there was no fire in the motors or in any part of the apparatus controlling the operation of the compressor plant or mechanism; that the fire then existing in the compressor plant was burning the paper roof of the building, and that the wires which went into the side of the building did not communicate or were not in contact with the paper roof that was on fire. The testimony is also direct that at the time of the arrival of the first witness, who reached the scene of the fire, that the transformers were on fire; that the smoke was mounting therefrom approximately 200 feet into the air; that the pole from which the wires were brought down to the compressor plant was on fire, and, also, there is sufficient in the testimony to justify the conclusion that the burning oil in one of the transformers was sufficient to spread the fire to the plaintiffs' buildings. In the case at bar it is not admitted by the defendant that the fire started in the transformers or on the pole down which the wires were brought and on which fuses were installed by the defendant, but the evidence which we have referred to amply justifies the conclusion that the fire started in that portion of the plant under the exclusive control and superintendence of the defendant, nor is there any evidence in the record indicating that the fire was caused by any other agency than the electricity carried on the defendant's power lines and conducted through the transformers. In the case of *Marovich v. Central Cal. Traction Co.*, 191 Cal. 295, 216 P. 595, the question of whether an instruction applying the doctrine of res

ipsa loquitur should be given, we find the following:

"The general rule is that 'where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say, where the plaintiff instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of *res ipsa loquitur* does not apply.' " *Connor v. Atchison, T. & S. F. Ry. Co.*, 189 Cal. 1, 207 P. 378, 22 A. L. R. 1462.

And, continuing:

"The foregoing statement of the rule in the cited case was followed by the qualification that 'where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the *res ipsa loquitur* doctrine.' Regardless of the effect of the foregoing qualification upon the general rule, it is clear that where the plaintiff in his complaint makes no general allegation of negligence, or no allegation of general negligence, instructions applying the doctrine of *res ipsa loquitur* should not be given. This must be so for the reason that in such case the plaintiff can recover only upon proof of one or more of the specific acts or omissions alleged in his complaint," citing a number of cases.

[13] Had the case been submitted to the jury simply with the general instruction, which we have above quoted, we think reversible error would have been committed. Immediately following the giving of this general instruction, the court proceeded to carefully and specifically point out to the jury that no verdict could be rendered against the defendant unless they found the defendant guilty of the particular acts of negligence alleged, as shown by the following instructions, which we quote:

"Instruction No. 8. You are instructed that the mere fact of the accident and consequent injury to the property of plaintiffs raises no presumption of negligence, but the plaintiffs must show by independent evidence that the accident was due to want of ordinary care on the part of the defendant and without any contributory negligence on the part of plaintiffs or their employees.

"Instruction No. 12. The plaintiffs have charged that the defendant was guilty of negligence in three respects, namely:

"(1) In installing transformers improperly and insufficiently grounded.

"(2) In installing fuses between its transformers and power lines of such size and strength as to afford inadequate or no protection to plaintiffs' property against excessive voltage.

"(3) In holding closed the breakers at its substation for several minutes after they had kicked out.

"All of these charges of negligence defendant has denied.

"I instruct you that a recovery may be had by plaintiffs, if at all, only on the charges of negligence pleaded. 'No recovery can be had on acts of negligence, or upon negligent conduct not alleged, as a defendant in such an action

is entitled to know by the pleadings just what he is called upon to meet." *Brown v. Northern Cal. Power Co.*, 14 Cal. App. 651, 655 (114 P. 54, 74).

"Instruction No. 13. If you find it to be a fact that plaintiffs' property was set on fire by means of electric current on the 29th day of July, 1923, it does not necessarily follow therefrom that your verdict should be in favor of plaintiffs and against defendant. You should not return your verdict against the defendant in this case unless you find by a preponderance of evidence the defendant to have been guilty of some negligence charged in the complaint which contributed directly and proximately to the burning of this property. The defendant is not liable if the plaintiffs' property was set on fire by an electric current without negligence on the part of defendant.

"Instruction No. 14. In proving the cause of action set out in the complaint, the burden of proof is on plaintiff to show, first, that said buildings were set on fire by means of an electric current; second, that the fire thus caused was the result of one or more of the acts or omission to act on the part of the defendant as set out in plaintiffs' complaint; and, third, that this act or acts or the omission to act by the defendant was negligence on its part.

"Instruction No. 15. If all of the evidence, fairly considered, leaves this matter in doubt, so that you are left to guess or conjecture as to whether the fire was caused by an act of negligence on the part of the defendant as set out in the complaint or in some other way, there can be no recovery by the plaintiffs and your verdict on the complaint of plaintiff and the answer of defendant must be for the defendant." *Clifford v. M., St. P. & S. S. M. R. Co.*, 105 Wis. 618, 81 N. W. 143.

"Instruction No. 16. I instruct you that you will have no right to find a verdict against defendant and in favor of plaintiffs solely because the defendant was furnishing electricity to plaintiffs to be used by plaintiffs in their compressor house, even though you find as a fact that the fire that destroyed said buildings was caused by electricity. Defendant in supplying electricity to plaintiffs' buildings did not guarantee that said buildings would not be set on fire from the electricity."

In view of the rule that instructions must be considered as a whole and that the error in the instruction is cured if, when the whole charge is taken together, the law is accurately stated, we are of the opinion that the jury in this case was not misled by the giving of the instruction complained of. By reason of the fact that the jury was instructed over and over again that the specific negligence alleged must be proved by a preponderance of the evidence before the plaintiff was entitled to recover, the general language in the instruction alleged to be erroneous was limited and applied to instructions pertaining to the installation and maintenance of the particular portion or part of the equipment alleged in the complaint, as constituting the gravamen of the charge of negligence. It does not appear from the record that general negligence on the part of the defendant

was urged before the jury either in the introduction of testimony or in the argument of counsel, and, therefore, the instructions which we have quoted, and especially No. 15, limits the general instruction alleged to be error to the specific acts alleged in the complaint, from which we conclude that no prejudice resulted to the defendant, even though measured by the rule announced in *Marovich v. Central Cal. Traction Company*, supra, the instruction should not have been given. Error is also alleged in relation to a few of the other instructions given by the trial court which we think untenable and not of sufficient importance to require a further discussion in this opinion.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

LONDON GUARANTEE & ACCIDENT CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5532.) ★

District Court of Appeal, Second District, Division 2, California. May 26, 1927.

Hearing Granted by Supreme Court July 25, 1927.

1. Admiralty ⚓—Vessel need not be in commercial service to warrant admiralty jurisdiction.

It is not essential that, for the purpose of admiralty jurisdiction, a vessel should be in commercial service.

2. Admiralty ⚓—As regards admiralty jurisdiction, fishing vessels capable of going out to deep waters of Pacific with equipment for 500-mile cruise held "vessels," within statutory definition (U. S. Comp. St. § 3).

Fishing vessels maintained for the accommodation of the public seeking recreation in deep sea fishing and capable of going out to deep waters of Pacific ocean with equipment for a cruise of as much as 500 miles held "vessels," within meaning of Rev. St. U. S. § 3 (U. S. Comp. St. § 3), as regards admiralty jurisdiction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vessel.]

3. Admiralty ⚓—Fishing vessels conveying passengers between anchorage and deep sea fishing banks held engaged in "commerce" and subject to admiralty jurisdiction.

Fishing vessels, maintained for accommodation of public seeking recreation in deep sea fishing and actually conveying passengers to and fro between anchorage and deep sea fishing banks, held engaged in "commerce" on navigable waters, subject to admiralty jurisdiction, since transportation of persons, even on short excursions, is commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commerce.]

4. Admiralty ⚓13—"Maritime contract" for personal service must relate to reparation or betterment of vessel in aid of navigation or employment directly connected with navigation.

A "maritime contract" for personal service must relate to reparation or betterment of vessel in aid of navigation, or to employment directly connected with the propulsion, or navigation of a ship capable of use in commerce or tending to enable ship to discharge its maritime duty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maritime Contract.]

5. Admiralty ⚓21—Death of spare skipper while attempting to preserve employer's navigable vessel from marine peril held "maritime accident," subject to admiralty jurisdiction.

Where person employed as a spare skipper, and who was generally employed aboard ship in operative navigation, was drowned in attempting to preserve employer's navigable vessel from a marine peril while in navigable waters, the casualty was a maritime accident occurring in the performance of duty over which admiralty had exclusive jurisdiction.

6. Admiralty ⚓20, 21—Rights and liabilities for maritime injury or death through maritime casualty are dependent on maritime law.

When one employed in work at sea under maritime contract directly affecting navigation or commerce receives a maritime injury or suffers death through maritime casualty, ensuing rights and liabilities are dependent, under Constitution, on general principles of maritime law.

Proceeding under the Workmen's Compensation Act by Sarah Jane Brooke and another, claimants, for the death of James Uttley Brooke, a minor son, opposed by the Morris Pleasure Fishing, Inc., employer, and the London Guarantee & Accident Company, Limited, insurance carrier. To review an award by the Industrial Accident Commission, the insurance carrier brings certiorari. Award annulled.

E. R. Young, H. R. Kelly, and E. L. Williams, all of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Commission.

JOHNSON, Justice pro tem. This is a proceeding in certiorari to review an award of the Industrial Accident Commission for payment of \$150 for the burial expenses of John James Uttley Brooke, an unmarried minor 19 years of age, who was drowned in Santa Monica Bay on April 8, 1926, while in the service of the Morris Pleasure Fishing, Inc. The petitioner was the insurance carrier of the employer; and the question presented is whether the case must be relegated to the exclusive cognizance of a court of admiralty, or may be brought within the pur-

view of the Workmen's Compensation Act of this state (St. 1913, p. 279, as amended).

On a petition to the Industrial Accident Commission filed by the mother and the stepfather of the deceased, hearings were had on June 10 and September 13, 1926, before the commission, which on October 6th made its findings that Brooke, while employed as a spare skipper, met his death by drowning in an accident occurring in the course of and arising out of his employment; that he was not at the time engaged in maritime employment; and that both he and his employer were subject to the provisions of the Workmen's Compensation Act. The commission further found that neither the mother nor the stepfather of the deceased was dependent upon him; and, accordingly, the award was limited to the reasonable expenses of burial, which were fixed at \$150. Application for a rehearing was filed by the employer and its insurance carrier, which was, however, denied.

The evidence taken at the hearings showed the facts to be as follows: The Morris Pleasure Fishing, Inc., is a corporation which carries on the business of maintaining and operating from Santa Monica Bay a small fleet of fishing vessels, for the accommodation of the public seeking recreation in deep sea fishing. In the fishing season its practice has been to have excursions daily from Santa Monica Bay to the ocean fishing grounds, a distance of three to five miles, with fixed charges both for half-day and full-day trips. For use in this business the company has several vessels, ranging from four to fourteen tons registry, equipped with gas engines and capable of cruising a distance of 500 miles. The business has been confined entirely to the maintenance of these pleasure fishing vessels and the transportation of patrons to and fro by water, except that excursionists have also been supplied with bait. As one of the necessary incidents of its business the company employs seamen to navigate its vessels; and before and at the time of the accident which occasioned Brooke's death, he was in the company's employ as an apprentice navigator and seaman. In that capacity he made daily trips as required with the company's vessels, and at times substituted as "spare skipper" for one of the regular skippers. On April 8, 1926, one of the company's fishing vessels called "W. K.," of about seven tons registry, was moored, with no one aboard, in Santa Monica Bay about three-quarters of a mile to a mile from the pier. A storm having arisen, the vessel broke from her moorings early in the afternoon, and began to drift toward the shore. In an effort to save the vessel from destruction, Captain Morris, as Brooke's superior officer, had Brooke and another employee, named Gregory, put off from the pier with the captain himself, in a

boat about eighteen feet long, with the purpose in mind of boarding the W. K. and returning her to her anchorage. But as they neared the drifting vessel, their boat was capsized by a heavy wave and all three were drowned.

The petitioner here contends that Brooke's employer was engaged exclusively in a maritime industry; that its contract with Brooke was for maritime services alone; and that Brooke's life having been lost in such service in navigable waters of the United States, the rights and liabilities of the parties are to be determined by the general maritime law, and hence there was no jurisdiction in the Industrial Accident Commission to conduct any hearing or to grant any award.

The commission does not dispute the fact that the casualty occurred in navigable waters; but it contends that as the business of the employer was a pleasure business, there was not a maritime contract touching rights and duties pertaining to commerce or navigation in a way to invoke the rules of maritime law and exclude the case from juridical competency of the state tribunals, and that the matter is one merely of local concern. In this connection it is argued that federal jurisdiction is not broadly conferred by reason of the navigability of waters, but is limited to a regulation of interstate and foreign commerce, in consequence of which admiralty takes cognizance only of those maritime controversies which have a commercial nexus, and that the exercise of its powers is conditioned upon the synthesis of navigable ships, engagement in commerce, and the law of the sea.

[1] It is not essential, however, that for the purpose of admiralty jurisdiction a vessel should be in commercial service. In *Repert v. Robinson*, 20 Fed. Cas. No. 11,703, it was said by Judge Taney:

"The manner in which the vessel is actually employed cannot affect the question of jurisdiction. It depends upon her character; * * * and it did not rest with the owner to confer or take away the admiralty jurisdiction, at his pleasure, by the mode or trade in which he afterwards employed her."

And in *The General Cass*, 1 Brown Adm. 334, 10 Fed. Cas. No. 5,307, the rule is thus stated:

"The true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion."

[2, 3] The fishing vessels of the Morris Pleasure Fishing, Inc., were capable of going out to deep waters of the Pacific ocean, and their equipment was sufficient for a cruise of as much as 500 miles on occasions. They were therefore, vessels within the definition

given in section 3 of the United States Revised Statutes (U. S. Comp. St. § 3), which reads:

"The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

This statutory definition is construed in *Charles Barnes Co. v. One Dredge Boat* (D. C.) 169 F. 895, 896, to include "a navigable structure capable of being used for transportation whether intended to be or actually used for that purpose." In the case of these fishing boats, there was in the season a regular service, and each voyage had a place of origin and a place of destination, though the termini may not have been geographically constant. Since the ships did actually convey passengers to and fro between the anchorage in Santa Monica Bay and the deep sea fishing banks, they were not only capable of use, but were in real use, as vehicles of nautical transportation; and while performing their service to patrons they were in fact engaged in commerce upon navigable waters. For the transportation of persons, even on short excursions, is commerce. *The City of Pittsburg* (D. C.) 45 F. 699, 702; *County of Mobile v. Kimball*, 102 U. S. 695, 702, 26 L. Ed. 238.

It is true, the vessels did not engage in the carriage of goods or passengers between fixed ports, but their use for purposes of recreation, sport, or pleasure did not detract from the character of the craft. In the case of *The W. F. Brown* (D. C.) 46 F. 290, a former ferry boat, propelling a floating circus from place to place on the Mississippi river for exhibition purposes, was held to be in maritime service. In like manner, a dismantled steamboat converted into a pleasure barge, without independent means of propulsion, and used, when towed, for picnic and excursion parties, was pronounced in *The City of Pittsburg* (D. C.) 45 F. 699, to be a vessel subject to the maritime law. Again, in *Reinhardt v. Newport Flying Service Corporation*, 232 N. Y. 115, 133 N. E. 371, 18 A. L. R. 1324, a hydroaeroplane, though not utilized commercially, was declared, when in the water, as a seaplane, to be stamped by location and function as a means of water transportation, notwithstanding that while in the air it would possess no such character. And in *The Public Bath No. 13* (D. C.) 61 F. 692, where a structure built on floats not permanently moored, and used as a transportable municipal bathhouse, had been swept adrift in a storm, Judge Brown, who was exceptionally well versed in admiralty law, in awarding salvage for the rescue of the contrivance, declared that use in trade and commerce was not essential to salvage, and remarked that if that were material there could be no salvage allowed upon yachts and other water craft for pleasure, which, he said, would be absurd.

It is thus not the use to which a craft is

being put in navigable waters that fixes its status, but the use to which it is capable of being put; and there can be no doubt that the vessels owned by Brooke's employer were of a character and in a service rendering them amenable to the processes of admiralty.

In the present case, there is no charge of any delictual omission or commission. The death was due to a casualty occurring in navigable waters, and the accident, which was due to a peril of the sea, was one arising out of and in the course of Brooke's employment. The award of the commission is thus not predicated on any tort, but is based on the theory that the indemnification provided by the local statute became a legal incident of the relationship created by the contract of employment. The real test of jurisdiction, however, must be found in the nature of the employment itself. If the deceased met his death while performing maritime service under a maritime contract, then, according to the rule promulgated by the United States Supreme Court, neither his contract nor the rights and liabilities growing out of it could be affected by any local statute of indemnification for injury or death. To ascertain the character of the contract we must look to its subject-matter and determine the nature and class of service which Brooke was required to render. *State Ind. Com. v. Nordenholt Corp.*, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013.

[4, 5] A maritime contract for personal service must relate to the reparation or betterment of a vessel in aid of navigation, or to an employment directly connected with the propulsion or navigation of a ship capable of use in commerce, or tending to enable the ship to discharge its maritime duty. *Gurney v. Crockett*, 11 Fed. Cas. No. 5,874. The services which Brooke was employed to perform were not those of a landsman. He was a spare skipper and was generally employed aboard ship in operative navigation, his labor contributing to the accomplishment of the ship's voyage. A vessel and its crew are considered a unit, whatever may be the stations of the respective members; and under Brooke's general employment he was to be classed as a seaman or mariner. On the fatal occasion he was called by his employer to assist in a maritime exigency, and to lend aid in preserving one of his employer's navigable vessels from a marine peril. He thus went to his death in navigable waters in the performance of a service peculiarly maritime, and the casualty was incontestably a maritime accident occurring in the performance of duty. The finding of the commission that Brooke was not at the time engaged in maritime employment is contrary to the evidence; and we thus face the question whether, under the facts of the case, the local law of California may have accorded to it primacy over the law of the sea.

[6] The rule by which we must be guided has been enunciated by the United States Supreme Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. Though in that case there was vigorous dissent on the part of some members of the court, and the decision has not, in general, had a hospitable reception, yet, through reiteration in subsequent cases, the principle of the *Jensen* Case has been so firmly established that it must serve as the norm for resolving jurisdictional conflicts between courts of admiralty and tribunals deriving their powers under the compensation laws of the states. Under the doctrine promulgated by the august court whose arbitrament is final, when one employed in work at sea under a maritime contract directly affecting navigation or commerce receives a maritime injury, or suffers death through a maritime casualty, the ensuing rights and liabilities are dependent, under the Constitution, upon the general principles of maritime law, operating uniformly throughout the broad expanse of the nation by virtue of the grant to the federal courts of "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." Hence, any local legislation which would be destructive of that uniformity is, to the extent of the conflict, unconstitutional, since it must tend to hamper and impede freedom of navigation between the states and with foreign countries. The central thought of the decision is thus expressed:

"And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. * * * If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

So in the *Jensen* Case the New York Compensation Act (Consol. Laws, c. 67) was held unavailable to the dependents of an employee killed by injury received aboard ship while performing the work of a stevedore in unloading cargo. The same rule was applied in *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171, where a fireman on board a steamship, while performing duties on deck during a storm, received injuries necessitating amputation of his leg. Again, in *Robins Drydock & Repair Co. v. Dahl*, 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed. 372, a workman making repairs for the betterment of a vessel lying in navigable

waters was precipitated into the hold by the breaking of a defective scaffold, and brought suit in the state court of New York to recover damages for injuries sustained by reason of his employer's negligence. It was held that since the work directly related to navigation and commerce, the rights and liabilities of the parties depended on general maritime law, and could not be altered or impaired by a state statute prescribing the duty of the employer relative to providing scaffolding such as to give proper protection to workmen. Accordingly an instruction that the jury might consider the local law in determining whether or not the employer was negligent was pronounced erroneous, and the judgment in favor of the employee was reversed.

In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, a bargeman, while doing work of a maritime nature, fell into the Hudson river and was drowned. This case presented for consideration the amendment of October 6, 1917, to the Judicial Code (U. S. Comp. St. §§ 991, 1233), attempting to make compensation statutes applicable to maritime injuries. But the court, holding such attempt to be ineffectual and reaffirming the rule of the *Jensen* Case as to the dominance of the general maritime law, said (p. 164 [40 S. Ct. 441]):

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant."

The rules so declared applies not only to cases of personal injury suffered in a maritime employment directly affecting navigation or commerce, but also to cases arising out of a breach of a maritime contract. In *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261, there was an oral contract made with Erickson in California to proceed to Alaska, and after arrival there to serve for a year as master of a vessel at an agreed compensation. He was discharged, however, before the expiration of the term of his employment, and thereupon filed in admiralty a libel in rem for damages for breach of his contract. One of the defenses was that the contract, being oral, was invalid, under section 1624 of the Civil Code of California, the

state in which the contract was made. In this case, as in the *Jensen* Case, the employment was held to have been in contemplation of the recognized principles of admiralty law, which no state law can be permitted to infringe or defeat. Accordingly, the defense based on the statute of frauds of California was declared to be untenable.

The rationale of these decisions being founded on the necessity of preserving unimpaired the harmony and uniformity of the characteristic features of maritime law, some mitigation of the rigor of the rule has been deemed permissible, in a limited class of cases, where the matter is one of mere local concern and the enforcement of the local enactments will work no material prejudice to maritime rules in general. A broad line of demarcation is thus drawn between rights and liabilities existing under employments having direct relation to navigation and commerce, and those arising under contracts of a nonmaritime character. In *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008, a carpenter was injured while engaged in work on an uncompleted vessel lying in navigable waters; and both employer and employee having treated the Compensation Law of Oregon as governing their relations, and the contract being nonmaritime, it was deemed that no prejudice to the general maritime law would result by letting the rights and liabilities of the parties be adjudged in accordance with the local statute.

Not only is there this well-defined distinction between cases arising under maritime contracts and those in which the contracts are nonmaritime, but even where the contracts are maritime, cases in which injuries occur on land may have different treatment from those in which the injuries are suffered at sea. Thus in *State Ind. Com. v. Nordenholt Corp.*, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013, a longshoreman was mortally injured while working on the deck and aiding in the discharge of a cargo of cement from a vessel lying alongside. The court there said (page 272 [42 S. Ct. 474]):

"When an employee, working on board a vessel in navigable waters, sustains personal injuries, there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land."

After reviewing the *Jensen* Case and others already cited, the court in conclusion ex

pressed itself as follows (page 276 [42 S. Ct. 475]):

"The stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land. In *Jensen's Case*, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antagonism exists. There is no pertinent federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law."

Another instance of the application of the local law is afforded when death occurs in consequence of a maritime tort committed within the territorial limits of a state where a statute affords a right of action for damages. A case of this character is exemplified in *Western Fuel Co. v. Garcia*, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210. In that case a stevedore was killed while at work in the hold of a vessel discharging cargo in San Francisco Bay. A suit in personam, based on allegations of negligence, was instituted in admiralty by the heirs of the deceased; but, the suit having been begun more than one year after the accident, the question arose whether the state statute of limitations could be interposed as a bar. It was held that, inasmuch as the alleged tort had been committed on navigable waters, admiralty could entertain jurisdiction, but nevertheless the right of action for a wrong committed within the territorial limits of the state was so far local in character as to be brought within the purview of the state statute without prejudice to the rule of uniformity, and hence the right to maintain the suit was subject to the bar of the local statute. The view that, in a suit in admiralty to recover damages for death due to a maritime tort committed on navigable waters of a state, the rules of maritime law may be supplemented by the local death statute is reaffirmed in *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479, 43 S. Ct. 418, 67 L. Ed. 756.

Still another case of local concern is exhibited in *Miller's Indemnity Underwriters v. Braud*, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470, in which, under the name of *Miller's Indemnity Underwriters v. Boudreaux*, there had previously been a decision by the Supreme Court of Texas, reported in 261 S. W. 137. There a diver employed by a shipbuilding company submerged himself from a small floating barge or pontoon at anchor in a navigable river, 35 feet from the shore, to saw off timbers of an abandoned set of ways once used for launching ships and which had become an obstruction to navigation. The Texas court states that he was not engaged in work upon or connected with the barge, and could not be considered a seaman. While he was at work on the submarine timbers, his air supply was in some way cut off

and he was suffocated. Though the death occurred through a maritime tort, yet the work of this diver was not so directly connected with navigation and commerce as to fall exclusively within maritime jurisdiction, and since the state statute of Texas prescribed the only remedy that could be had, it was held that its exclusive feature superseded the right to resort to admiralty which would otherwise have existed.

An instructive contrast with this decision is furnished by a case possessing certain distinguishing features, which had previously arisen in New York—*De Gaetano v. Merritt & Chapman Dock & Wrecking Co.*, 203 App. Div. 259, 196 N. Y. S. 573. In this case the diver was one of the regular crew of a vessel engaged at the time in laying a submarine cable, and was at work on the sea floor in the very service in which the vessel was being employed. He was, therefore, a seaman attached to the vessel, and engaged at work intimately connected with its operation. Upon that ground the New York court held that the state Compensation Law was not applicable.

The law as proclaimed in the cases cited has been applied, with regard paid to its distinctions, by the appellate courts of this state in several cases which have engaged their attention. The first case decided by our Supreme Court after the decision in the *Jensen Case* was *Tallac Co. v. Pillsbury*, 176 Cal. 236, 168 P. 17, where a mate, hired in San Francisco for a voyage to British Columbia, was injured on board the plaintiff's steamer while loading cargo in the port of New Westminster. Upon the return of the ship to San Francisco, the Industrial Accident Commission, on application of the injured seaman, made an award in his favor under the Workmen's Compensation Act, but upon certiorari the award was annulled upon the ground that the commission was wholly without jurisdiction.

In *Sudden & Christensen v. Industrial Acc. Com.*, 182 Cal. 437, 188 P. 803, the court was called upon to review an award of death benefits to the dependents of a stevedore, killed while working on the deck of a lumber vessel discharging cargo at her dock. Here again the court, following the *Jensen Case*, declared that the award of the commission was an invasion of the exclusive jurisdiction of admiralty.

In *Alaska Packers Ass'n v. Industrial Acc. Com.*, 191 Cal. 763, 218 P. 561, a seaman was injured while working as a rigger on board a bark at her dock in the Oakland estuary, where she was being made ready for her next voyage. Quoting pertinent portions of the opinions in *State Ind. Com. v. Nordenholt Corp.*, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013, and *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479, 43 S. Ct. 418, 67 L. Ed. 756, the court

denied jurisdiction to the Industrial Accident Commission and annulled its award.

A like conclusion was reached in *Zurich General Accident & L. I. Co. v. Industrial Acc. Com.*, 191 Cal. 770, 218 P. 563, which in its circumstances is not dissimilar to the case at bar. There an award had been made to the dependents of a deck hand employed on a dredger at Newport harbor, who was drowned in attempting to go ashore in a motor launch upon an errand connected with his employment. After a survey of the authorities, the court held that the employment was so directly connected with navigation and commerce as to require the application of the rule of the *Jensen Case* in the interest of uniformity, and again the award of the commission was annulled.

James Rolph Co. v. Industrial Acc. Com., 192 Cal. 398, 220 P. 669 (affirmed 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646), is another case in which the death of a stevedore occurred by reason of injuries received while working on a vessel discharging cargo at her dock. The court emphasized the distinction made in *State Ind. Com. v. Nordenholt Corporation* between work aboard ship and work ashore, and held that the commission acted in excess of its jurisdiction, and hence its award could not be sustained.

In *Beyerle v. Industrial Acc. Com.* (Cal. App.) 241 P. 894, injury was suffered in the waters of San Diego Bay by an employee of a lumber company, whose employment required him to aid not only in the operation of a motor boat used in towing, but also in work on rafts of logs lying at anchor. In this case the Industrial Accident Commission had denied compensation, and upon certiorari the order was affirmed upon the ground that the injury having occurred in navigable waters and in a maritime employment, the case was within the exclusive jurisdiction of admiralty.

Thus whenever a case has been presented in which injury has been accidentally suffered in navigable waters or on board a completed ship by one engaged in maritime employment directly affecting navigation or commerce, our appellate courts have consistently maintained the exclusiveness of the admiralty jurisdiction. On the other hand, certain cases have arisen in which the circumstances have been such as to bring the cases within an exception to the general rule. In *Los Angeles Shipbuilding & Dry Dock Co. v. Industrial Acc. Com.*, 57 Cal. App. 352, 207 P. 416, a marine machinist was injured while installing machinery in a vessel which had been launched, but was still under construction. The vessel being uncompleted, the employment was held to be of a nonmaritime character, as in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R.

1008; and the injury was therefore adjudged compensable under the state law.

In *City of Oakland v. Industrial Acc. Com.*, 198 Cal. 273, 244 P. 353, a civil service employee of the municipality was serving as a deck hand on a scow used as a tender to a municipal dredger operated by the city in deepening the channel of the Oakland estuary. The scow was tied to the wharf at the time, waiting to be towed to some point in the channel, and the employee was injured while cutting wood for a boiler on board. The Supreme Court held that there was nothing in the facts of this case indicating that either the general employment in the civil service, or the activities of the employee at the time of the injury had any direct relation to navigation or commerce; and hence the matter was one of mere local concern, wherein the maritime rules might properly yield to state regulations. The award of the commission was therefore affirmed.

The latest case from our Supreme Court is *Alaska Packers Ass'n v. Industrial Acc. Com.*, 253 P. 926. In this case, an employee named Peterson, who had entered into a contract in San Francisco to render services as a seaman and fisherman for the fishing season in Alaska, was injured at the close of the season in work incident to the storage of fishing boats for the winter. He and a fellow employee had temporarily left their boat at anchor near the beach, and on returning found that because of the low tide the boat had become stranded in the mud and sand, though for the most part still in water. Standing on the bank, Peterson attempted with the aid of others to lift the boat sufficiently to float it, but in doing so suffered injury to his back and hip. The Industrial Accident Commission awarded compensation; and in considering the question of jurisdiction the Supreme Court, while pronouncing the contract to be of a maritime nature, laid stress on the fact that the injury occurred while Peterson was standing on the beach, and took the view that his activity in pushing and lifting the boat was essentially land labor, and not maritime in character. The case was therefore placed in the category of those involving injuries sustained on land by dock and port employees working under maritime contracts, which may be governed by the local law without prejudice to the characteristic features of admiralty.

It can hardly be said that the body of judicial decisions is sufficiently diversified as yet to permit any broad generalization definitive of the class called cases of local concern. The law of the subject is still in a formative stage, and intervening between the dominant maritime class and the territorial class is a twilight zone which will doubtless narrow, little by little, as the marginal lines become more sharply delimited under the

process of judicial paring. At present we may, however, make certain general deductions from the decisions of authoritative rank.

When a maritime injury occurs in navigable waters to one engaged in distinctive maritime work under a contract directly affecting navigation or commerce, the necessity of preserving the freedom of interstate and international navigation and commerce commits the case to the exclusive jurisdiction of admiralty. Under such circumstances the maritime jurisdiction is established by the conjunction of the locus of the accident and the nature of the employment. When, however, such concurrence is wanting, the rule of uniformity may be relaxed, where the circumstances permit relief to be advantageously afforded by the local law without conflict with the tribunals of the sea. And particularly is this course allowable when the work, though performed on navigable waters, is under a nonmaritime contract; and likewise when, though the employment is maritime, the locus of the accident is so related to the territorial jurisdiction that antagonism will not be bred by according paramountcy to the local law rather than to the general maritime law as administered in admiralty.

In the present case there does exist the concurrence of maritime locus and maritime work under a maritime contract, which, in the interest of uniformity, renders the state Compensation Act inoperative. Brooke, under his employment as a seaman attached to navigable vessels, lost his life in navigable waters while engaged in an effort to save one of his employer's vessels from a peril of the sea. His contract of employment as a mariner contemplated submission to the dominant federal rule in all such perilous undertakings; and whenever under such circumstances casualties of that character occur, the attendant rights and liabilities are to be determined by the same general law, whether the place of the fatality is in the Bay of Santa Monica, or of San Francisco, or New York, or in the Gulf of Mexico, or in midocean. The controlling principle is aptly illustrated in the rather unique case of *Reinhardt v. Newport Flying Service Corp.*, 232 N. Y. 115, 133 N. E. 371, 18 A. L. R. 1324. There a hydroaeroplane, while moored in the navigable waters of Gravesend Bay, dragged its anchor, and was drifting toward the beach in danger of being wrecked. The plaintiff, who was employed in the care and management of the craft, waded into the water to turn the plane about, and was injured by the propeller. Compensation was awarded him by the New York Industrial Accident Commission; but the Court of Appeals, holding both the employment and the injury to be maritime, asserted the supremacy of the gen-

eral maritime law, and, reversing the award, dismissed the claim.

A similar disposition must be made of the case at bar, which, possessing no affinity with cases of mere local concern, must take its place in the realm over which admiralty reigns supreme.

The award is annulled.

We concur: WORKS, P. J.; THOMPSON, J.

83 Cal. App. 449

PAINE v. KESZTHELYI. (Civ. 4341.)

District Court of Appeal, Second District.
Division 2, California. May 27, 1927.

1. Patents ⚡216—Evidence held to sustain finding that plaintiff was entitled to possession of workshop equipment under contract.

Evidence held to sustain trial court's finding that defendant, owner of patent rights, was entitled to possession of workshop and equipment under contract to provide him therewith as against claim, under transfer by the other party to the contract, of one who advanced money to that party for the purposes of the contract.

2. Replevin ⚡8(4)—Plaintiff cannot have judgment in action for claim and delivery, unless entitled to immediate and exclusive possession of property.

Plaintiff is not entitled to judgment in action of claim and delivery, where defendant was entitled to the possession of the property at the time the action was commenced, since plaintiff, to recover, must have the right to immediate and exclusive possession.

3. Pleading ⚡36(3)—In action of claim and delivery, court may find value of property as alleged and admitted in pleadings, notwithstanding testimony of lesser value.

Court may find value of property taken and sold, in action of claim and delivery, under the allegation of value in the verified complaint which was expressly admitted by the answer, notwithstanding testimony of lesser value introduced by the plaintiff without objection.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Mary R. Paine against A. S. Keszthelyi. Judgment for defendant, and plaintiff appeals. Affirmed.

David Welts and C. C. Trott, both of Los Angeles, for appellant.

Fred Mansur, of Los Angeles, for respondent.

WORKS, P. J. This is an action in claim and delivery. Judgment went for defendant, and plaintiff appeals.

[1] It is contended, first, that there was no evidence to support the finding of the trial court that respondent was entitled to the possession of the property in controversy in the

action, and that appellant was neither the owner nor entitled to possession. There was evidence of the following facts, which was practically undisputed: Respondent was the owner of patent rights protecting the manufacture and sale of certain sound-producing instruments. He entered into a written agreement with one Henriette Coon, which, construing it in a general way according to its context, was executed for the purpose of promoting the manufacture and sale of the instruments covered by the patents. Certain parts of the document, which was very lengthy, have a bearing upon the question of the title to the personalty which is involved in this action. For the purpose of carrying out the design of the parties to the instrument, it provided that, within a specified time, Miss Coon would form a corporation in accordance with the terms of a certain schedule attached to it; that upon the assigning of the agreement she would "place at the disposal" of respondent a certain sum of money and "within a reasonable time thereafter the remainder of the money to be used by [respondent] as required for the purposes and to properly equip and maintain a workshop * * * with such machinery and material as may be required by [him] for his use in developing said instruments"; that Miss Coon "shall be given an option conferring exclusive rights to manufacture or sale of each and every of the said instruments developed and completed by" respondent; that, upon the failure of either of the parties to comply with the terms of the contract "in any respect," the other might give 60 days' notice of intention to cancel it, and that, at the expiration of such period after such notice, a cancellation should result unless the breach was remedied in the interim; that upon cancellation "all rights and titles of whatsoever nature in and to said patents and inventions, all models, samples and instruments made and developed by and under the supervision of" respondent, with exceptions as to articles already on the market, "shall belong and become the sole property of" respondent; and that "all rights and obligations of" Miss Coon "in this agreement shall inure to, and evolve upon, the proposed corporation when formed and organized by" her, "and this agreement will be ratified by said corporation by appropriate action spread upon its minutes." The "schedule" attached to the agreement, and, providing a scheme for the organization of the corporation referred to in it, recited that a part of its purposes should be to secure from respondent the rights "to manufacture or sell license rights on all instruments as perfected under patent"; that the corporation was to be capitalized at a certain figure; that 30 per cent. of the stock was to be issued to respondent, a certain amount was "to be sold for the first financial requirements of the company," and a part of this amount was

to be sold "for emergency fund and expenses"; and that it was "proposed to develop workable, commercial models of the five instruments, and manufacture the instruments, and sell on royalty basis or lease rights to use."

Miss Coon took subscriptions from various persons for the purpose of carrying out the arrangement she had made with respondent, and assembled a considerable amount of money by that method. To some of these "investors," as they termed themselves on the witness stand when testifying in the trial court, although perhaps not to all of them, she issued receipts to the effect that the money paid in was "an investment in company now forming to develop instruments under patents of A. S. Keszthelyi, for which [the investor] is to receive stock when and as issued in accordance with incorporation proceedings." One investor testified that when she paid her money to Miss Coon the latter said she was "to receive stock in the corporation" for it, and others testified to the same effect. With the money thus acquired Miss Coon purchased and delivered to respondent a long list of machinery and tools, although payment for the highest priced articles thus purchased was made in installments under conditional sales contracts. Some of the tools were purchased for cash, under selection by respondent; Miss Coon paying the money. The machinery and tools thus bought were acquired in compliance with the provision of the contract between Miss Coon and respondent whereby she agreed to place money at his disposal "as required for the purposes of and to properly equip and maintain a workshop." They together constituted the property which was the subject of the present action. Collectively they will be referred to hereafter as the workshop equipment.

The conditional sales contracts covering the larger part of the workshop equipment, in value, were executed by Miss Coon as the purchaser. Appellant Mary R. Paine was the heaviest "investor" among those from whom Miss Coon procured subscriptions. Before the latter got from Mrs. Paine the money subscribed by her, she was having difficulty in making payments on the sales contracts, and she told Mrs. Paine that, if the latter would subscribe the amounts necessary to complete the payments she, Miss Coon, according to her testimony, "would have a bill of sale made in her name to protect her interest in it." Mrs. Paine then paid the necessary money, and, when the payments on the conditional sales contracts were completed, Miss Coon requested the sellers to issue receipted invoices covering the property purchased to Mrs. Paine, and this was done. Miss Coon, also, executed a bill of sale to Mrs. Paine for the entire workshop equipment.

The corporation referred to in the agree-

ment between Miss Coon and respondent was organized, with a board of directors and officers, although not within the time specified in the agreement. The board held several meetings, and at one of them a resolution was adopted to the effect that the corporation accepted an assignment of all Miss Coon's right, title, and interest in the contract between her and respondent. The resolution and a copy of the contract were engrossed upon the minutes of the corporation. One of the directors who voted for the resolution was Mrs. Paine. Another was Miss Coon.

[2] Respondent contends that he was the owner of the workshop equipment, and the trial court so found, but it is not necessary for us to pass upon the point. If respondent was entitled to the possession of the property at the time the action was commenced, appellant could not have obtained judgment against him. To succeed in an action for the recovery of specific personal property a plaintiff must have the right to the immediate and exclusive possession of it. 5 Cal. Jur. 160, § 4. A mere perusal of the statement of facts which we have made demonstrates that respondent had the right to the possession of the workshop equipment at the time of its delivery to him. Nor can we perceive that the right was ever lost. As touching this particular question appellant relies upon a circumstance to which we have not before adverted, but have reserved for mention in this place. At a certain stage in the relations between respondent, Miss Coon, and the corporation which was organized pursuant to the contract between the two natural persons, respondent in writing notified Miss Coon and the board of directors of the corporation that he elected to cancel the contract. The notice pointed out certain particulars in which respondent asserted that the terms of the contract had not been fulfilled, and demanded that Miss Coon and the corporation take certain designated steps in order to repair the alleged breach. Toward the close of the paper respondent stated that, "unless all of the above stated demands and requirements as set forth in said contract are fulfilled, this will be your notice that sixty days from this date and thereafter said contract will be canceled and declared void." And immediately following this statement he said: "This is intended as a notice of cancellation as provided in said contract." Appellant takes the position that at the end of the 60 days the contract was canceled and set at naught, and that she at once became entitled to the possession of the workshop equipment. The corporation is not a party to the action, and we therefore do not decide whether appellant was the owner of the

property involved in it. Laying aside that question, and also the question whether by their contract Miss Coon and respondent intended that either of them by this mere ipse dixit should have the right to terminate the obligations imposed by the instrument, we think there is at least one answer to the proposition advanced by appellant. There was no evidence that Miss Coon and the corporation did not comply with the demands made by respondent in his notice of cancellation, and we think it was incumbent upon appellant to make proof to that effect as one of the links in the chain of evidence showing her right to the possession of the property. If the demands were complied with, the notice of cancellation at once fell to the ground, and respondent's right to the possession of the workshop equipment was not interrupted or terminated. The trial court found that the contract was canceled, but we think the issue upon which the finding was based is immaterial, having decided that the evidence supports the finding that respondent was entitled to possession.

[3] Upon the commencement of the action, under appropriate proceedings, the sheriff took the workshop equipment into his possession, and delivered it to appellant, who sold it. The judgment in favor of defendant was for the value of the property. It is insisted by appellant that the finding of the trial court as to value is not supported by the evidence. Appellant herself alleged in her complaint that the value was as found by the court, and the allegation was expressly admitted by the answer. However, appellant at the trial, without objection by respondent, introduced evidence showing a lesser value than that established by the pleadings and found by the court. Appellant contends that the court must have found in accordance with this evidence, notwithstanding the state of the pleadings. The point is not tenable. Certainly, if the evidence could be considered at all, the most that can be said is that there was a conflict between the sworn allegation of the complaint, for the pleading was verified, and the testimony, and the court could have found either way. Upon the question whether the evidence could be considered at all, see *Welch v. Alcott*, 185 Cal. 731, 198 P. 626; *Romer v. Wehmer*, 61 Cal. App. 411, 214 P. 993.

The question as to what rights the corporation, or the "investors," may have in the fruits of the judgment in respondent's favor is not, of course, involved in the present action.

Judgment affirmed.

We concur: CRAIG, J.; MURPHEY, Justice pro tem.

83 Cal. App. 434

SCHWARTZ v. HANDLEY. (Civ. 5328.)★

District Court of Appeal, First District, Division 1, California. May 27, 1927.

Hearing Denied by Supreme Court July 26, 1927.

1. Partnership ⚡49—Excluding evidence of partnership between owner and agent holding power of attorney to sell held error, in action for commission by broker, whom agent employed.

In action by broker to recover commission for sale of leasehold interest in apartment house under written contract of employment with owner's agent, to whom owner executed power of attorney to sell without expressly authorizing employment of subagent, excluding evidence as to partnership between owner and agent held error.

2. Partnership ⚡140—Holder of power of attorney to sell apartment house leasehold interest, if owner's partner, had authority to employ broker to effect sale.

Person holding written power of attorney to sell leasehold interest in apartment house from owner, if owner's partner, had authority to enter into binding contract as principal for employment of agent to make sale, notwithstanding power of attorney did not expressly authorize subagent's employment.

3. Brokers ⚡63(1)—Broker held entitled to commission on sale of leasehold, on refusal of principal to procure assignment of lease preventing sale's consummation.

Broker held entitled to commission on sale of leasehold to purchaser able, ready, and willing to purchase, who had necessary funds to complete purchase, on principal's refusal to procure assignment of lease preventing consummation of sale.

4. Brokers ⚡54—Broker is entitled to commission on finding one ready, able, and willing to purchase on terms prescribed.

Broker, properly authorized in writing to make sale for commission, becomes entitled to commission when he has found and brought to his principal party ready, able, and willing to buy on terms prescribed.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Hyman Schwartz against Elizabeth J. Handley, as administratrix of the estate of Lorin A. Handley, deceased, and individually. Judgment for defendant, individually and as administratrix, and plaintiff appeals. Reversed.

E. M. Swartz, of Los Angeles, for appellant.

Newby & Palmer, of Los Angeles, for respondent.

TYLER, P. J. Action to recover services rendered in the sale of a certain apartment house.

The cause is based upon a rejected claim presented against the estate of Lorin A.

Handley, deceased. The complaint recites that on or about the 12th day of August, 1920, Handley, by his duly authorized agent, entered into an agreement in writing with the plaintiff, by the terms of which he was to receive any and all amounts over and above the sum of \$15,000 for the sale of the leasehold interest and furnishings of the Murray Apartments on Orange street, in the city of Los Angeles; that on or about the 7th day of September following, he procured a purchaser ready, willing, and able to pay the sum of \$19,000 for the same, and defendant agreed to sell the apartments to such purchaser for such sum and entered into a written contract for such sale; that the purchaser deposited the sum of \$1,000 as part payment thereof; that subsequently, on October 4, 1920, defendant, the administratrix of the estate of Handley, notified plaintiff in writing that she refused to carry out and comply with the terms of the agreement; that by reason of such refusal on her part there is now due, owing and unpaid to plaintiff the sum of \$4,000, less the sum of \$1,000 deposit which plaintiff had retained. Then follows allegations of the presentation to, and the rejection by, the administratrix of the claim. Defendant, answering, denied the allegations of the complaint, and as a special defense by way of counterclaim averred that plaintiff had willfully and fraudulently appropriated the deposit of \$1,000, and she prayed that it be adjudged that the sum was fraudulently converted, and that execution against the person of the plaintiff issue for the collection of any judgment that might be recovered. The trial court found, in substance, that all the allegations of plaintiff's complaint were untrue. As conclusions of law it was adjudged that plaintiff take nothing by his action and that defendant recover the sum of \$1,000, which sum was found to have been wrongfully appropriated by plaintiff. It was further adjudged that plaintiff was guilty of fraud in incurring the obligation on which the judgment upon defendants' counterclaim was based, and it was then further adjudged that execution issue against the person of the plaintiff for the collection of the judgment as well as against his property.

Plaintiff here claims that there has been a complete miscarriage of justice in depriving him of the compensation to which he is rightfully entitled, and in destroying his reputation without any evidence of bad faith on his part in any particular. Considering the nature of the judgment, we feel that the facts should be fully set forth in the opinion. During his lifetime, and up to the date of his death, which occurred on September 20, Lorin A. Handley held the title of the lease and furnishings of the Murray Apartments in the city of Los Angeles. He resided in San Francisco, and did not personally attend to its management. One Elizabeth Lamb was in

charge of the property, and she also managed another apartment house which was likewise held by Handley. She collected the rents of the Murray Apartments and deposited the same in the bank under the name of "The Murray Apartments, Elizabeth Lamb," and she had power to and did check against this fund. What interest, if any, she had in the apartment, or the extent thereof, does not appear from the record, as the trial court rejected evidence upon this subject. That she had some interest is apparent from a reading of the entire record. Plaintiff resided at the said apartment house and was the friend and private counsel of both Handley and Mrs. Lamb. On July 28, 1920, Handley executed and delivered his power of attorney to Mrs. Lamb. It read as follows:

"San Francisco, July 28th, 1920. I hereby appoint Elizabeth Lamb, 1935 West Sixth street, Los Angeles, California, my attorney with full power to sell the Murray Apartments, all my interest therein, and with full power to sign all contracts conveying all rights possessed by me in the lease of said Murray Apartments. [Signed] Lorin A. Handley."

Upon receiving this power of attorney, Mrs. Lamb employed plaintiff to dispose of the lease of the apartments, and executed and delivered to him the following writing:

"Wilshire 3927; 50051. Mrs. Lamb, Proprietress. The Stratford Apartments, Sixth street at Burlington avenue. Los Angeles, Cal. Aug. 12, 1920. Mr. Hyman Schwartz: For your services, etc., in handling the sale and transfer of the lease on the Murray Apartments and for obtaining and handling the transactions with purchasers therefor, it is agreed that you shall have and receive any sum over and above the \$15,000.00. It being the intention that the price over \$15,000.00 received for the sale and transfer of said lease shall be retained by you, or paid to you for your services, etc. [Signed] Lorin A. Handley by Elizabeth Lamb."

Concerning this authorization, Mrs. Lamb testified that she had advised Handley that she had given it to plaintiff, and that he had agreed to the arrangement. After receiving this authorization, plaintiff procured the services of the Century Investment Company on a commission of 5 per cent. to assist him in procuring a purchaser. Thereafter, on September 7, 1920, plaintiff and the investment company obtained a written proposal of purchase from a Miss A. H. Martin, for the sum of \$19,000, and a deposit of \$1,000 was made by her as part payment of the purchase price, which deposit was paid to Mrs. Lamb. The amount of the deposit was thereafter paid by Mrs. Lamb to plaintiff on account of his services. On September 14, 1920, Mrs. Lamb executed and delivered to plaintiff the following writing:

"Mr. Hyman Schwartz: I herewith hand you assignment and transfer of lease covering the Murray Apartments, dated April 1, 1920, which

you are to deliver to Miss A. H. Martin upon the compliance by Miss Martin of the terms and conditions of a certain offer and agreement to purchase the said lease executed by Miss Martin on the 7th day of September, 1920, and accepted of even date herewith. You are authorized to make the arrangements and do the things necessary to complete the deal. You may deduct your fees and other sums agreed upon for the consummation of the transaction and pay over the balance to me. [Signed] Lorin A. Handley, by Elizabeth Lamb."

Negotiations relative to the sale lasted up to the time of the death of Handley. Subsequent to the time the deposit was made, the Guaranty Trust & Savings Bank of Los Angeles, as executors of the estate of one John Murray, the owner in fee of the apartments, upon being requested to consent to the assignment of the lease, addressed a letter to Miss Martin, advising her that upon the payment of it of the sum of \$1,500 as additional security for the lease it would consent to a transfer of the leased property. Miss Martin objected to this demand, claiming it was no part of her agreement of purchase, and she insisted that the parties of whom she was purchasing settle this difficulty. Plaintiff and Mrs. Lamb thereupon attempted to adjust the matter between themselves. Before the arrangements were concluded, Handley was killed. After his death, plaintiff, together with Mrs. Lamb and Miss Martin, continued to negotiate the assignment of the lease and to have defendant herein, the widow of Handley, settle the same. Plaintiff visited her and fully explained the transaction. He informed her that her deceased husband and Mrs. Lamb were indebted to him in a considerable sum for legal services, but that he, Mrs. Lamb, and Mr. Handley had agreed that this sum was to be waived in consideration of his receiving the amount of his fee as provided for in the written agreement for the sale of the apartments. He further advised her that the sale was a very profitable one, as it had been acquired for the sum of \$7,000 a short time previously. On September 28, 1920, defendant wrote to plaintiff, advising him that the sale was satisfactory to her, and suggested that he close the same. On October 4 following she again wrote plaintiff, informing him that she withdrew her approval of the sale, and revoked any and all authority of plaintiff in the premises, and she demanded that plaintiff turn the matter over to her attorney. Acting upon this communication, plaintiff visited her representative and fully advised him of the transaction, and presented to him the various documents. He explained to him how the amount of his fees had been merged into his agreement with Handley and Mrs. Lamb. He suggested that Miss Martin was bound under her agreement of purchase. Defendants' attorney was of a like opinion, and he requested that plaintiff turn over to the estate the amount Mrs. Lamb

had paid him on account of his services, and that he would close the transaction and then pay plaintiff the \$4,000 due him. Plaintiff consented to this plan. He drew his check for the amount and delivered it to defendants' representative. Thereafter, on October 7, 1920, the defendant Mrs. Handley addressed a letter to Miss Martin, advising her of her appointment as administratrix of her husband's estate and informing her that she was ready to receive the amount due on account of the sale of the apartments in conformity with the terms of her contract, and that she desired to close the transaction. Miss Martin, who in the meantime had gone into possession of the premises, visited the bank to secure the assignment of the lease. Upon learning that the transfer had not been made and probably would not, she immediately notified Mrs. Handley in writing that she rescinded the contract of purchase and demanded the return of her deposit. It appeared in evidence that no steps had been taken by defendant or her attorney in the probate court to approve and dispose of the transaction. Thereafter plaintiff received a letter from defendants' counsel which indicated that he had doubts concerning the enforcement of the contract of sale with Miss Martin, as it was subject to the procurement of an assignment of the lease, which had not been obtained. Plaintiff, concluding that he was being unfairly dealt with, stopped payment of the check he had given to defendants' counsel, and the present suit followed. During the trial, evidence was offered to show the business relations of Mr. Handley and Mrs. Lamb, and also the interest that Mrs. Lamb had in the property. Evidence was also offered to show that Handley had orally ratified the contract of sale. The trial court was of the opinion that plaintiff's case rested entirely upon the power of attorney that Handley had given to Mrs. Lamb, and that it had to stand or fall upon that instrument. It concluded that under this authority Mrs. Lamb had no power to appoint a subagent to sell the property and that evidence of the oral ratification of the contract of sale was inadmissible, as to be effective, it should have been in writing to conform to the statute of frauds. It was of the further opinion that evidence of the relation of the parties or the interest that Mrs. Lamb had in the property was immaterial. Accordingly the evidence of

ratification and all evidence going to show that Mrs. Lamb was a partner of Handley in the enterprises was rejected.

[1-4] Conceding the power of attorney was limited to a sale and conveyance by her of the property and that the language of the instrument was not broad enough to permit the employment by her of an agent, and conceding also that the rule of the trial court in rejecting evidence of the oral ratification of the contract to be correct, we are of the opinion that the court erred in rejecting all evidence concerning the relations of the parties and the interest that Mrs. Lamb had in the property. If, as she claimed in her testimony given by deposition, she was a partner of Handley, she had full power to bind him under her written contract with plaintiff. By the written power of attorney given her, Handley had consented to a sale of the premises, and, this being also her desire, she then had power, as a partner, to enter into a binding contract as a principal for the employment of an agent to accomplish this purpose, notwithstanding the power of attorney did not expressly authorize such employment. Plaintiff under this written contract was required to find a purchaser, able, ready, and willing to purchase. That he did so, there is no question. It was in evidence that Miss Martin had the necessary funds in bank to complete the purchase. The contract entered into by her during the lifetime of Handley was a binding one. That it was never consummated was through no fault of plaintiff. It was the duty of the defendant to have procured an assignment of the lease, which she refused to do. Having so refused, and plaintiff having completed his services and earned his commission, he was entitled to the same. A broker, properly authorized in writing to make a sale for a commission, becomes entitled thereto when he had found and brought to his principal a party who is ready, able, and willing to buy on the terms prescribed.

From what we have said, it follows that the action of the trial court in rejecting all evidence as to a partnership existing between the deceased and Mrs. Lamb constituted error justifying a reversal of the judgment. It is so ordered.

We concur: KNIGHT, J.; CASHIN, J.

83 Cal. App. 408

BEECHER v. STAFFORD et al. (Civ. 4531.)

District Court of Appeal, Second District, Division 2, California. May 26, 1927.

1. Highways $\S$ 184(2)—Evidence held insufficient to support judgment against automobile owner whose car was forced off road and injured plaintiff.

In personal injury action against owner of automobile which struck plaintiff standing beside road, evidence held insufficient to support judgment for plaintiff, where defendant's car was forced off road by overtaking car.

2. Evidence $\S$ 586(3, 4)—Negative testimony of occupants of third automobile was not evidence that defendant's car was not struck by overtaking car, as against positive testimony of occupants of defendant's car.

Where there was issue in personal injury action against automobile owner as to whether defendant's car was forced off road by overtaking car, negative testimony of occupants of third automobile was not evidence that overtaking car did not strike defendant's as against positive and direct testimony of occupants of defendant's car.

3. Highways $\S$ 176—Negligence of motorist unlawfully passing car, if proximately contributing to accident, rendered him solely liable (Motor Vehicle Act, $\S$ 122).

Automobile driver attempting to pass car in violation of Motor Vehicle Act (St. 1923, p. 557, $\S$ 122), where highway was not sufficiently clear ahead, was guilty of negligence which if proximately contributing to accident rendered him solely liable for injury caused by overtaken car forced from road.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Walter Beecher against John D. Stafford and another. Judgment for plaintiff, and the defendant named appeals. Reversed.

W. I. Gilbert, of Los Angeles, for appellant.

Edward E. Gray, of Los Angeles, for respondent.

MURPHEY, Justice pro tem. [1] This is an action for damages for personal injuries suffered by the plaintiff. The verdict of the jury was in favor of the plaintiff against both of the defendants, and, following the verdict, judgment was rendered against the defendants for a substantial sum of money. The defendant Reed made no appearance at the time of the trial, and the judgment against him, except as to the amount, was by default and by direction of the court. The defendant Stafford appeals from the judgment entered against him and bases his attack upon the grounds: First, insufficiency of the evidence to warrant the verdict; and, second, errors at law committed by the trial court. There is no claim that the plaintiff was guilty of negligence in any degree or at all. The circumstances surrounding the

transaction are as follows: The plaintiff had parked his car on the roadside on Whittier boulevard near the outskirts of the town of Whittier; the car was standing about 2 feet clear of the traveled highway; plaintiff was standing close to his car and about 1½ feet from the traveled highway with his back to the east, talking to a friend who was standing at the front and west end of his car. An employee of the defendant Stafford, Miller by name, was driving the Stafford car westerly along Whittier boulevard, and with him were two other men who were also employees of Stafford, all returning home after a day's work. The defendant Reed was also driving his car westerly along the same road and immediately before the accident was following the Stafford car. At this same time and immediately prior to the accident, a car driven by a man named Kittle was approaching the scene of the accident from the west, traveling in an easterly direction along the boulevard. In this car with the driver Kittle was his wife and another lady. As these cars approached each other and when within less than 300 feet of each other, the Reed car turned out to pass the Stafford car. Seeing this, Kittle slowed down somewhat and proceeded with his car about two-thirds of its width off the traveled highway. When the three cars were opposite each other and almost abreast the Stafford car suddenly swerved to the right and struck the plaintiff, Beecher, carrying him from 20 to 35 feet, after which he fell to the roadside, the car proceeding for from 20 to 35 feet farther before it was brought to a stop. The evidence is substantially as follows: It is not disputed that either the plaintiff Beecher or the witness Anderson, the man to whom he was talking, saw any of the cars until after Beecher was struck. Anderson testifies that the Stafford car carried Beecher about 35 feet before he was dropped and that it proceeded 35 feet thereafter before it was brought to a stop. Miller, the driver of Stafford's car, testified that he saw Beecher and Anderson near the Beecher car for a considerable distance before the accident, several hundred feet, and that he was driving along the right-hand side of the road and at a rate of speed under 25 miles an hour; that immediately before the accident the Reed car cut in on him and hit his fender and front wheel at a time when he was about 3 feet from the rear of the Beecher car, and it swerved his car off and knocked the steering wheel loose from his hand and he hit Beecher. Browne, an occupant of the Stafford car, testified:

"This Kittle car was coming east, and this Reed car pulled right around in front of us and jammed us—struck the front wheel. When we went back to look there was a mark in the tire. We looked on the Reed car, and the hub cap was bruised, and the first thing I knew was

we hit this fellow that was standing beside the car, and he turned right over on the fender and bumped off the side. We carried him 25 or 30 feet, and we traveled 25 or 30 feet after he dropped off."

Olson, another occupant of the Stafford car, testified as follows:

"As we got up there the second car coming behind us, I should judge he was about 3 feet out in the street from our side of the car, and as he got up about the center of us, he turned into an angle of about 20 or 25 degrees and he hit us—he hit our fender with his center of the car, but in the meantime we hit Mr. Beecher. * * * He came up behind, and as he reached the middle of our car he changed his course and cut in on us. He struck our car. The center of his car struck our fender or thereabouts; something like that. As far as I remember it was the center of his car that struck us."

[2] There is no evidence in the record to show that prior to the accident the driver of the Stafford car had any knowledge that Reed was attempting to pass him. There is evidence that no horn was blown nor any warning given. It will be observed that these three witnesses testified positively that the Reed car struck the Stafford car and that its course was deflected toward Beecher. The testimony of the other eyewitnesses, the occupants of the Kittle car, is negative in character, and it is upon this negative evidence that the plaintiff must and does rely to sustain the verdict of the jury. No one of these witnesses contradicts the testimony given by the witnesses in the Stafford car, these witnesses in effect saying that they did not see the Reed car strike the Stafford car. Kittle, the driver says: "I did not look at the cars as they were passing, I was watching my own tracks." Mrs. Kittle testified: "We were all almost abreast when the boy was struck, our car was perhaps a little to the east." And Mrs. Walker, the other occupant of the Kittle car, testified that they were almost abreast and that she did not know whether they struck or not. The above is substantially all the evidence as to the happening of the accident except a diagram drawn by the witness Miller to which we will advert later. Under the circumstances above set out it is not strange that the parties in the Kittle car did not see the cars strike. The driver, as he says, was attending to his own business, and if the body of the Reed car was between the Stafford car and the point of contact it would be practically impossible for the other occupants of the Kittle car to see what occurred as between the Reed and the Stafford cars. In addition to this negative character of evidence the respondent relies upon a diagram made by the driver of the Stafford car. An inspection of this diagram, however, gives little comfort to the plaintiff and in no wise negatives the meeting of the cars. The Reed car as drawn is pointed di-

rectly toward the course of the Stafford car. A projection of the lines of the courses of travel of these two cars will bring them together at the very point designated by the occupants of the Stafford car as being the place where the cars actually collided. In this connection it may be said that under all the circumstances of the case as above outlined the happening of the accident as detailed by the appellant's witnesses is both reasonable and probable. Reed was attempting to pass the Stafford car at a time when the Kittle car was approaching from the opposite direction and at a time when the attempt was in direct violation of the statute. Under such circumstances it was natural and probable, if not inevitable, that he should attempt to cut in ahead of the Stafford car to avoid meeting the Reed car. Miller, Browne, and Olson had the opportunity to observe the contact of appellant's car with that of his codefendant Reed. The other witnesses in the Kittle car, in all probability, did not have such opportunity of observation, and in any event if they did, they did not avail themselves of seeing it. At the most, their testimony is of a negative character, and as against the positive, direct, and really uncontradicted testimony of Miller, Browne, and Olson, it is not evidence that Reed's car did not strike that of the appellant. In the case of *Gage v. Billing*, 12 Cal. App. 691, 108 P. 666, the District Court of Appeals said:

"Although Pohli was a witness and in court, and must have known whether or not defendant told the truth, he did not contradict or deny the defendant's testimony, and we find nothing in his testimony given in support of plaintiff's cause of action that necessarily or at all contradicts the testimony of the defendant as to the terms upon which he was employed or requested to find a purchaser for the property. We are not unmindful of the rule that it is not always necessary that a witness be expressly contradicted to raise a conflict. For testimony may be so improbable or contradictory in itself as to justify its disbelief. But no such case as that is presented here."

In the same case the court says:

"The two persons who knew the facts were both in court. One, the defendant, gave specific testimony, not improbable, but entirely reasonable and showing a contract in accordance with the usual custom in such cases. He was not impeached in any way, was not even cross-examined as to the evidence in question. The other person, Mr. Pohli, did not contradict such witness, and gave no testimony necessarily in conflict with this explicit testimony of the defendant. In such a case the testimony of the witness explicitly testifying to the particular facts should be taken as true. *Newton v. Pope*, 1 Cow. (N. Y.) 109; *Lacey v. Wilson*, 24 Mich. 479; *Matthews v. Lanier*, 33 Ark. 91."

The case of *Leal et ux. v. Martin*, 59 Cal. App. 760, 211 P. 853, is directly applicable to the facts of this case:

"It is not argued that respondent was guilty of negligence per se or that he violated any statute relating to the manner of operation of the automobile upon the public highway other than the provisions of section 22, subd. A, of the Motor Vehicle Act (Stats. 1919, p. 220), which requires that one operating a motor vehicle on the public highway shall do so in a careful and prudent manner and at such a rate of speed as shall not endanger the life or limb of another."

In passing it may be well to state that the trial court instructed the jury in this case:

"If you find from the testimony that the defendant Stafford was driving or operating his automobile along the right-hand side of the highway at a legal rate of speed—and the court instructs you that he was going at a legal rate of speed; there is no evidence here sufficient to warrant you in finding that he was going at an excessive rate of speed—if you find from the testimony that the defendant, Stafford, was driving or operating his automobile along the right-hand side of the highway at a legal rate of speed, and that the driver of the passing car, A. H. Reed, suddenly and without warning, cut his car sharply to the right and collided with or forced the car of defendant Stafford to the right, and thus caused the injury, then your verdict would be in favor of the defendant Stafford."

The court concludes:

"When reliance is placed on this provision of the statute, it is necessary to prove that the vehicle was not operated in a careful or prudent manner or that it was operated at an unreasonable rate of speed."

[3] The appellant requested the court to give the following instruction to the jury, which was refused:

"You are instructed that the defendant Reed, under the Motor Vehicle Act, had no right to pass the car of the defendant Stafford, in the highway, unless the boulevard on his left as he proceeded forward was clear and unobstructed for a distance of not less than one hundred yards in advance of the car he was about to pass. Therefore, if you shall find that the defendant Reed, at the time he attempted to pass the car of his codefendant, Stafford, knew there was an automobile approaching the automobiles of the two defendants at a distance of less than 100 yards from them at the time the defendant Reed attempted to pass Stafford, then I instruct you that the defendant Reed was guilty of negligence; and if you shall find that such negligence directly or proximately contrib-

uted to the happening of the accident, then your verdict will be in favor of the plaintiff and against the defendant Reed, but in favor of the defendant Stafford, unless you shall find that Stafford himself was guilty of negligence directly or proximately contributing to the happening of the accident."

The instruction should have been given. It is clearly the law, and was pertinent to the determination of the issue submitted to the jury for consideration.

Lastly, it is contended on the part of the appellant that opposing counsel were guilty of misconduct that tended to prejudice the jury against him, which alleged misconduct as disclosed by the transcript is as follows: The attorney for plaintiff, during the course of his argument to the jury, started to read to the jury the answer of the defendant A. H. Reed, and the following proceedings were had:

"The Court: Mr. Reed is not here, and you cannot read what he said in his answer against the other defendant.

"Mr. Gray: He is not here because somebody wants to get out of this.

"Mr. Gilbert: I object to any such statement as that.

"The Court: That is misconduct, and the court so adjudges. Now, proceed with the argument against the defendant. The jury must not pay any attention to that. Proceed."

The action of the court in promptly directing the jury to disregard the statement of counsel went as far as possible to eliminate any unfavorable impression from the minds of the jury, but in view of the fact that the record in this case discloses no substantial evidence of negligence on the part of the defendant Stafford, the failure to give the foregoing instruction and the implied impropriety of a collusive arrangement as between the codefendants are circumstances that may well have had potential influence in causing the jury to penalize the defendant Stafford as it did do through its adverse verdict.

We are entirely satisfied that, irrespective of any error of law or any misconduct on the part of counsel for the plaintiff, the verdict in this case as against the defendant Stafford is not supported by the evidence and that the judgment must be and is as to him reversed.

We concur: WORKS, P. J.; THOMPSON, J.

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5618.) ★

District Court of Appeal, Second District, Division 1, California. May 31, 1927.

Hearing Granted by Supreme Court July 29, 1927.

1. Master and servant ⇨371—Compensation is recoverable only for injuries arising out of employment (Workmen's Compensation, Insurance and Safety Act of 1917).

Employee cannot recover damages or compensation for injuries sustained under Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831), where accident causing injuries did not arise out of scope of employment.

2. Master and servant ⇨375(1)—Injuries to newspaper carrier delivering milk for milk wagon driver, with whom he rode in delivering papers, held not compensable (Workmen's Compensation, Insurance and Safety Act of 1917, § 6).

Injuries to newspaper carrier sustained during deviation from paper route in delivering milk for milk wagon driver with whom he rode in delivering papers, without employer's knowledge, held not accident arising out of course of his employment by newspaper proprietor under Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831), § 6, though carrier had one paper left to deliver at time of accident.

3. Master and servant ⇨371—Whether accident arises out of and in course of employment depends on facts of case (Workmen's Compensation, Insurance and Safety Act of 1917, § 6).

Whether accident arises out of and in course of employment under Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831), § 6, must be determined according to facts of particular case.

4. Master and servant ⇨371—Compensation is recoverable only where injury can be traced to nature of work or to risks reasonably incidental to employment (Workmen's Compensation, Insurance and Safety Act of 1917, § 6).

Before employee is entitled to compensation for injury, it must be possible to trace injury to nature of work of employee or to risks to which employment exposes him, and to show that risk of accident was reasonably incidental to employment under Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831), § 6.

5. Master and servant ⇨375(1)—Employee, engaged at time of injury in service pertaining peculiarly to one employer, cannot claim compensation from others (Workmen's Compensation, Insurance and Safety Act of 1917, § 6).

If at time of injury employee is engaged in service which pertains peculiarly to one employer, he cannot claim compensation from oth-

ers under Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831), § 6.

Proceedings under the Workmen's Compensation, Insurance and Safety Act of 1917 by George Abram by his guardian ad litem, Henry D. Abram, opposed by the Hartford Accident & Indemnity Company, in which the State Compensation Insurance Fund was a party. Award of the Industrial Accident Commission in employee's favor, and the Hartford Accident & Indemnity Company brings certiorari. Award annulled so far as it affects the Hartford Accident & Indemnity Company.

George L. Greer, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco (W. F. Beem, of San Francisco, of counsel), for respondents.

HOUSER, J. In this proceeding the petitioner seeks to have reviewed an award made by the Industrial Accident Commission.

In substance, the facts are that a boy named Abram was employed to make daily deliveries of a newspaper over a given route; that the territory which was thus presumed to be served was included within a much larger area which was served by a corporation in the delivery of milk to its customers; that without the knowledge or acquiescence of the proprietor of the newspaper the boy made an arrangement with the man who delivered the milk by which it was understood that, where the milk route and the newspaper route covered practically identical territory, the boy should be given transportation on the milk wagon, for which privilege he would compensate by helping the milkman deliver milk within such territory; that on two days of each week, to wit, on Saturday and on Sunday, the boy would thus assist the driver of the milk wagon, not only for that part of the milk route which was practically identical with the newspaper route, but, in addition thereto, the remainder of the milk route, for which extra service the boy was to receive a money consideration; that on one of the Saturdays when the boy was thus engaged to perform the larger service, after all his newspapers, with the exception of one, had been delivered, he proceeded to and did in part carry out his agreement with reference to that part of the milk route which had not then been served; that, after leaving the neighborhood which was covered by the newspaper route, the milkwagon route traversed a very large area in delivering milk to consumers, and finally in the course thereof the driver and the boy were working to and fro on different streets, returning in a general direction toward the place where the one newspaper still remaining in the possession of the boy was to be delivered; that, while still engaged solely in the delivery of milk, and when located on a street paralleling that on which the house was situated

at which the newspaper was to be delivered, and approximately two blocks therefrom, in reaching for a bottle of milk the boy slipped and fell under the milk wagon, which ran over him and caused him serious injuries; that thereafter an application for compensation for such injuries was duly presented to respondent Industrial Accident Commission, and an award was made by it as against both the newspaper proprietor and the corporation owner of the milk route. A petition by the petitioner herein, as insurer of the proprietor of the newspaper, for rehearing on the award having been denied by respondent, petitioner has come to this tribunal on a writ of review affecting the award as against the proprietor of the newspaper route only.

The sole question submitted to this court for determination is purely one of law, to wit, whether from the facts as hereinbefore set forth the respondent was justified in reaching the conclusion that at the time of the happening of the accident which resulted in the injury to the boy he was in the employ of the proprietor of the newspaper, and was acting within the course of his employment.

[1, 2] Generally speaking, it is a principle of law so well established as to require no citation of authority for its support that, in the absence of a particular statute to the contrary, an employee will not be permitted to recover damages or compensation for an injury sustained by him where the accident which was the cause thereof occurred through circumstances not arising out of the employment of the injured person.

[3] Section 6 of the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831) provides for compensation to the employee for any injury sustained by him "arising out of and in the course of the employment." As is stated in the case of *General Accident F. & L. A. Corp. v. Industrial Accident Commission*, 186 Cal. 653, 200 P. 419, it would seem that no comprehensive definition can be formulated which will correctly and with absolute certainty determine what accidents will be embraced within the phrase "arising out of and in the course of the employment," and therefore each case must be decided conformably to the specific facts which are therein presented. Perhaps the leading authority in which an attempt has been made to generally outline the boundaries of the phrase is that entitled *In re McNicol*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306. It is there said: "

"It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required

to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In the case of *Press Publishing Co. v. Industrial Accident Commission*, 190 Cal. 114, 210 P. 820, it was held that compensation by an employee for an injury could be recovered from each of two concurrent employers of the injured person. The facts were that a man was employed to deliver newspapers both in bulk and to individual customers along a route covered by a state highway. By a second employer, who operated a dairy, the man was also engaged to carry cream from the end of the newspaper route back to the dairy which was located in the vicinity of the place where the newspaper route commenced. The man used a motorcycle with a side car attachment in performing his work. On the day on which the accident happened the man had procured the newspapers which were to be delivered, together with some ice for cooling the cream. He then went to his home for the purpose of getting some empty milk cans in which to carry the cream. Either of two roads was available to the man in departing for the vicinity where his work in delivering newspapers on the state highway would actually begin. One of such roads was in a better condition for travel from the newspaper office to the state highway than was the other road, which latter road was a little shorter and nearer to the man's home and the dairy than was the former road. The road nearer the man's home, however, intersected the road which was nearer the newspaper office before the state highway could be reached. After getting the empty milk cans, and while traveling on the road nearer to his home, before such road intersected the other and better road, he met with the accident and sustained the injury for which compensation was sought.

Based upon the fact that, after the employee had secured the newspapers, instead of going immediately on the better road which passed the newspaper office to the state highway, he went to his home to get the empty milk cans, and thereby apparently

deviated from a direct course from the newspaper office to the state highway on which the deliveries of the newspapers were to be made, the question was raised as to the liability of the proprietor of the newspaper for the damages resulting from the injury to the employee. The court held in effect that, in view of the fact that it was not denied, the employer was aware of, and acquiesced in, the practice of the employee to take the road which he did; that, because there was no showing that the employee was not privileged to select the road which he would take in reaching the commencement of his newspaper route, and that any deviation which the employee had made had been completed, at the time of the accident he "was engaged in the performance of his duty carrying newspapers in bulk preparatory to their delivery to individual customers."

The facts of that case are distinguishable from those of the instant case in two important particulars, to wit: First, as to the knowledge and acquiescence of the employer in the practice followed by the employee; secondly, at the time the accident in the cited case occurred the employee had completed the deviation from his work of delivering the newspapers; while in the instant case at the time the accident occurred the employee was still engaged solely in delivering milk, and had not returned from his deviation from delivering newspapers.

So far as the proprietor of the newspaper was concerned, it is clear that the boy was engaged to perform a definite service, to wit, to deliver a newspaper at each of several designated places. After the delivery of all the newspapers, with the exception of the one which remained in the possession of the boy, and, upon his departure with the milkman from the neighborhood covered by the newspaper route, the boy occupied a position no different from that which he would have occupied had he left his occupation as a carrier of newspapers and gone away on any other business or pleasure. For example, had the boy taken the one newspaper with him and gone with another boy up in nearby hills on a rabbit hunting expedition, expecting to deliver the one newspaper on his return from the rabbit hunt, and had the boy been injured while thus engaged, could it be reasonably contended that, while the boy was rabbit hunting, he was acting within the scope of his employment as a deliverer of newspapers? Or, assuming that through the carelessness of the boy while he was either on the milk route, or on the rabbit hunt, he had caused a personal injury to result to some third person, would his employer, the proprietor of the newspaper, have been held liable for the damages thus caused? Or, assuming a third situation: Instead of the remainder of the milk route lying in a neighborhood adjoining that covered by the newspaper route, let it be assumed that such re-

mainder of the milk route lay in a territory somewhat remote therefrom—say, a distance of ten miles—would it be reasonable to hold that, although the general trend of the milk route at the time the accident occurred was in the direction of the house at which the one remaining newspaper in the possession of the boy was to be delivered, the boy was acting in any capacity in connection with his occupation of delivering newspapers?

[4] If the definition as to what constitutes "arising out of and in the course of the employment," as contained in the McNicol Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, be accepted as a guide, it will become apparent that the injury sustained by the boy in the instant case is not compensable so far as the proprietor of the newspaper is concerned, for the reason that the accident did not occur "while the workman is (was) doing the duty which he is (was) employed to perform," and that there was no causal connection between the conditions under which the delivery of the newspaper was required to be performed and the resulting injury. Unless it could have been contemplated by the employer of the boy that he would make an arrangement with the milkman facilitating the delivery of the newspapers, and that the boy would leave his work and engage solely in the delivery of milk, it cannot be said that the injury to the boy "followed as a natural incident" of his work. While in the instant case the evidence shows that no restrictions were placed by the employer upon the boy with reference to the method, mode, or manner of making deliveries of the newspaper, the rule is that, before an employee will be entitled to be compensated for an injury, it must appear that the accident arose out of his employment, that it is possible to trace the injury to the nature of the work of the employee, or to the risks to which the work exposes him; and that the accident must have been one resulting from a risk reasonably incident to the employment. 27 Cal. Jur. p. 344, and cases there cited.

[5] Had the accident in question occurred at a time when the boy was concurrently engaged in his two separate occupations of delivering newspapers and assisting in the delivery of milk, in view of the decisions, and especially the case of Press Publishing Co. v. Industrial Accident Commission, 190 Cal. 114, 210 P. 820, it perhaps would follow that the proprietor of the newspaper would be liable for compensation to the boy as provided by the statute; but, as stated in 27 California Jurisprudence, at page 332: "If at the time of his injury he was engaged in service which pertained peculiarly to one employer, he may claim no compensation from the others." With the conditions present as hereinbefore set forth, that is to say, that at the time the accident occurred the boy had deviated from his employment as a

newspaper carrier, and at that time was acting without the scope of such employment, it results that he should have received no award of compensation arising out of his employment as such carrier.

So far as the award by respondent affects petitioner, it should be annulled. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 463

PEOPLE v. GARCIA. (Cr. 1365.)

District Court of Appeal, First District, Division 1, California. May 31, 1927.

1. Criminal law $\S$ 1165(1)—Defendant must have been substantially injured by error before conviction will be reversed.

Before a judgment of conviction will be reversed, it must appear that the defendant has been substantially injured by the error complained of.

2. Criminal law $\S$ 1169(1)—Where record showed no prejudicial effect from receiving improper evidence and having portions of it read to jury before it was finally stricken, conviction was not reversed.

On trial for assault, where certain evidence was improperly received, and portions of it were read over to the jury before it was finally stricken, but the record on appeal did not show that the verdict was the product of confusion caused by court's rulings, or that prejudicial effect remained from the original reception of the evidence, the conviction was not reversed.

3. Criminal law $\S$ 1169(5)—Trial court may correct error in admission of testimony.

The trial court is allowed to correct error which may have been committed in the admission of testimony.

4. Criminal law $\S$ 1144(12)—Jury is presumed to have disregarded improper evidence withdrawn immediately, where court so instructed.

Where improper evidence is withdrawn without delay, and the jury instructed to disregard it, error in admitting it is cured, and jury will be presumed to have obeyed the instruction.

5. Criminal law $\S$ 1163(3)—In absence of affirmative showing that jury misunderstood ruling admitting evidence for limited purpose, rights of defendant are not presumed prejudiced.

In the absence of an affirmative showing that the jury misunderstood ruling admitting certain evidence for a limited purpose only, it will not be presumed that the rights of the defendant were prejudiced.

6. Homicide $\S$ 170—Evidence that complaining witness pointed out defendant to officer as one committing assault held admissible for identification only.

In prosecution for assault with intent to commit murder, evidence that several days after

the alleged crime the complaining witness pointed out defendant to an officer, and said, "This is the man," held admissible to identify defendant, but not for purpose of showing guilty intent.

7. Criminal law $\S$ 695½—Where admissible evidence was stricken from record, there was no error in later restoring it.

Where judge, in prosecution for assault with intent to commit murder, struck certain admissible evidence from the record owing to a misunderstanding as to its purpose, held that it was not error to restore the same to the record later during the trial.

8. Homicide $\S$ 174(8)—Defendant's false statements as to presence at certain station and ownership of automobile he was driving, made eleven days after alleged assault, held admissible on question of guilt.

In prosecution for assault with intent to commit murder, defendant's false statements to officers regarding his presence at a certain station and as to the ownership of the automobile he was then driving, made eleven days after the alleged assault, held admissible on question of guilt.

9. Criminal law $\S$ 829(1)—Refusing instructions covered by court's charge held proper.

Refusal to give instructions which were substantially covered in the court's charge held no error.

10. Criminal law $\S$ 1044—Defendant cannot complain of testimony admitted over objection where he neither made motion to strike nor claimed misconduct in asking question.

Where, after certain testimony was admitted over defendant's objection, defendant made no motion to strike out the question or the answer, nor asked that the question be assigned as misconduct, he cannot raise the point on appeal.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Henry Garcia was convicted of simple assault, and he appeals. Affirmed.

Myron Harris and Leo Sullivan, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Earle Warren, Dist. Atty., and Charles D. Wehr, Deputy Dist. Atty., both of Oakland, for the People.

KNIGHT, J. The defendant was charged by information with the crime of assault with intent to commit murder alleged to have been committed on February 15, 1926, and upon trial was convicted of simple assault. Upon this appeal he urges as grounds for reversal that the court erred in ruling upon matters of evidence and in refusing to give the jury two instructions proposed by him; also misconduct on the part of the district attorney.

Thomas M. Hyland, a detective police sergeant, testified as a witness for the prosecution with reference to a conversation held

with the defendant shortly after his arrest and as to the latter being identified at that time by the complaining witness and others. Defendant objected to much of the testimony, and moved to strike out portions thereof; many of his objections and motions being sustained. At the conclusion of the direct examination the court stated:

"I am going to strike out some of this testimony that is not admissible. All of the testimony of the witness given here this afternoon, until they started in about the row of the men, the line-up, everything previous to that. So there will be no misunderstanding on the part of the jury, we had better have the portion read that remains in the testimony."

The reporter then proceeded to read the testimony to the jury, but, when he reached a particular answer therein, the court interrupted, stating:

"I cannot say as far as that is concerned the testimony is admissible."

The district attorney briefly commented on the answer regarding which the court was doubtful, and the court then said:

"I am afraid the jury will be confused about what is to remain in and remain out. We will take a recess at this time."

During recess the court designated the portions of the objectionable testimony it was going to exclude, which embraced more than had been stricken out at the time the testimony was read by the reporter before recess was declared. Upon reconvening, the court said:

"In order that there may be no misunderstanding about the testimony that Officer Hyland has given this afternoon, which is to be stricken out and disregarded by the jury—the court has ordered certain portions stricken out—the reporter is going to read all that remains in; that is, all that you are to consider. You are only to consider what the reporter is going to read to you,"

—and thereupon the reporter read only the portions of the testimony which the court allowed to stand.

Defendant contends that, on account of the manner in which the objectionable portions of the testimony were stricken out, "it is doubtful whether after final ruling of the court the jurors knew or appreciated how much of the testimony of the witnesses they were to consider and how much they were to disregard"; and that, since the jury heard the improper testimony once and part of it twice, "it is extremely unlikely that the prejudicial effect of the original reception of the testimony and the subsequent repetition of a part thereof were entirely obliterated from the minds of all jurors by the final ruling or any instructions of the court."

[1-4] Before a judgment of conviction will be reversed, however, it must affirmatively appear that the defendant has been substan-

tially injured by the error complained of. *People v. Lapara*, 181 Cal. 66, 183 P. 545; *People v. Mahach*, 65 Cal. App. 359, 224 P. 130; *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042; *People v. Stephens*, 29 Cal. App. 616, 157 P. 570, 572. We find nothing in the record before us upon which to base the inference that the verdict herein was the product of confusion caused by the court's rulings or that any prejudicial effect from the original reception of the objectionable evidence remained with the jury after the same had been stricken out. The trial court is allowed to correct error which may have been committed in the admission of testimony; and, where the improper evidence is withdrawn without delay, and the jury instructed to disregard the same, it will be presumed that the jury obeyed the instruction, and any error committed in admitting the same is cured. *People v. Dominguez*, 61 Cal. App. 182, 214 P. 448; *People v. Prather*, 134 Cal. 436, 66 P. 589, 863; *People v. King*, 56 Cal. App. 484, 205 P. 703; *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383. In the instant case, therefore, nothing appearing to the contrary, we must presume that the jury acted in pursuance of the trial court's admonition regarding the excluded testimony; and consequently any error which may have been committed in its original reception is deemed to be cured.

Testimony was given by another police officer named J. A. Sevina as to having seen the defendant on February 26, 1926, several days subsequent to the date of the alleged crime, at High street station in the city of Alameda, sitting in an automobile, apparently waiting for the arrival of a train, at which time, the officer testified, he held a conversation with the defendant as to the ownership of said automobile, and regarding the latter's presence at said station at that particular time. He further testified that the complaining witness who had just arrived on the train was asked by the officer in the defendant's presence "if he knew any of these boys," and, upon answering in the affirmative, was asked "which one"; that thereupon "he pointed out the defendant, and said, 'This is the man.'" Counsel for defendant made frequent objections to the introduction of this testimony, and moved to strike out certain portions of it, and, when the direct examination had been concluded, stated: "We renew our motion," to which the court replied: "The motion is granted, and the jury is instructed to disregard it." However, at the next session, the court of its own motion ordered the testimony restored to the record, and allowed the prosecution to further examine the police officer upon some of the same matters. In making the order of restoration the court said:

"This morning I struck out testimony of the police officer as to the occurrence on the 26th

day of February, where he said that the complaining witness said 'This is the man.' I thought the purpose of introducing that testimony was to show guilty intent on the part of the defendant. I struck it out for that reason. The thought occurred later that it should not have been stricken out; that the prosecution is entitled to have it in the record for the purpose of showing that the complaining witness identified the defendant at that time, on the 26th, eleven days after. I am going to restore that portion of the testimony, the testimony of Officer Sevina. You understand it is for no other purpose than showing that he identified the defendant on that day."

Defendant contends that "the rulings of the trial court produced confusion and uncertainty in the minds of the jurors as to what portions of the testimony of the witnesses were finally left in the evidence for their consideration."

[5-7] It is apparent, we think, that the order of restoration did not have the effect asserted by defendant, for the reason that it specifically referred to the "testimony of the police officer (Sevina) as to the occurrence on the 26th day of February where he said that the complaining witness said, 'That is the man,'" which testimony, the court stated, had been stricken out that morning. In any event, as held with reference to the preceding point, in the absence of an affirmative showing that the jury misunderstood the ruling, we cannot presume that the rights of the defendant were prejudiced thereby (*People v. Lapara*, supra; *People v. Mahach*, supra), and, the testimony being, in our opinion, admissible for the limited purpose stated by the court (*People v. Wallin*, 55 Mich. 497, 22 N. W. 15), no error was committed in restoring the same to the record.

[8] The question of the falseness of defendant's statements made to the two officers mentioned regarding his presence at the High street station on February 26, 1926, and as to the ownership of the automobile he was then occupying and driving, was a matter which the jury was entitled to consider as a circumstance in determining the question of defendant's guilt. *People v. Cole*, 141 Cal. 90, 74 P. 547; *People v. Peete*, 54 Cal. App. 333-352, 202 P. 51.

[9] The ground upon which the court refused to give the two instructions proposed by defendant was that the elements stated therein were substantially covered in the court's charge. There was no error in such refusal. The effect of the first of these instructions was that, if it were established beyond a reasonable doubt that the defendant was driving the automobile from which the shot was fired at the complaining witness, such fact was "not alone of itself sufficient to convict the defendant of the crime charged in the information." The instruction given by the court on that subject was as follows:

"The mere fact that a person is present at the scene of a crime and knows that a criminal offense is about to be perpetrated is not sufficient to convict a defendant in a criminal case. In addition thereto it must appear that the accused person, with knowledge of the criminal intent of the person who directly commits the offense, has done or is doing some act that assists or is assisting in the perpetration of the crime."

The other proposed instruction related to the presumption of innocence and the law of reasonable doubt. Both matters were fully and fairly covered in the court's charge.

[10] After examining the assignments of alleged misconduct on the part of the district attorney and those portions of the record to which they relate, we fail to find grounds for reversal. The first assignment is based upon a remark made by the district attorney in his opening statement to the jury, to which objection was made and sustained, and at defendant's request the jury was instructed to disregard it. At the conclusion of the opening statement the jury was further instructed at defendant's request that said opening statement was not evidence, and should not be considered as such. Any injurious effect the remark may have produced was doubtless removed by the court's instructions. "It must be a very exceptional case in which a reversal will be ordered by reason of the character of the opening statement of the prosecuting officer. * * *" *People v. Sing Yow*, 145 Cal. 1, 78 P. 235. The next point refers to certain testimony to which objection was made by defendant and by the court overruled. No motion was made to strike out the question or the answer, nor was the asking of the question assigned as misconduct. Consequently defendant is not now in a position to raise the question. *People v. Wong Toy*, 189 Cal. 587, 209 P. 543; *People v. Babcock*, 160 Cal. 537, 117 P. 549; *People v. Nakis*, 184 Cal. 105, 193 P. 92. The third and fourth assignments relate to the cross-examination of the defendant upon matters which had been excluded by the court's order striking out part of the testimony. Despite the exclusion of said testimony, the defendant, while testifying, adverted to the same matter, and consequently there was more or less justification for the cross-examination complained of, which weighs strongly against the charge of misconduct. The force and effect of the question upon which the fifth assignment is based, assuming the question to have been improper, was clearly overcome by the timely objection of the defendant which was sustained, and the prompt instruction of the court to the jury that it should be disregarded. In *People v. Garbutt*, 197 Cal. 200, 239 P. 1080, it was said:

"Counsel's conduct must reach a course of proceedings militating against justice and the fair and orderly conduct which should charac-

terize a judicial proceeding in criminal cases before error can be predicated on it."

In our opinion, the conduct complained of herein did not approach the limitation of the rule stated, nor can it be said to have interfered with the defendant's having had a fair and impartial trial.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

83 Cal. App. 399

KREISS v. SWINEHART et ux. (Civ. 5808.)★

District Court of Appeal, First District, Division 2, California. May 26, 1927.

Hearing Denied by Supreme Court July 25, 1927.

1. Sales ⇨52(5)—Finding that instrument leasing rugs sought to be replevied was intended to be used as collateral held sustained by evidence.

In action by sellers to replevy oriental rugs, evidence held to sustain finding that an instrument leasing such from the sellers was executed merely to enable the sellers to use it as collateral.

2. Appeal and error ⇨93(4)—Where trial court found generally for defendants in replevin action, appellate court was bound to assume that it found according to defendants' contention that lease was not intended as such.

Where trial court made finding in action in replevin merely that defendants were owners and entitled to possession of the rugs sought, appellate court was bound to assume that the trial court found in accordance with defendants' contention that they signed an instrument leasing the rugs from the sellers merely to enable the sellers to borrow money thereby.

3. Evidence ⇨462—Evidence that lease was executed for use as collateral held not to vary terms.

Evidence that lease was executed merely to enable the purported lessors to use it as collateral for the purpose of borrowing money held not to vary the terms of the lease, but to merely show that no lease was executed as between the parties.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Replevin by Herbert L. Kreiss and others, copartners doing business under the name and style of L. Kreiss & Sons, against D. G. Swinehart and wife. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

R. H. Cross and Cross & Brandt, all of San Francisco, for appellants.

Annette Abbott Adams and B. D. Marx Greene, both of San Francisco, for respondents.

KOFORD, P. J. Plaintiffs were furniture dealers. They brought this action in replevin against their customers, the defendants, for possession of four oriental rugs. Judgment was for the defendants. Plaintiffs appeal from the judgment and from an order denying a new trial.

The issues in the case relate to whether the defendants had purchased the rugs outright or whether they held the rugs under a lease contract. The defendants had been customers of plaintiffs for a number of years and had purchased large amounts of furniture. The plaintiffs had been in the habit of extending, or at least the defendants had been in the habit of enjoying, very liberal terms of credit on these purchases. However, no lease contracts were employed by the parties in their dealings with each other prior to the rug deal involved here. Commencing in May, 1921, various rugs were by plaintiffs put down in defendants' residence for trial, but it was not until about October 1, 1921, that defendants settled upon and selected the four certain rugs described in the complaint herein. At that time the defendants delivered to plaintiffs one oriental rug previously purchased and paid for by them, which was by the plaintiffs accepted as equivalent to the payment of \$1,900. There was no express agreement about the terms of payment or credit. A few days later the manager of plaintiffs' rug department called at defendants' residence and procured defendant Mrs. Swinehart to sign a lease contract of the rugs. This is not the lease contract involved or relied on here. Two further payments of \$500 each were made on the rugs, but one of these payments was applied by the plaintiffs to the defendants' general account.

On June 21, 1922, plaintiffs' manager called upon both defendants at their residence. At this time a further payment of \$500 was made. At the request of plaintiffs' manager the defendants both signed at this time a form of lease which, after describing the four rugs, stated:

"This is to certify that (defendants) have this day leased of (plaintiffs) the goods described above, value \$7,410, subject to the following terms."

The lease then recited \$1,900 credit for the rug turned in, \$500 credit for one of the \$500 payments previously made, and a further credit of \$500 for a payment on the then date. It provided that further payments should be made on October 1, 1922, January 1, 1923, and March 31, 1923. It provided that should plaintiffs fail to make any of the specified payments, then the defendants agreed to surrender and return the said goods to plaintiffs. The lease also contained other provisions, including a recapture clause for breach of covenants. This is the lease involved in this action.

Later, about November, 1922, according to the testimony, defendants returned two of the four rugs to be by plaintiffs stored or resold and the proceeds credited to defendants' account. At the time this action was commenced these two rugs were still in the possession of plaintiffs. The sale prices of these two rugs, which we will refer to as the returned rugs, were \$540 and \$4,500, respectively. The other two rugs, which we will refer to as the replevied rugs, were taken at the commencement of this action by plaintiffs under claim and delivery proceedings. They were priced at \$850 and \$1,520, respectively.

The complaint alleged that plaintiffs were the owners and entitled to the possession of the four rugs, and that all four were in possession of defendants, who refused to give possession on demand. Defendants' answer admitted plaintiffs were the owners and entitled to the possession and alleged that plaintiffs were in possession of the two returned rugs, but asserted ownership and right of possession in the two replevied rugs. The court's findings of fact were that plaintiffs were the owners and in possession of the returned rugs, but that defendants were the owners and entitled to the possession of the replevied rugs.

The allegations of the complaint and answer thus contained only general averments and the findings of fact following the pleadings do likewise, so that we must look to the evidence in the case for the exact theory of the decision. The evidence is undisputed that the defendants failed to make the payments called for by the terms of the lease. Respondents contend that the judgment is supported by the evidence in the record upon two theories: First, that there was a complete sale of the rugs prior to the lease signed on June 21, 1922, and therefore there was no consideration for the execution for the said alleged lease. Second, that the alleged lease was signed for the particular and limited purpose of permitting the plaintiffs to use the same as a means of borrowing money at the bank, and that it was not in the minds of the parties that the lease should represent the transaction as between the parties nor be binding upon them according to its terms.

Appellants contend that the evidence does not show that the sale was complete with title passed when the lease agreement was signed, so that there was a consideration for the

lease; that even if title had passed, the lease by its terms extended the defendants' period of credit and that was a consideration; and that, in any event, the signing of the lease was a novation.

[1] Our view of the evidence is that the sale was complete and title passed when the final selection of rugs was made and the \$1,900 rug was turned in on the purchase price. It is a disputed point in the briefs whether the lease gave more favorable terms of credit than the defendants had a right to expect from the statements made by the salesman. It would not help in solving this case to determine this question. The appellants' arguments are predicated upon the assumption that the lease exists as a fact between the parties. Assuming the existence of the lease, they argue its covenants are its consideration. If there is no lease between the parties, no question of consideration need be determined.

The testimony of both defendants was that the plaintiffs' manager represented that his firm wanted the lease signed so that it could raise money with it as collateral; that upon this representation they signed the lease for the sole purpose of allowing plaintiffs to use it as collateral to borrow money; that there was no intention of the parties that it would constitute the existing or any new agreement or understanding between the parties. Oral testimony offered by plaintiffs was to some extent in conflict with defendants on this point. The lease agreement was never used as collateral.

[2, 3] Upon this appeal, we are required to presume that the court decided the lease was signed for the purpose of a limited use. This evidence does not vary the terms of the lease, but shows that no lease as such was executed as between the parties. *Nolan v. Nolan*, 155 Cal. 477, 482, 101 P. 520, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056; *Peugh v. Davis*, 96 U. S. 232, 336, 24 L. Ed. 775; *Bridges & Co. v. Bank of Fergus County (Mont.)* 251 P. 1057, 1060; *McCaull-Dinsmore Co. v. Stevens*, 59 Mont. 206, 194 P. 213, 214; 22 Corpus Juris, § 1617, p. 1214; 17 Cyc. 692, 694. It is like proving an absolute deed to be a mortgage, or an assignment to be for the purpose of collection only.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

porations exercising same powers, jurisdiction, and privileges, and, generally, when public corporation, holding limited powers, is annexed to a municipality possessing all of such powers, and wider powers in addition, the annexing municipality takes over the functions of the annexed corporation, and its powers and duties in such territory are thereupon extinguished.

3. Municipal corporations ⇨35—City's annexation of unincorporated territory of county involved in pending improvement proceeding did not deprive county of jurisdiction to proceed with improvement (Acquisition and Improvement Act of 1925).

Where lands to be acquired for street improvement, under Acquisition and Improvement Act of 1925 (St. 1925, p. 849), consisted in part of land in Culver City and in part of unincorporated territory of the county of Los Angeles, and where the unincorporated territory was annexed to and became part of the city of Los Angeles while the improvement proceeding was still pending, *held* county of Los Angeles having acquired jurisdiction did not lose jurisdiction by reason of such annexation and could properly proceed to issue bonds.

In Bank.

Original petition by the Allied Amusement Company of Los Angeles and others for writ of mandamus to be directed against H. L. Bryam, Treasurer of the County of Los Angeles, to compel him to issue certain street improvement bonds. Writ granted.

Overton, Lyman & Plumb, and Tanner, Odell & Taft, all of Los Angeles, for petitioners.

E. W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent.

WASTE, C. J. Petitioners have applied for a writ of mandate, to be directed to the respondent, Bryam, as treasurer of the county of Los Angeles, commanding him to execute and issue certain bonds in a street improvement proceeding in the county, instituted under the Acquisition and Improvement Act of 1925, commonly called the "Mattoon Act." The constitutionality of the act (Stats. 1925, p. 849) was upheld in *County of Los Angeles v. Hunt*, 198 Cal. 753, 247 P. 897. In a proceeding known as "In the matter of Acquisition and Improvement District No. 24, of the County of Los Angeles," matters have progressed up to the time the issuance of the bonds authorized thereby is to be had through the action of the respondent, in his capacity as treasurer of Los Angeles county. He has refused to proceed until certain questions which may affect the legality of the bonds, if issued, have been settled by this court. The matter comes before us on a general demurrer to the petition.

The board of supervisors of the county of Los Angeles, under the Acquisition and Im-

201 Cal. 316

ALLIED AMUSEMENT CO. OF LOS ANGELES et al. v. BRYAM, County Treasurer. (S. F. 12518.)

Supreme Court of California. June 6, 1927.

1. Eminent domain ⇨262(5)—Inadvertent use of word "northwesterly," instead of "northeasterly," in a call in the description of property to be taken for street improvement, *held* harmless error (Acquisition and Improvement Act of 1925).

Inadvertent use of word "northwesterly," instead of "northeasterly," in a call in the description of property to be acquired for opening and widening of streets, under Acquisition and Improvement Act of 1925 (St. 1925, p. 849), *held* harmless error.

2. Municipal corporations ⇨39—Two distinct municipal corporations exercising same powers, jurisdiction, and privileges cannot exist at same time in same territory.

There cannot be, at the same time, within the same territory, two distinct municipal cor-

provement Act, initiated a proceeding for the opening of Washington place, partly within and partly without Culver City. At the time of the initiation of the proceeding the district to be assessed for the costs and expenses of the improvement, known as Acquisition and Improvement District No. 24, and the lands to be acquired, consisted, in part, of a portion of Culver City, and the balance of the district, and the remainder of the lands, were unincorporated territory of the county of Los Angeles. Having obtained jurisdiction, and proceeded under the statute until such step was next in order, the board of supervisors caused condemnation proceedings to be commenced in the superior court of Los Angeles county, for the purpose of acquiring the lands needed for the opening and widening of the street. The action was duly prosecuted to judgment, and an interlocutory decree in condemnation entered. Thereupon the board adopted a resolution authorizing and directing the county treasurer to issue bonds of acquisition and improvement district No. 24 in the sum of \$260,928.93. Pursuant to such direction, the treasurer published a notice offering the bonds for sale, and on May 6, 1927, the date specified in the notice, accepted the bid of Brown-Crummer Company, one of the petitioners, therefor. Prior to the acceptance of the bid all of the unincorporated territory included within acquisition and improvement district No. 24 was annexed to the city of Los Angeles. Because of the existing situation, the treasurer refused to go forward with the sale, or to execute or to deliver the bonds, upon the ground that the county of Los Angeles and its officers had lost jurisdiction of the proceedings, and were deprived of power to issue the bonds by reason of the fact that the district erected and to be assessed for their retirement is, at this time, entirely within the cities of Los Angeles and Culver City.

[1] But two questions are presented for our consideration. The first relates to an inadvertent error in the publication of the initial resolution of intention, ordering the acquisition of the property required for the improvement. As adopted by the board of supervisors, the last call in the description of "that portion of the 182.14-acre parcel of land allotted to Francisco and Dolores Machado in the partition of the Rancho La Ballona" read: "Thence *northeasterly* in a direct line to the point of beginning." In publishing the notice required by the act, the call read: "Thence *northwesterly* in a direct line to the point of beginning." (Italics added.) Otherwise the description was correctly published. The error was harmless. The "point of beginning," having been accurately and correctly established, both in the resolution and in the published notice,

was, in effect, a monument, and the words in the last call, "Thence * * * in a direct line to the point of beginning," controlled the word of course or direction. The error in publication can therefore be safely disregarded, for it is inconceivable that it in any way misled the owners of the property sought to be acquired, or the public generally.

[2, 3] The other question submitted for decision is whether or not a county, or its officers, having acquired jurisdiction to proceed, under the Acquisition and Improvement Act of 1925, for the opening or improvement of highways partly within a municipality and partly in unincorporated territory within the county, and having proceeded to the point of issuing the necessary bonds for the consummation of the project, lose jurisdiction when, by reason of subsequent annexation proceedings, all the territory in the district is included within two cities. Respondent's position rests upon the principle of law (so well established that we deem it unnecessary to cite the authorities) that there cannot be, at the same time, within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction, and privileges, and that, ordinarily, and as a general rule, when a public corporation, holding limited powers, is annexed to a municipality which possesses all of the powers of the corporation which has been annexed, and wider powers in addition, the annexing city takes over the functions of the limited corporation, and its powers and duties in such territory are thereupon extinguished. He cites *In re East Fruitvale Sanitary District*, 158 Cal. 453, 111 P. 368, in support of his position, but is driven to admit, as was held in that case, that, in the absence of any constitutional restriction, the Legislature has the absolute power over the organization, the extent, and the powers and liabilities of municipal and other public corporations established as agencies of the state for purposes of local government. "What shall be the effect," says the author of the opinion (page 457 [111 P. 370]), "of the enlargement or diminution of the boundaries of such corporations or of the consolidation of two into one, or of the annexation of the territory of one into another, is a question to be answered by a determination of the legislative intent." While there is no direct provision in the Acquisition and Improvement Act of 1925 expressing the intention of the Legislature as to what must follow when situations arise like that in the instant case, a study of the act as a whole, and of the scope of its provisions as to jurisdiction and procedure, leaves little doubt in our minds on that question.

In our former opinion (*County of Los Angeles v. Hunt*, supra), Mr. Justice Richards, speaking of the extent to which proceedings

may be carried under the terms of the act, said:

"When a general law of the state provides, as the act in question does, for a scheme of public improvement, the scope of which both intrudes upon and transcends the boundary of one or several municipalities, such contemplated improvement ceases to be a municipal affair and comes within the proper domain and regulation of the general laws of the state."

The controlling purpose of those who framed the act, and of the Legislature in its adoption, was to provide a simplified plan, and, at the same time, a comprehensive procedure for the acquisition and improvement of public ways, parks, and pleasure grounds, whether lying entirely within unincorporated territory of a county or within territory of a municipality, or lying partly within such unincorporated territory and partly within one or more municipalities; or lying within two or more municipalities; or forming the exterior boundary of any municipality where the same joins unincorporated territory of a county or the territory of another municipality, whether partly within or without such boundary. *County of Los Angeles v. Hunt*, supra. The statute, supra (section 2), in terms declares that the true intent and meaning of its provisions for acquisition and improvement of property is that—

"The necessary jurisdiction and power for the consummation thereof shall be vested in, and proceedings therefor may be had and taken by, the legislative body, either of the county or of any municipality in which the public interest or convenience is affected thereby and that each of said legislative bodies shall have concurrent jurisdiction to initiate such proceedings; provided, that the legislative body initiating the proceeding and adopting the resolution of intention therefor, as [in the act] provided, shall thereafter have exclusive jurisdiction of the proceeding and of all acquisitions and improvements comprehended therein, for the purposes of consummating the same."

Language could not be plainer or more comprehensive in its scope in the matter of providing for a concurrent and a continuing jurisdiction, and for the "consummation" of the acquisition or improvement permitted under the act. If, then, the Legislature provided for county jurisdiction over a district lying partly within one or more municipalities, and partly within unincorporated territory, is it reasonable to suppose that it intended that a district, having acquired jurisdiction in a proceeding, would pass out of existence because a part only of its territory became merged in a city, the rest of the territory remaining, as before, within another and a separate municipality? To accept such a contention would be, in effect, to hold that the formation of a district embracing any territory within a city could not be accom-

plished as an initial proceeding. The respondent admits, as he must, that the improvement contemplated in district No. 24 was of more than local concern, and that the county of Los Angeles became the mandatory of the state to initiate and conduct the proceedings. *Pasadena Park Imp. Co. v. Leland*, 175 Cal. 511, 166 P. 341; *Gadd v. McGuire*, 69 Cal. App. 347, 231 P. 754.

We are not now called upon to determine what result would follow if all the territory of a district, created and existing under the Acquisition and Improvement Act, should be absorbed and become a part of a single municipality having superior powers. District No. 24 includes within its boundaries territory in two separate and distinct municipalities.

Let a writ of mandate issue as prayed for.

We concur: SEAWELL, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

201 Cal. 322

DE HAVEN v. SMITH. (S. F. 11204.)

Supreme Court of California. June 6, 1927.

1. Trusts $\Leftrightarrow$ 44(1)—Evidence in suit for accounting held to sustain finding that defendant received property as confidential agent in trust for plaintiff's benefit.

Evidence that defendant traveled about with plaintiff, inducing her to intrust him with her income, capital, automobile, and jewelry, attending to her business and traveling arrangements *held* to sustain the trial court's finding in plaintiff's action for accounting that defendant held the property in trust as a confidential agent.

2. Trusts $\Leftrightarrow$ 325—Evidence of value of property in suit against confidential agent for accounting held to warrant judgment in alternative for property or value.

Evidence of value of property received by a confidential agent in trust for the use of the plaintiff *held* sufficient to warrant, in suit for an accounting, judgment in the alternative for the return of specific property or its value.

3. Evidence $\Leftrightarrow$ 113(4)—Proof of par value is some evidence of value of bonds.

Evidence of the par value of bonds is some evidence of their value.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action for an accounting by Louise De Haven against John A. Smith. From the judgment, defendant appeals. Affirmed.

Harry H. Baier and Albert Jacoby, both of San Francisco, for appellant.

Myrick & Deering and Scott, of San Francisco, for respondent.

LANGDON, J. Plaintiff alleged that on or about December 1, 1920, at Reno, Nev., she and defendant entered into an agreement whereby defendant was to become the confidential agent of and trustee for plaintiff in all of plaintiff's financial affairs, and that thereafter certain money and property were delivered by plaintiff to defendant in his fiduciary capacity; that on December 13, 1920, plaintiff delivered to the defendant, as her agent and trustee, the sum of \$13,951, with instructions to buy an automobile to cost not more than \$5,000 and to use the balance for the use and benefit of plaintiff; that defendant purchased an automobile for \$4,620 and held the balance in trust for plaintiff; that thereafter and from time to time during the years 1920 and 1921, plaintiff delivered to defendant, as her said agent, sums of money aggregating in excess of \$10,000, and that defendant has refused to account for any of said sums, although a demand for such accounting has been made by plaintiff.

It is further alleged that in the year 1921 plaintiff delivered to defendant two pearl earrings of the market value of \$2,000 for the purpose of having them examined and valued by a jeweler and for no other purpose and that defendant retained said jewelry and refuses to deliver it to plaintiff; that in the same year plaintiff delivered to defendant as her said agent and trustee 18 bonds of the par value of \$1,000 each, upon his representation that he would invest the proceeds thereof so as to increase the capital 100 per cent. and that defendant still retains the said bonds or the proceeds thereof; that in February, 1921, plaintiff delivered to defendant as her said agent and trustee \$4,000 with which to purchase a second automobile for plaintiff; that defendant purchased said automobile with said funds and now holds the same or the proceeds thereof as trustee for plaintiff. The prayer was for an accounting and judgment for money and property found due plaintiff by defendant.

Defendant answered denying the allegations of the complaint as to the confidential relationship of the parties and alleging that the property mentioned in the complaint was delivered to him from time to time as gifts from plaintiff to defendant.

The trial court found that the property was delivered to defendant, as the confidential agent and trustee of the plaintiff, and found the amounts and value thereof to be as alleged in the complaint, except that the pearl earrings are found to have been of the value of \$200. The bonds are found to be of the value of \$18,000 and the automobile to be of the value of \$1,500, and judgment was given for the return of these three items of property or their value as found by the court. As to the money, aggregating over \$20,000,

intrusted to defendant by plaintiff, no judgment was given, because an accounting thereof was waived by plaintiff. The record discloses that these sums were used, in part at least, for the living expenses of plaintiff and defendant during the period of their association upon their travels over the country.

From this judgment defendant appeals, contending that the record fails to disclose a fiduciary relationship between the parties; that there is no evidence of the value of the property retained by defendant, and therefore a judgment in the alternative for its return or for its value is error; that the record discloses that part of the funds with which the second automobile was purchased belonged to defendant, having been received by him as insurance upon the first automobile purchased by him with the funds of plaintiff, which first automobile he contends was a gift to him from plaintiff.

Plaintiff and defendant met at Reno, Nev. Plaintiff was securing a divorce; defendant conducted a taxicab business. Plaintiff had two daughters in Germany. She secured a divorce from her husband and was in receipt of an income from him. She was also one of the heirs to considerable property in Chicago, from which she was receiving an income of over \$1,000 a month. Plaintiff met defendant when she engaged his "cabs" for use during her stay in Reno. He asked her to "help him out" with money, and she gave him \$500. She paid for the use of his "cabs" during the six months she was in Reno. When plaintiff was ready to leave there, she spoke of coming to California in an automobile, and defendant proposed that she should take one of his cars with a chauffeur for three months, for which she was to pay \$1,000 a month. There was then discussed a scheme by which the defendant was to try to secure for himself an inheritance. It appears that plaintiff was one of the beneficiaries of a trust in an estate referred to in the record as the "Bigelow estate," and under the provisions of the trust her share was to vest in her surviving children, upon her death. Although defendant was about 30 years of age, the parties discussed a plan by which he would become the adopted son of plaintiff, provided the parties were advised by counsel that an adopted child would meet the requirements of the trust. With this idea in mind, the suggested arrangement about renting defendant's automobile with a chauffeur at \$1,000 a month was "turned entirely aside," according to the testimony of plaintiff, and we may pause to remark that we are taking her testimony as true wherever a conflict is found in the record. Defendant was taken to California, "almost as an adopted son." Plaintiff gave defendant a draft for more than \$13,000, and out of the proceeds thereof he was to buy an automobile for her and use the rest for their travels. After that plaintiff handed defendant her income checks as

they were received and he placed them in the bank. At first the account was in the defendant's name and, later, it was placed in a joint account of plaintiff and defendant. In Los Angeles, Cal., the automobile was wrecked, and from the insurance money received for this loss by defendant and with additional money furnished by plaintiff, the automobile involved in the present action was purchased. While traveling about with plaintiff, defendant suggested that the bonds she had were not proper investments, that they had been sold to plaintiff because the seller wanted to get rid of them and that plaintiff should sell them or she would suffer a loss. The bonds were United States Liberty bonds, United States Steel Corporation bonds and railroad bonds. Plaintiff testified:

"He (defendant) told me Mr. Howe must have given me these old bonds—that he wanted to get rid of them, and that he told me he was going to double the bonds for me if I would give them to him. He told me that in Reno there was absolutely no garage—no heated garage—and he showed me black on white that if he only had 50 cars in there he would get me an income of one thousand to fifteen hundred dollars a month, and that he would put his brother in there to keep the books and he needed two men only, but that the \$18,000 that I had bonds would not be enough, so he would be able to get the rest and the first thing he would be able to pay that off and we would go to Europe and not depend on the National Trust Company."

Plaintiff continued:

"He took me down to the bank—I don't know the name of the bank—and he asked he got me to sign these papers and to have the bonds come to Los Angeles. We were in Santa Barbara and were leaving for Los Angeles."

"Q. And where did the bonds come? A. The bonds came to Los Angeles, and when I had them in my hand, I said, 'I want the document, because the capital is mine,' and he answered me, 'Of course, you shall have the document,' and he turned around and said, 'Have you no confidence in me?' And I said, 'Yes, I have confidence, because, you know, I want to adopt you, and I believe that you would not hurt me.' I did not want to give him the bonds until I got the document."

"Q. Did you at any time give him the bonds? A. I gave him the bonds under the condition that he would give me once the document, and he said he would."

"Q. Did he ever do that? A. He has never given me a document and has just gone off with them."

Plaintiff testified that, later, when she asked for these bonds so that she could borrow money upon them to pay federal taxes, defendant claimed they belonged to him.

[1] It is unnecessary to go into further detail regarding the record. The defendant traveled about with the plaintiff, gathering unto himself as he went her income checks,

her capital, her automobile and even her furs and jewelry. During all this time he was managing everything for her, attending to her business and her traveling arrangements, and planning for her future. The record abundantly supports the conclusion that he undertook to hold this property for her use and benefit and expend it according to her directions. He spent large sums of money on himself, and even when he was away from plaintiff demanded \$400 a month for his personal living expenses. He succeeded in using up all plaintiff's income, for which no recovery is had in the judgment appealed from. He now seeks to retain her bonds, automobile and jewelry upon his testimony and that of members of his family that they were gifts to him.

[2, 3] As to the judgment in the alternative, awarding the value of the property to plaintiff in the event it could not be returned to her, the court gave judgment for the par value of the bonds, which was some evidence of their value, and defendant offered no testimony to show that the market value was less than the face value. As to the automobile, the defendant testified that it had cost \$5,385. He told plaintiff that he could resell it for about \$2,000, and the court has allowed plaintiff \$1,500 as its value.

There is no prejudicial error in the record, and if plaintiff collects the amount of this judgment from the defendant partial justice only will have been done her. The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

201 Cal. 357

In re BALLELIO'S ESTATE.

BALLELIO v. PONTRELLI.

(L. A. 9223.)

Supreme Court of California. June 9, 1927.

1. Wills $\S$ 96—Instrument containing testamentary distribution without reference to son, and on reverse side beneficiary's promise to pay son money, held valid testamentary instrument (Civ. Code, $\S$ 1307).

Writing containing testamentary disposition of estate on one side without reference to child, and on the other side promise by sole beneficiary to pay testator's son \$1,000, held properly construed as testamentary instrument, in which testator intentionally omitted to provide for son because of beneficiary's promise, notwithstanding Civ. Code, $\S$ 1307.

2. Wills $\S$ 384—Where testimony is not brought up, reviewing court will assume it supported order admitting will to probate.

Where no testimony in will contest is brought to reviewing court in aid of appeal, it

is justified in assuming that trial court heard such evidence as would furnish support for its order admitting will to probate.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

In the matter of the estate of Emma Ballesio, deceased. Proceeding by John Ballesio, Jr., by his guardian ad litem, contestant, against Ignazio Pontrelli, administrator with the will annexed, proponent. From an order admitting the will to probate and from an order refusing distribution to contestant, he appeals. Affirmed.

George D. Home, of Los Angeles, for appellant.

Turnbull, Heffron & Kelly, of Los Angeles, for respondent.

Ernest M. Torchia, of Los Angeles, for appellant.

WORKS, Justice pro tem. This is an appeal from an order admitting the will of Emma Ballesio to probate and from an order refusing to distribute her estate to John Ballesio, her son.

[1] The writing admitted to probate as a will was executed on both sides of a piece of paper. On one side was the following, preceded by a date line:

"I, Emma Ballesio, being of sound mind wish to dispose of my property consistin of one lot at Monterey Calif and one hous and lot located at 2627 Loosmore St Los Angeles Calif and all my othore property and personal and real to Ignazio Pontrelli, to him I give and bequeatch everything.

"[Signed] Emma Ballesio
"Bettie F. Turner
"John Visconti"

On the reverse side of the sheet was the following:

"I Pontrelli Ignazio

"I agree to deposit one thousand dollars \$1,000.00/100 in the bank for John Ballesio son of Emma Ballesio same pay to him when he will be 21—twenty-one years of age

"Emma Ballesio
"Bettie F. Turner
"John Visconti"

The contest filed by appellant was based on grounds which were disposed of by findings of the trial court adverse to the allegations of the contest.

It is contended by appellant, as a question of law arising upon the face of the will, that the trial court "erred in its interpretation of the document admitted to probate as the will of Emma Ballesio in holding that the reverse side of said document with the writing

thereon constituted a testamentary instrument." It is said in support of this contention:

"The language appearing on the face of the instrument is a clear and unqualified testamentary disposition of the entire estate of deceased to one Ignazio Pontrelli, while on the reverse side of the same instrument appears an unambiguous and unequivocal statement by Pontrelli Ignazio agreeing to do an act himself."

It will be observed, however, as the decedent left a son surviving her, that the "face" of the instrument was incomplete as a testamentary disposition of her estate, for the reason that the son is neither there provided for, nor is an intention there shown to omit to provide for him. The son is mentioned only on the reverse side of the paper. Section 1307 of the Civil Code reads, in part:

"When any testator omits to provide in his will for any of his children, * * * unless it appears that such omission was intentional, such child * * * has the same share in the estate of the testator as if he had died intestate."

It will be observed, also, that here the name of the testatrix and the names of the subscribing witnesses were subscribed to the matter appearing on each side of the paper. This is a material circumstance in determining whether both sides of the paper, taken together, were intended to constitute the will of the testatrix.

[2] Further, no record of testimony is brought to us in aid of the appeal, and we are therefore justified in assuming that the trial court heard such evidence as would furnish support for its order admitting the will to probate. Both sides of the questioned paper were offered for probate; and the trial court found "that said instrument and all thereof, offered as the will of Emma Ballesio, is the will * * * as one document." We may assume, in support of the finding, for instance, that there was evidence that the testatrix declared to the subscribing witnesses that both sides of the paper constituted her will.

The entire document bears the reasonable construction that the testatrix, because of the promise of Pontrelli to pay \$1,000 to her son, intentionally omitted to provide for him in the will. Section 1307 of the Civil Code is thus satisfied.

Orders affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

83 Cal. App. 415

RICHARDSON v. O'HANRAHAN et ux.★
(Civ. 3272.)

District Court of Appeal, Third District, California. May 26, 1927.

Rehearing Denied June 25, 1927. Hearing Denied by Supreme Court July 25, 1927.

1. Dedication ⇨19(1)—Plat need not be made by owner to constitute offer to dedicate street.

To constitute offer to dedicate land for street, it is not essential that plats should be made by owner.

2. Dedication ⇨19(5)—Making sales with reference to another's plat is sufficient dedication.

It is a sufficient offer to dedicate land for street that the owner of the land recognizes and approves plat made by another, making sales with reference thereto.

3. Evidence ⇨460(9)—"Official," in deeds referring to official town map, subsequently filed, may be treated as surplusage, and map identified by parol evidence.

Use of word "official," in deeds referring to official town map, filed after execution of deeds, may be treated as surplusage, and map referred to identified by parol evidence.

4. Dedication ⇨44—Identity of town map, referred to in deeds and former owner's recognition, approval, and dedication of streets delineated thereon, held sufficiently shown.

In action to enjoin obstruction of street and recover damages, evidence held to warrant inference that grantors of town lots referred to only map in their possession or shown to be in existence by use of term "official map" in deeds, and that corporation, through which defendant deraigned title to obstructed part of street, recognized, approved, and dedicated to public use streets delineated on such map.

5. Dedication ⇨35(1), 37—Direction to place town map in county road book, expenditures in improving part of streets delineated, and public user, held acceptance of dedication.

County supervisors' direction to place town map in county road book, designation of street delineated thereon as county roads, and expenditure of public funds in improving part thereof, together with their use by public, constituted sufficient acceptance of landowner's offer to dedicate streets to public use; improvement or use of whole area of street being unnecessary.

6. Municipal corporations ⇨671(7)—Lot owner, whose access to street was shut off by obstruction, sustained special damage, entitling her to sue for injunction.

Lot owner, whose access to street was shut off by obstruction therein, held entitled to sue for injunction; her damage differing in kind, as well as degree, from that sustained by public in general.

7. Municipal corporations ⇨671(5)—Lot owner could sue to enjoin obstruction of street to center thereof as presumptive owner (Civ. Code, §§ 831, 1112).

Lot owner held entitled to sue for injunction against, and damages by, obstruction extending

from her property line to center of street; presumption being that she owned to center of street under Civ. Code, §§ 831, 1112.

8. Easements ⇨17(4)—Deed referring to map subsequently filed gave grantee private easement in adjoining streets delineated thereon.

Deed of lots by reference to map gave grantee private easement in adjoining streets delineated thereon, though it was not filed for record until after execution of deed.

9. Easements ⇨61(7)—Widow of grantee in deed referring to map could sue, as owner of private easement, to enjoin obstruction of adjoining street delineated thereon.

Widow of grantee of lots by deed referring to map held entitled to sue for injunction against, and recovery of damages by, obstruction of adjoining street delineated thereon, as owner of private easement.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by S. M. Richardson against T. O'Hanrahan and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Prewett & Chamberlain, of Auburn, C. F. McGlashan, of Truckee, and Theodore W. Chester, of Sacramento, for appellants.

Cooke & Stoddard, of Reno, Nev., and Nilon & Nilon, of Nevada City, for respondent.

FINCH, P. J. Judgment was entered herein enjoining the defendants from obstructing High street in front of the plaintiff's residence near the westerly end of block G in the town of Truckee, and for damages in the sum of \$100. The defendants have appealed from the judgment.

As stated in appellants' opening brief, "there is little or no dispute as to the material facts." The defendants claim ownership of the part of High street in question under a quitclaim deed from Paul M. Doyle, whose claim of title was based on a quitclaim deed from the Pacific Improvement Company. Plaintiff's residence is upon lots 1, 2, and 3; being the first three lots at the westerly end of block G. These lots were conveyed to plaintiff's husband, now deceased, and to whose title the plaintiff has succeeded, by a deed executed by Charles Crocker April 6, 1883, in which deed the property is described as follows:

"All that real property situated in the town of Truckee * * * known and described on the official map of said town as lots numbers one, two and three in block G."

No map of the town of Truckee was filed in the office of the county recorder until July 15, 1890, and no other map thereof was filed thereafter until June 3, 1901. The court found that the map filed July 15, 1890, "is the official, and only official, map of said town of Truckee and of that section of the town of Truckee embracing the premises in contro-

versy; that for many years prior and down to July 15, 1890," and since that time, "all, or practically all, of the deeds conveying lots in said section of the town of Truckee referred to said map, and described the lot or lots sold by and with reference to said map; * * * that the actual width of said High street at all times has been, and now is, the same as delineated and shown upon said official map filed July 15, 1890; * * * that * * * prior to July 15, 1890, a public street then designated and at all times since known as High street, was duly and regularly laid out, dedicated as a public street, and abandoned to the public as such, by the owner of the land affected thereby; * * * that about 20 years ago, the people of the town of Truckee, assisted by the board of supervisors of said county of Nevada, at substantial expense, caused to be set apart and constructed along the line of intersection of said High street with the easterly line of Spring street a side path about 5 feet wide; that on account of the steep grade of said side path, a series of ten granite steps were cut and laid in one of the steepest portions of said path for the permanent use of plaintiff and other residents of that section of the town of Truckee, and that about the same time plaintiff and her husband, now deceased, at their own expense, caused an iron railing to be affixed to said granite steps for the convenience and security of pedestrians using the same."

Relative to the acts of which the plaintiff complains, the court found:

"That on or about May, 1921, defendant T. O'Hanrahan wrongfully and unlawfully, and for the purpose of vexing, annoying, and preventing plaintiff from reaching her said premises on High street by her usual and accustomed pathway of travel, entered upon said High street and upon that portion thereof fronted by plaintiff's said dwelling house and in close contact with the front line of plaintiff's said premises, and upon and within the exterior boundaries of plaintiff's said lots from her said property line to the center of said High street, and did wrongfully and unlawfully make thereon an excavation about 5 feet deep on the northerly side of said street and in contact with plaintiff's said property line, and said excavation being about 50 feet long easterly and westerly, and about 20 feet wide, and on the southerly and lower side of said excavation did wrongfully throw up excavated material consisting of rocks, boulders, and earth, making a fill from 8 to 10 feet high, * * * and tore out and destroyed a portion of said side path and removed and carried away eight of said steps, so that plaintiff and other pedestrians have been compelled to abandon the use thereof; * * * that, by reason of the acts of said defendant, * * * plaintiff's view of a portion of the business section of the town of Truckee, which she had previously enjoyed, has been greatly obscured and cut off, the rental value of her said property has been largely diminished, she has lost tenants for said property, and she has suffered inconvenience in being deprived of the use of said side path and steps, all to her damage

in the sum of \$100; * * * that said High street between Spring and Bridge streets * * * was traveled and used by the public generally for a long time prior to July 15, 1890, as well as all the time since said date, with the knowledge of, and without objection of owners of the land affected thereby."

From the map referred to, which was introduced in evidence by the plaintiff, it appears that block G is 875 feet in length, and is bounded on the south by High street and on the east and west ends thereof by Bridge and Spring streets, respectively. That part of High street lying south of block G is about 160 feet wide at the east line of Spring street and 42 feet in width at the west line of Bridge street. A traveled roadway, referred to in the testimony of the county surveyor as being of "the width of * * * the wheel tracks," runs along the northerly side of High street, between Bridge and Spring streets, cutting into the southerly ends of some of the lots in block G and being entirely on plaintiff's lots, near the north line of High street, at the west end of the block. A roadway of similar character extends from the intersection of the east line of Spring street and the south line of High street to about the center of the south line of block G, there connecting with the roadway first mentioned. Both of these roadways have been used by the general public at all times since the year 1872. The triangle bounded by these two roads and the east line of Spring street is the land claimed by the defendants. It lies on a steep hillside over which vehicles are unable to travel in its present condition; the roadway in front of plaintiff's dwelling being about 80 feet higher in elevation than a point opposite thereof in the south line of High street.

April 18, 1870, a patent was issued by the United States to Central Pacific Railroad Company for the section of land in which the town of Truckee is located. June 9, 1870, that company conveyed the land to Charles Crocker. August 14, 1871, Crocker conveyed it to the Contract & Finance Company, which company reconveyed it to Crocker October 26, 1875. October 6, 1888, the land was conveyed to the Pacific Improvement Company by Leland Stanford, Collis P. Huntington, Mary F. S. Searles (formerly Mary F. S. Hopkins), the executors of the last will of Charles Crocker, deceased, and others. The deed recited that "title to the property * * * was vested in Charles Crocker, who held the same for the benefit of himself, Leland Stanford, Collis P. Huntington, and Mary F. S. Hopkins in equal shares of one fourth each, * * * for the sole purpose of facilitating conveyances and leases," that Stanford, Huntington, and Mary F. S. Searles each owned one-fourth of the capital stock of the Pacific Improvement Company, and that the surviving wife and children of Charles Crocker, deceased, owned the other one-fourth thereof. The map herein-

before referred to is indorsed, "Filed at request of C. P. R. R. Co. July 15, 1890 at 10 min. past 11 o'clock a. m. A. B. Brady, Recorder." April 8, 1892, the supervisors of Nevada county adopted a resolution ordering that "the county surveyor place the map of the streets of Truckee now on file in the recorder's office in the road book of the county." The map was so placed, with the following indorsement: "Townsite of Truckee, surveyed by the C. P. R. R. Co. Filed by request of the Hon. Board of Supervisors on Friday April 8, 1892." The minutes of the board of supervisors of January 10, 1893, contain the following:

"On motion and by order of the board, the roads in the several townships of the county are hereby designated as follows: * * * Meadow Lake. Division No. 1. Streets in town of Truckee."

May 10, 1902, the Pacific Improvement Company executed and delivered a quitclaim deed to Paul M. Doyle, purporting to convey to him "all of the land bounded on the north by High street, on the east by Bridge street extended, on the south by lots on the north side of Main Street East, and on the west by Spring street." Main street is the next street south of and parallel with High street. March 30, 1920, Doyle executed a quitclaim deed to defendant Lillian E. O'Hanrahan, purporting to convey to her the triangular parcel of land in question here. The defendants contend that the roadway along the south side of block G and a strip of land alleged to be 42 feet wide through which such roadway runs constitute the whole of High street, while the plaintiff claims that High street includes all the territory shown on the map as such.

Appellants contend that they are entitled to a reversal of the judgment on four grounds as follows: (1) That the filing of the map on July 15, 1890, at the request of the Central Pacific Railroad Company, did not constitute an offer to dedicate the streets shown thereon to public use, because that company then had no interest in the property; (2) that "it was not permissible to show by parol that a certain map in San Francisco was the one referred to in the various deeds as the 'official map' of Truckee"; (3) that, "if any offer of dedication was ever made, it was not accepted"; (4) that the findings "show an obstruction in a public street which is a public and not a private nuisance and a private individual cannot abate it."

[1, 2] To constitute an offer to dedicate land for a street, "it is not essential that the plat should have been made by the owner of the land; it is sufficient that he recognizes and approves a plat made by another making sales with reference thereto." 18 C. J. 60: Logan v. Rose, 88 Cal. 263, 267, 26 P. 106: People v. Laugenour, 25 Cal. App. 44, 51, 142

P. 888. In *Harding v. Jasper*, 14 Cal. 643, 648, it is said:

"In dedication no particular formality is necessary; * * * it may be made either with or without writing, by any act of the owner; * * * the dedication being proved in most, if not all, of the cases, by matter in pais, and not by deed. The vital principle of the dedication is the intention to dedicate. * * * If accepted and used by the public in the manner intended, the dedication is complete. * * * Dedication, therefore, is a conclusion of fact, to be drawn by the jury from the circumstances of each particular case."

"The offer of the owner to dedicate may be manifested in a hundred different ways; and the acceptance of the offer by the public may be manifested in a like number of ways." *City of Los Angeles v. Kysor*, 125 Cal. 463, 466, 58 P. 90, 91; *Venice v. Short Line Beach Land Co.*, 180 Cal. 447, 450, 181 P. 658; *County of Inyo v. Given*, 183 Cal. 415, 418, 191 P. 688; *People v. Laugenour*, supra; *Mulch v. Nagle*, 51 Cal. App. 559, 566, 197 P. 421; *Ferguson v. Oildale Mut. Water Co.* (Cal. App.) 248 P. 256.

[3] Between 1868 and October 6, 1888, Crocker executed numerous conveyances of town lots in the town of Truckee. During the succeeding 12 years the Pacific Improvement Company made many conveyances of lots therein. These deeds refer to "the official map" of the town in describing the property conveyed thereby. Such use of the word "official" may be treated as surplusage in the deeds executed prior to the filing of the map, and the map referred to in the deeds may be identified by parol evidence. 9 Cal. Jur. 305; *Devlin on Deeds* (3d Ed.) §§ 1016-1018; *Leonard v. Osburn*, 169 Cal. 157, 146 P. 530, 532.

[4] *Lewis Tasheira*, a witness for the plaintiff, testified that he was employed by the Pacific Improvement Company from 1893 to 1915; that during that time he had access to the records of the company; that in the course of his employment he "had occasion to examine and refer to the maps and plats" in the possession of the company; that one of such maps was the same as the one here in question. On cross-examination, he testified as follows:

"Q. Do you know when that map came into the possession of the Pacific Improvement Company? A. No; I couldn't say. I think that was made during his (Crocker's) administration. Q. That is, the original map? A. Yes. * * * Q. You think this map, referring to Exhibit A in the deposition, correctly shows the courses and distances and the metes and bounds of what it purports to represent as they were set forth on the map which was on file in the office of the Pacific Improvement Company? A. I think so, without a doubt. Q. During the time of your employment in the office from 1893 until 1915, did you see any other map than the original of which this purports to be a copy? A. I never saw any other map."

There is no evidence tending to show that either Crocker or the Pacific Improvement

Company ever had possession of any map of the town of Truckee other than the map of which the one filed July 15, 1890, is a copy. It is not to be presumed that the term "official map," appearing for so many years in conveyances of town lots, was undesignedly used. While the evidence is not as satisfactory as might be desired, it is a fair inference therefrom, in the absence of contradictory evidence, that, by the use of the term "official map," the grantors referred to the only map in their possession or shown to be in existence. This inference is strengthened by the fact that, after the map was filed in the office of the county recorder, and after the supervisors had ordered it placed in the road book of the county and had designated the streets of the town as county roads, the Pacific Improvement Company, in its deeds, continued to refer to "the official map" of the town. These facts, together with the other facts enumerated, warrant the inference that the company recognized and approved the map and dedicated to public use the streets delineated thereon.

[5] The direction to place the map in the road book of the county, the designation of the streets as county roads and the expenditure of public funds in the improvement of a part thereof, together with the use thereof by the public, certainly constituted a sufficient acceptance of the offer of dedication. It was not necessary that the whole area of the street should have been improved or used to make the acceptance complete. *Santa Ana v. Santa Ana Val. Irr. Co.*, 163 Cal. 211, 219, 121 P. 847.

[6, 7] The damage suffered by plaintiff from the obstruction in the street differed in kind as well as in degree from that sustained by others, particularly in that her access to the street was shut off. *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 121, 92 P. 70, 125 Am. St. Rep. 47; *Gardner v. Stroever*, 89 Cal. 26, 29, 26 P. 618. See, also, *Fisher v. Zumwalt*, 128 Cal. 493, 61 P. 82; *Johnson v. V. D. Reduction Co.*, 175 Cal. 63, 164 P. 1119, L. R. A. 1917E, 1007. Further, it is presumed that plaintiff owns to the center of the street. Civ. Code, §§ 831 and 1112. The court found that the obstruction of which complaint is made was "upon and within the exterior boundaries of plaintiff's said lots from her said property line to the center of said street." It appears, therefore, that the obstruction was upon land owned by the plaintiff, subject only to the use thereof as a public street.

[8, 9] Regardless of any question of dedication to public use, the sale of the lots to the plaintiff's husband, under the circumstances stated, gave the grantee a private easement in the adjoining streets delineated on the map referred to in the deed, notwithstanding

the fact that the map was not filed for record until after the execution of the deed. *Eltinge v. Santos*, 171 Cal. 278, 283, 152 P. 915, Ann. Cas. 1917A, 1143. Plaintiff's action could have been maintained and judgment given in her favor on the basis of such easement.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

83 Cal. App. 455

**PHOENIX ASSUR. CO., Limited, OF LONDON
v. SALVATION ARMY. (Civ. 4347.)**

District Court of Appeal, Second District, Division 2, California. May 28, 1927.

Charities ⇨ 45(2)—Charitable corporation is liable as any other for servant's negligent operation of automobile for its purpose in city.

A charitable corporation is liable as any other corporation for injuries to third persons inflicted by its servant's negligent operation of an automobile in proceeding about the city for the purpose of engaging in the religious and charitable work which it is the corporation's object to perform.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by the Phoenix Assurance Company, Limited, of London, against the Salvation Army, for damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Floyd L. Anderson, of Los Angeles, for appellant.

Voltaire V. Perkins, of Los Angeles, for respondent.

WORKS, P. J. This is an action to recover damages inflicted upon plaintiff's assignors by the negligent operation of an automobile by a servant of defendant. Judgment went for plaintiff and defendant appeals.

It was stipulated at the trial that appellant is a charitable institution, and the record shows that at the time of the occurrences out of which the action arose the driver of the automobile was proceeding from one city to another for the purpose of engaging in a part of the religious and charity work which it is the object of appellant to perform. Appellant contends for a reversal of the judgment on the ground that, because of the purposes for which it exists, and because of the trust character of the funds which are at its disposal, it is exempt from that liability which would attach to a business or profit-making corporation in the situation which appellant occupies under the facts of the present litigation. Upon the question thus suggested the cases in the other states of the Union are in hopeless irreconcilability, and the decisions

of the jurisdictions which are ranged on the respective sides of the controversy exhibit a width of discussion which has practically exhausted the subject. The line of reasoning on one side is, we think, strained and unconvincing, although the cases which follow it reach back to a greater antiquity than do those which support the opposite view. The courts of this state have never espoused either side of the discussion, for the exact question has never arisen here. The present case is one of first impression in California.

The states which have aligned themselves with the view which supports the contention of appellant, or at least some of them, are indicated by the following list of cases, in which is contained the last pronouncement, as far as we can discover, of the courts of each jurisdiction: *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103; *Loeffler v. Trustees of Sheppard Hospital*, 130 Md. 265, 100 A. 301, L. R. A. 1917D, 967; *Zoulalian v. New England Sanatorium*, 230 Mass. 102, 119 N. E. 686, L. R. A. 1918F, 185; *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S. W. 1189, but see reservation in the opinion upon the question whether a charitable institution would be liable for damages occasioned by an act of negligence committed in a public street; *O'Neill v. Odd Fellows' Home*, 89 Or. 382, 174 P. 148, but note that the decision there rendered was based upon statutory enactment; *Vermillion v. Woman's College*, 104 S. C. 197, 88 S. E. 649; *Gamble v. Vanderbilt University*, 138 Tenn. 616, 200 S. W. 510, L. R. A. 1918C, 875, but observe that the rule there stated as settled in the jurisdiction did not apply to the facts of the case decided; *Bachman v. Young Women's Christian Association*, 179 Wis. 178, 191 N. W. 751, 30 A. L. R. 448. An opinion touching similar questions and presenting a similar view is to be found in *Woman's Christian Library Association v. Fordyce*, 74 Ark. 621, 86 S. W. 417.¹ It has been decided in some cases that charitable institutions which are governmental agencies are not liable for damages caused by the torts of their servants. See *Gallon v. House of Good Shepherd*, 158 Mich. 361, 122 N. W. 631, 24 L. R. A. (N. S.) 280, 133 Am. St. Rep. 387; *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 15 A. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; *Wildoner v. Central Poor District*, 267 Pa. 375, 110 A. 175. These last cases, we think, present a question different from that here under consideration.

One or two quotations will serve to show the reasoning of the decisions generally which support the contention made by appellant here.

"An institution of this character, doing charitable work of great benefit to the public without profit, and depending upon gifts, donations,

legacies and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work, by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent acts of those employed to carry the beneficent purpose into execution." *Parks v. Northwestern University*, supra.

In one of the outstanding opinions on the subject the court said:

"The exemption of public charities from liability in actions for damages for tort rests * * * upon grounds of public policy, which forbid the crippling or destruction of charities which are established for the benefit of the whole public to compensate one or more individual members of the public for injuries inflicted by the negligence of the corporation itself, or of its superior officers or agents, or of its servants or employees. The principle is that, in organized society, the rights of the individual must, in some instances, be subordinated to the public good. It is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity. The law has always favored and fostered public charities in ways too numerous to mention, because they are most valuable adjuncts of the state in the promotion of many of the purposes for which the state itself exists. That being so, what difference can it make whether the tort is that of the corporation itself or its superior officers and agents, or that of its servants? Liability for the one would as effectually embarrass or sweep away the charity as the other. It would, therefore, be illogical to admit liability for the one and deny it for the other. This rule does not put such charities above the law, for their conduct is subject to the supervision of the court of equity; nor does it deny an injured person a remedy for his wrong. It is merely an exception to the rule of respondeat superior, which is itself based on reasons of public policy. The injured person has his remedy against the actual wrongdoer. It is said, however, that he may be and often is financially irresponsible. But the answer is that the law does not undertake to provide a solvent defendant for every wrong done. There are many cases of wrongful injury not compensated, because the wrongdoer is insolvent. The head of a family is liable for the torts of his servants; but you cannot take his homestead and break up his family to satisfy a judgment against him, either for his own or for his servant's torts. Public policy says it is better for the individual to suffer the injury uncompensated than for the state to suffer the evil consequences of having the homes and families of its citizens destroyed. The state is likewise most deeply interested in the preservation of public charities. Questions of public policy must be determined upon consideration of what on the whole will best promote the general welfare." *Vermillion v. Woman's College*, supra.

¹ Reported in full in the *Southwestern Reporter*; not reported in full in *Arkansas Reports*.

Here are some of the adjudications which stand in opposition to the contention made by appellant: *Bruce v. Central Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150; *McLuerny v. St. Luke's Hospital*, 122 Minn. 10, 141 N. W. 837, 46 L. R. A. (N. S.) 548, but note that the effect of this decision is somewhat impaired by the remarks at the close of the opinion: *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626, 32 L. R. A. (N. S.) 62, 139 Am. St. Rep. 889; *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; *Basabo v. Salvation Army*, 35 R. I. 22, 85 A. 120, 42 L. R. A. (N. S.) 1144; *Armendarez v. Hotel Dieu* (Tex. Civ. App.) 145 S. W. 1030; *Hospital of St. Vincent v. Thompson*, 116 Va. 101, 81 S. E. 13, 51 L. R. A. (N. S.) 1025.

It is said in the opinion in one of the cases last cited:

"The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from such trusts justify the exemption; that is, as implied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity." *Bruce v. Central Church*, supra.

In an opinion which contains an exhaustive review of the authorities the court concludes:

"In view of the principles above set forth, this court is of the opinion that both upon reason and upon authority, so far as the cases directly apply to the case at bar, the defendant corporation, although it is a charitable corporation, is liable, as any other corporation, for injuries to third persons caused by the negligence of its servants and agents in the care and management of its horses and teams while employed for its purposes. * * * We believe that public policy does not require any such exemption from liability as is claimed by the defendant in this case, but on the contrary that such exemption would be contrary to true public policy. * * * It would, in our opinion, be manifestly unjust and contrary to public policy to hold that a person run over and injured on a public highway by a horse and wagon belonging to the defendant and driven by the defendant's servant, through the negligent acts of such servant, would not be entitled to recover against the master, but could only recover

against the negligent servant; while a person injured under similar circumstances by the servant of an expressman, or the driver of a cab belonging to a liveryman, would be allowed to recover against the master. There is no reason or logic in the attempted distinction between the servant of the defendant and the servant of any other person or corporation." *Basabo v. Salvation Army*, supra.

Another decision, contains the following:

"This defendant, it appears from the evidence, conducted its affairs for the combined purposes of revenue and charity; the former being, in the religious aims of the members, subordinated to the latter as the ultimate object. But independently of this, had this corporation derived no revenues from its operations, and the funds which enabled it to carry on its benefactions were derived, not from its beneficiaries, but from endowments or contributions, it would not in our opinion make a particle of difference in its attitude to the law with reference to its legal duties and liabilities to persons in its service as employés. It was an incorporated body, chartered by its own volition, endowed with power to employ servants, and with the capacity to sue and to be sued. It was not in any sense an agency of the state, nor has the legislature seen fit to extend to such corporations exemption from the well-known duties and liabilities imposed by the general law governing master and servant. This being so, defendant would be liable for injury sustained by its employee due to the negligence, if any, of itself, its managing officers, or agents or vice principals, which is the case presented here." *Armendarez v. Hotel Dieu*, supra.

In an excellent opinion, filed in one of the cases which adheres to the doctrine for which appellant contends, a dissenting justice said:

"The Young Women's Christian Association has been a powerful factor for good in every civilized community. To my mind it is repulsive to the very idea underlying the organization and its purpose to make claim to or grant immunity, especially where an injury is sustained through the negligence of a servant of the association by a stranger. What reason is there for immunizing an association of this kind on account of the negligence of its servants, and placing the entire consequences of an injury upon an innocent third person or upon the family of such injured person? The doctrine of responsibility for negligence is not solely based upon the doctrine of compensation, but has its primary source in a desire on the part of the public to secure careful and reasonable conduct. This latter doctrine is made applicable to nearly all the affairs of life, and it has resulted in raising the standard of human conduct. Any other doctrine leads to carelessness, neglect, and injury to mankind and property. For an association like the defendant to claim immunity from the negligence of its servants is like a minister of the gospel pleading the statutes of limitations to avoid the payment of a just obligation. I think it is wrong in principle, is not in accordance with the prevailing doctrine in this country, and is not conducive to human welfare, and should not receive the sanction of this court." *Bachman v. Young Women's Christian Association*, supra.

We thoroughly agree with the view taken by the courts which adhere to a doctrine contrary to that upon which appellant asks for a reversal of the judgment against it, and we can add but little to what they have said in their reasoning upon the question. The courts which have declared for the exemption of a charitable institution from liability for torts of which strangers to the charity are the victims, have shown an unnecessary solicitude for the welfare of such organizations and of their beneficiaries. They have assumed dangers to the administration of charities which do not exist, or which are so paltry as to furnish no adequate ground for the exemption from liability which they declare, with its attendant injury to those suffering damages from torts, or to their families. It is not at all likely that prospective donors to charities will withhold their benefactions merely because the institutions to which they contemplate donations may be compelled to render that justice which the law exacts from other corporations. Certainly, if any are thus held back they will be so few in number as not seriously to imperil the administration of charities generally. Then, too, the depletion of the funds which are actually subscribed to charities, through a refusal to allow the exemption, will be inconsiderable when the amounts necessary to pay judgments for damages are compared with the amount actually devoted to the purposes for which charitable organizations are formed—that is, if the activities of all such organizations be considered together.

We are much impressed with the reasoning in one of the above quotations which is based upon the evident purpose of the law of torts to secure careful conduct on the part of those handling instrumentalities which, because of a lack of such conduct, may become engines of destruction. We think this state should not be added to the list of those whose courts have encouraged—as in some degree they surely have—the agents of charitable institutions to render less than due care for the security of life, limb and property, the very things which it is the sole purpose of such institutions to preserve and protect.

Counsel expend much time in their briefs in considering the effect upon the present litigation of the opinions in *Thomas v. German Benevolent Society*, 168 Cal. 183, 141 P. 1186, and *Stewart v. California Medical Association*, 178 Cal. 418, 176 P. 46. Whatever the effect of those opinions may be in proper cases—for they are opposed to each other—they have no bearing here. The expressions in them to which counsel refer are concerned with the question of the liability of charitable institutions for damages inflicted upon those who voluntarily become beneficiaries of the charities administered by such institutions—those, for instance, who become free

patients in charity hospitals—and suffer injury through the negligence of the servants of the institutions. It is well settled, with practically no dissent, that in such cases the institutions are not liable, if, at least, they have been careful in the selection of the servants. Under practically all the authorities such a question is very different from the one here presented.

Judgment affirmed.

We concur: THOMPSON, J.; JOHNSON, Justice pro tem.

83 Cal. App. 470

SCHNIER v. PERCIVAL et al. (Civ. 4636.)

District Court of Appeal, Second District, Division 1, California. May 31, 1927.

1. Brokers $\S$ 96—Authority to negotiate sale of real property does not authorize collection of purchase price.

Authority to negotiate sale of real property does not carry with it any express or implied authority to collect, as agent for owner, money on account of purchase price named in negotiations.

2. Brokers $\S$ 99—Liability, if any, of owner of property to one purchasing from agent, believing agent was owner, is that of undisclosed principal.

Where purchaser of real estate from agent of owner did not know true owner, but supposed that agent owned property, recovery of purchase price from true owner after agent disappeared with payment on purchase price must be as from undisclosed principal; there being no question of ostensible agency.

3. Brokers $\S$ 106—In purchaser's action against landowner for payments to agent whom plaintiff thought was owner, evidence held to support finding of agreement authorizing agent to receive payments.

In action by purchaser against owner of land for payments made to owner's agent whom purchaser believed to be true owner, evidence held to support finding that there was oral agreement between owner and agent authorizing agent to receive payments.

4. Brokers $\S$ 103—Landowner's knowledge that agent was collecting payments from purchasers and demanding accounting ratified collection.

Knowledge by landowner that agent was collecting payments from purchasers, and demand of accounting therefor, ratified acts of agent in collecting such payment, and made owner liable as undisclosed principal.

5. Principal and agent $\S$ 117(1)—Agent's authority to collect money need not be in writing.

Authority given to agent, selling real estate for principal, to collect money, is not required by law to be in writing.

6. Principal and agent $\Leftrightarrow$ 171(7)—Agency to sell real estate may be created by "subsequent ratification" by retaining benefits (Civ. Code, §§ 2307, 2310).

Agency to sell real estate may be created by precedent authorization or by "subsequent ratification," but subsequent ratification can be made only in manner necessary to confer original authority, or, where oral authorization would suffice, by accepting or retaining benefits in view of Civ. Code, §§ 2307, 2310.

[Ed. Note.—For other definitions, see Words and Phrases, Subsequent Ratification.]

7. Brokers $\Leftrightarrow$ 8(2)—Broker's acts, justifying inference that principal knew of them and would not have permitted them if unauthorized, are competent evidence of agency.

In determining whether broker, authorized to sell real property, had authority to accept payments, his acts, which were of such nature and so continuous as to justify reasonable inference that principal knew of them and would not have permitted them if unauthorized, are competent evidence of agency.

8. Principal and agent $\Leftrightarrow$ 145(2)—Contract of agent, not disclosing principal's name, is contract of principal.

Contract of agent, who deals in his own name without disclosing that of his principal, is contract of principal.

9. Brokers $\Leftrightarrow$ 106—Purchaser, suing vendors for payments to absconding agent, need not show vendor's specific knowledge of particular payments.

In purchaser's action against vendors to recover payments made to agent, who subsequently disappeared with part of purchase price, plaintiff was not required to prove specific knowledge of defendants as to particular payments, in view of proof of defendants' general consent and approval of agent's receipt of payments from purchasers.

10. Brokers $\Leftrightarrow$ 88(14)—Finding that money was paid to agent as agent of vendors, with their consent and approval, held finding that agent was authorized to collect money for vendors.

In purchasers' action against vendors for payment to absconding agent, finding that money was paid to him "as the agent of the said defendants as aforesaid, with the consent and approval of said defendants," held sufficient, when considered with findings as whole, to constitute finding that agent was authorized to collect money in capacity of agent for defendants.

11. Evidence $\Leftrightarrow$ 249(1)—In action against vendors for payment to absconding agent, owners held bound by statements and conduct of joint owner who conducted negotiations.

In action against vendors to recover payments made to absconding agent, defendants held bound by statements and conduct of joint owner, who actively conducted business between defendants and agent, notwithstanding that title to property stood in name of another as trustee and contract binding agent as selling agent was signed by trustees.

Appeal from Superior Court, Los Angeles County; M. S. Sayre, Judge.

Action by Elizabeth Schnier against J. Phil Percival and others, associated together and doing business under the style and firm name of the Percival-Fallis Syndicate; J. Phil Percival and Eugene P. Fallis, trustees. Judgment for plaintiff, and defendants appeal. Affirmed.

Stephens & Stephens, Chandler P. Ward, and Carroll Searls, all of Los Angeles, for appellants.

W. I. Gilbert, Milton Bryan, and Burton Briggs Crane, all of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Plaintiff brought suit to recover the purchase price paid by plaintiff to H. B. Eshleman, doing business under the style and firm name of H. B. Eshleman Realty Company, for certain real property which was owned by defendants and which was being sold by Eshleman as the agent of defendants. Judgment was rendered for plaintiff, and defendants appeal therefrom.

Appellants were joint owners of certain real estate; the title being in the name of appellants J. Phil Percival and Eugene P. Fallis as trustees for all of the owners. According to the testimony of respondent's witness Raven, appellant Roberts, as part owner and agent of the other owners, approached the Eshleman Realty Company on the subject of taking over as agents and selling various lots in the tract of real estate. Subsequently J. Phil Percival and Eugene P. Fallis, as trustees, entered into a contract with H. B. Eshleman Realty Company for the sale of the lots described therein; the contract being as follows:

"Mr. J. Phil Percival and E. P. Fallis, trustees of that certain real property hereinafter described, and having full and due authority, do hereby make, constitute, appoint and employ the H. B. Eshleman Realty Company of 345 South Hill street in the city of Los Angeles, county of Los Angeles, state of California, for a period of six months from the date hereof, as sole and exclusive agents for the sale of the unsold lots situate, lying and being in that certain tract of land lying and being in the county of Los Angeles, state of California, designated and known as tract No. six hundred thirty-five (635), sheet No. two (2), according to the official map and plat of said tract of record in the office of the county recorder of said county of Los Angeles.

"The schedule of prices for which said lots shall be sold are as follows, to wit: (Here follow lot numbers and prices.)

"The terms of the sale of said lots shall be as follows, to wit: 25% of the total sales price to be in cash. The balance of the purchase price of each of said lot or lots to be evidenced by a promissory note payable in six equal semi-annual payments, with interest upon all unpaid

balances at the rate of seven per cent. (7%) per annum payable quarterly. Such promissory note to be secured by a trust deed upon the lot or lots so sold.

"As commission and as compensation for services to be performed by the said H. B. Eshleman Realty Company in effecting the sale of said lots, they shall be allowed a commission of 25% of the total sale price of each lot, to be paid in the manner following:

"Seventy per cent. (70%) of each payment made on account of the purchase price of said lots as the same is made in cash until the full amount of said commission shall have been paid.

"Purchasers of any of said lots shall be allowed a five per cent. (5%) discount from the total sales price if paid in cash, the H. B. Eshleman Realty Company thereupon to be entitled to their full commission.

"Percival-Fallis Syndicate,

"By J. Phil Percival, Trustee.

"By Eugene P. Fallis, Trustee.

"H. B. Eshleman Realty Company,

"By H. B. Eshleman, Pres."

Thereupon Eshleman entered into the performance of the contract. A sales campaign was put on. Respondent, with others, was conveyed to the tract in a bus of the Eshleman Company. Respondent agreed to purchase one of these lots, and as first payment delivered to J. J. Wright, Eshleman's employee, a check for \$362.50, payable to H. B. Eshleman Realty Company, and received therefor a receipt signed, "H. B. Eshleman Realty Co., by J. J. Wright." Respondent was assured by Wright that she would be given a cash discount of 5 per cent. for cash payment on the lot, and thereafter issued her checks for the balance due on the purchase price, payable to H. B. Eshleman Realty Company, and was given a receipt therefor as follows:

"No. ——. Los Angeles, Cal., Feb. 9/21.

"Received of Elizabeth Schnier checks for one thousand and fifteen and no/100 dollars, Bal. in full on lot 16, block P, tract 635, checks for \$700—Fifty-Third Natl. Bank of Cincinnati. 315.00 Secy. Tr. and Savings Bank, L. A. \$1,015. H. B. Eshleman Realty Co.,

"By F. J. Raven."

Eshleman disappeared, and none of the money was received by appellants. Plaintiff thought that Eshleman owned the property, and did not know defendants in any connection until after Eshleman had disappeared.

Appellants' first point is that the contract in legal effect, gave Eshleman only the power to negotiate a sale and no power to enter into a contract of sale binding on the defendants. As that is not the question at issue, appellants' authorities in support of this contention are beside the point. The issue in this case is whether Eshleman had authority to accept payments of money on the contract so as to permit recovery of such payments from the defendants, although Eshleman did not turn the money over to the defendants.

[1] Appellants' second point is that—

"An owner of real property, who has employed a broker to negotiate a sale, is not answerable as principal to a third party, who has deposited with the broker a part, or the whole, of the purchase price. In other words, authority to negotiate a sale does not carry with it any express or implied authority to collect as agent for the owner money on account of the purchase price named in the negotiations."

[2] The rule of law as thus stated is conceded by respondent to be correct, and is well settled. *Hicks v. Wilson*, 197 Cal. 269, 240 P. 289; *Gold v. Phelan*, 58 Cal. App. 472, 208 P. 1001. It is held in these cases that the authority of a real estate broker is only to produce a purchaser who is willing to contract with the seller upon terms described, that such a broker has no authority to accept money from the purchaser and to conclude the sale, and that, when the purchaser pays money into the hands of a broker, in such a case the broker holds it as the agent of the purchaser and not of the seller, and any misappropriation thereof is the loss of the former and not of the latter. This rule, however, was not applied in the case of *Hicks v. Wilson*, supra, for the reason that under the facts of the case there was held to be an ostensible agency. Each of the foregoing cases was a separate transaction, in which the buyer knew he was dealing with the agent for the sale of the owner's property, and therefore the buyers were put upon inquiry to ascertain the selling agent's power to receive payments of money. In the case at bar, the plaintiff did not know the owner of the property and supposed the Eshleman Company to be the owner; there being nothing in the language of the receipts issued by the Eshleman Company to indicate they were acting as agents for others. In the case at bar, there were many transactions, and it is not to be presumed that no similar payments were made in plaintiff's presence. As will appear from the evidence, these payments were received by the Eshleman Company with the knowledge and consent of the owner, and further knowledge that the receipts therefor were being issued in the name of the Eshleman Company. The question of ostensible agency does not enter into the decision of the instant case, for the reason that the plaintiff had no communication with the defendants and did not know of their existence during the entire transaction. Neither did plaintiff deal with Eshleman as an ordinary agent, but rather as a principal; she having paid the purchase money to Eshleman as the owner of the land and believing him to be such owner.

If there is any liability on the part of appellants for payments made by respondent to the agents, it is that of an undisclosed principal. As we have observed, no such liability could arise on a written contract authorizing the agent to sell the real

estate. Respondent urges that his liability arises out of a separate oral contract, as pleaded and proved by the plaintiff. The complaint alleges:

"That subsequent to the execution of the said agreement on the part of the said defendants and the said H. B. Eshleman Realty Company, as aforesaid, and in negotiating the sale of said real property described in said agreement, the said H. B. Eshleman Realty Company and the said H. B. Eshleman, and each of them, received of and from the prospective purchasers of said real property, partial and full payments of the purchase prices of the respective lots sold to the respective purchasers thereof, and thereupon issued to said prospective purchasers, for the said payments upon the purchase price of said lots, receipts for the payment of said moneys. Plaintiff further alleges that the moneys paid to and received by said H. B. Eshleman Company and H. B. Eshleman by the respective purchasers of the lots described in said agreement were paid to and received by H. B. Eshleman Company to and for the use and benefit of said defendants and each and all of them; * * * that it was thereafter agreed and understood by and between said defendants and the said H. B. Eshleman Company that the said H. B. Eshleman Company and said H. B. Eshleman should have the right to receive and collect and issue receipts for any and all moneys paid by prospective purchasers as partial or whole payments upon the purchase price of said property described in said agreement; and that, in accordance with that understanding, the said H. B. Eshleman Company and H. B. Eshleman did receive and take and issue receipts for partial and whole payments of purchase prices paid by various purchasers for said lots described in said agreement."

Respondent urges that the testimony of appellant Roberts is sufficient to support the findings of the court in accordance with the above allegations. Roberts, when questioned by the court, testified as follows:

"Q. You expected them to receive money if they made a sale? A. Why, they were naturally acting as the agent to dispose of the property. Q. And as such were entitled to receive the first payment? A. Naturally. * * * Q. But they were authorized to receive the full amount from the purchaser and from that take their 25 per cent.? A. Yes; they would have been entitled to do it."

Roberts further testified that he knew Eshleman was receiving payments on the lots, and that, when the Eshleman Company received the 25 per cent. payment, they were supposed to place it in escrow in their department, and then call upon the owners for a contract or a deed in case the money was all paid. Dr. F. J. Raven, sales manager of the Eshleman Company, as a witness for plaintiff, testified that Roberts came into his office frequently during the sales campaign, that he advised Roberts that lots were being sold and that the Eshleman Company was taking in money on the sales, and that from and after the execution of the written

contract it was the custom of the Eshleman Company to receive the money. J. J. Wright, sales manager of the Eshleman Company, testified that appellants Roberts and Fallis were at the office of the Eshleman Company while he was engaged in selling appellants' land; that Roberts was at the tract nearly every day, and that the witness had a conversation with Roberts at the office respecting the sale of the property nearly every day; that Roberts would ask how many sales were made that day and "approximately how much cash"; and that he would tell Roberts that on the ground where the property was being sold. The witness further testified:

"Mr. Roberts had a conversation with me on one occasion either in the latter part of January or the beginning of February, 1921, and the question came up as to the statement that Mr. Roberts had been trying to get from the Eshleman Company all moneys that had been received on properties sold. He said something to me about it, and I said: 'Well, why don't you demand it?' 'Well,' he said, 'I have been after him for a week or two to give me a statement, and I have not been able to get it out of him.' And he says: 'How much money have you received?' I says: 'I don't know, but you see I am getting it every day, and you know that we are selling lots, and it is up to you to demand it and get your statement.' I know that Mr. Roberts saw a form of the receipt issued by H. B. Eshleman Company, and in the same form as Exhibit No. 1. We had half a dozen receipt books on the tract at all times, and I showed him receipts two or three times. At the time I had this conversation with Mr. Roberts in respect to the manner in which I was selling lots and accepting money, Mr. Roberts never made any objection to me about accepting money. He knew it was a general rule to do it."

The witness also testified that Roberts was present in the office on the tract when some of the receipts were issued, but made no objection. Appellants Roberts, Percival, and Fallis testified that there was no contract between the owners and the Eshleman Company besides the written contract herein mentioned.

[3-8] It thus appears that the evidence offered by plaintiff tends directly to the conclusion that a separate oral agreement existed whereby the Eshleman Company was authorized to receive payments. Where other payments were received with the knowledge and consent and without the objection of the defendants, defendants cannot be permitted to deny that the payment in the case at bar was made with their consent and to deny the existence of a separate oral agreement. Where an undisclosed principal permits his agent to hold himself out as the real principal and thereby defraud others by the collection of money, the undisclosed principal will not be permitted to deny the existence of an agreement authorizing such collections in his behalf as against innocent

third persons. Defendants, knowing that Eshleman was collecting payments and demanding an accounting therefor, ratified the acts of Eshleman in collecting such payments, and were liable as undisclosed principals. Authority to collect money is not required by law to be in writing. An agency may be created by a precedent authorization or by a subsequent ratification. Section 2307, Civ. Code. Subsequent ratification can be made only in the manner that would be necessary to confer original authority, or where an oral authorization would suffice, by accepting or retaining the benefit of the act with notice thereof. Section 2310, Civ. Code. In the case at bar, the evidence tends to show that defendants accepted and retained the benefit of Eshleman's act in collecting the money by demanding an accounting for all moneys so collected. It appears from the evidence in the case that defendants knew the general custom of Eshleman to collect payments and issue receipts in his own name, and, by failure to object, acquiesced in this conduct. Where the acts are of such a nature and so continuous as to justify a reasonable inference that the principal knew of them and would not have permitted them if unauthorized, the acts are competent evidence of agency to be submitted to the court or jury. *Reynolds v. Collins*, 78 Ala. 94. The fact that the principal with knowledge recognizes and acquiesces in the performance of the authority in a certain manner or to a certain extent, is ordinarily competent evidence that execution in that manner or to that extent was authorized. Usually, of course, no inference of recognition or acquiescence can be drawn unless it appears that the alleged principal had knowledge of what had thus been assumed in his name or on his account; but this knowledge need not be expressly shown. The act done may have been so public or notorious, or so closely related to the alleged principal, that he could not be heard to say that he was ignorant of it. *Mechem on Agency*, §§ 265, 266. The facts, moreover, may be so patent that for the principal to profess ignorance would be merely to stultify himself. They may be so obvious that the principal as a reasonable man cannot be heard to say that he was ignorant of them. *Mechem on Agency*, § 405; *Ballard v. Nye*, 138 Cal. 588, 72 P. 156. The rule is well established that the contract of an agent who deals in his own name, without disclosing that of his principal is the contract of the principal. 1 Cal. Jur. p. 856, § 133; *Geary St., etc., R. R. Co. v. Rolph*, 189 Cal. 59, 64, 207 P. 539, and cases cited; *Central Savings Bank v. Coulter*, 72 Cal. App. 78, 87, 236 P. 956. We conclude that under the circumstances in this case the evidence is sufficient to require us not to disturb on appeal the finding of the trial court that, at the time the moneys were paid by plaintiff

to the Eshleman Company, it was agreed and understood by and between defendants and the Eshleman Company that Eshleman Company did have the right to receive and collect and issue receipts for moneys paid by prospective purchasers as partial or whole payments upon the purchase price of property, and that said moneys were paid to the Eshleman Company for the use and benefit of defendants.

[9] Appellants' third and fourth points have been already disposed of in our decision that there was sufficient evidence to support the finding of the trial court that there was an actual contract authorizing the Eshleman Company to collect money, and the defendants were liable as undisclosed principals, although the plaintiff dealt with Eshleman in his own name and did not know the defendants were the owners. The agency was actual and not ostensible, and the evidence was sufficient to support the finding that Eshleman Realty Company accepted all payments, including that of the plaintiff, with the consent and approval of the defendants. Where there was proof of such general consent and approval, plaintiff was not required to prove specific knowledge of defendants as to the particular payments made to Eshleman by plaintiff.

[10] By point 5, appellants contend that there was no finding or allegation that Eshleman was authorized to collect the money in the capacity of agent for the defendants. Finding X states that the money was paid to Eshleman "as the agent of the said defendants as aforesaid, with the consent and approval of said defendants." We think this finding, taken together with the findings as a whole, is sufficient to meet the objection of the appellants, and that the finding is supported by the allegations of the complaint.

Finally, appellants urge that the court erred in various rulings in the admission of evidence; such evidence being the checks made payable to Eshleman and the receipts signed by Eshleman. As these objections are based upon the contention that the relation of principal and agent between Eshleman and defendants has not been established, we will not engage in further discussion of the point raised on the objections.

[11] Appellants' contention that the other defendants should not be bound by the statements and conduct of Roberts is not well founded. Roberts was a joint owner with the other defendants and actively conducted the business between defendants and Eshleman, although the title to the property stood in the name of Percival as trustee, and the contract binding Eshleman as selling agent was signed by them as trustees.

For the reasons stated, it is ordered that the judgment be affirmed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 555

COHN v. LEFFINGWELL et al.
(Civ. 4474.)District Court of Appeal, Second District,
Division 2, California. June 3, 1927.

1. Evidence $\Leftrightarrow$ 383(9)—Map filed by grantors 20 years after deed held of no evidential value.

Map filed in recorder's office by grantors some 20 years after execution of deed held of no evidential value in suit to quiet title.

2. Dedication $\Leftrightarrow$ 20(2)—Land used as highway for 40 years, with owner's acquiescence, and improved as such, held "dedicated to public use."

Land used as highway by public generally for 40 years, with knowledge and acquiescence of patentee's grantee, who was paid for performing work thereon, and improved by county as road, and by town after its incorporation as street, held "dedicated to public use."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dedication.]

3. Quieting title $\Leftrightarrow$ 44(3)—Evidence of dedication of street and plaintiff's possession and ownership of abutting lot held to show non-existence of adjacent lot.

Evidence, in action to quiet title, that land was dedicated to public use as street, and that plaintiff and her predecessors were in possession and ownership of land immediately abutting on south for over 40 years before commencement of action, held to show that there was no land north of her lot from which lot claimed by defendant could be carved.

4. Evidence $\Leftrightarrow$ 383(7)—Deed of lot, running north from another lot, and then west, parallel with street, held to show nonexistence of lot north thereof.

Deed describing lot conveyed as running 100 feet north from line of another lot, parallel with certain street, and 100 feet west, parallel with another street, held to show that there was no land north of grantee's lot from which grantors could carve lot described in subsequent deed to another, especially in view of their prior deed of lot described as 100 feet south of northern line of lot conveyed by second deed.

5. Adverse possession $\Leftrightarrow$ 106(4)—Lot owner had title to adjacent sidewalk area in his and predecessors' continuous possession for over 40 years, subject to town's easement.

Title in fee to sidewalk area, of which owner of adjacent lot and his predecessors were continuously in possession for over 40 years, would be in him, subject to easement vested in town for street purposes.

6. Quieting title $\Leftrightarrow$ 44(2)—Assessment lists, referring to map filed by grantors 20 years after executing deed, held inadmissible in action to quiet title.

In action to quiet title, assessment lists, referring to map filed by plaintiff's predecessors in title some 20 years after they conveyed land, held properly excluded from evidence as incompetent and immaterial; being purely negative

evidence, and not connected with any map recognized by law.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Action by Esther Cohn against W. H. Leffingwell and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

Arnold Praeger and William A. Sumner, both of Los Angeles, for appellant.

A. H. Swallow, of Los Angeles, for respondent.

MURPHEY, Justice pro tem. This is an appeal by the defendant Leffingwell from a judgment adverse to him and quieting plaintiff's title to the real property in controversy.

In 1868 the government of the United States patented to William Hyer the fractional northwest quarter of section 7, township 7 south, range 33 east, in the district of lands subject to sale at Stockton, Cal. In 1869 Hyer conveyed the same land to John B. Clarke, the predecessor in interest of both plaintiff and defendants. In 1880 Clarke and wife conveyed a portion of this land to Briggs, who, in turn, in 1888, conveyed the same parcel of land to Cohn, the husband of the plaintiff in this action. The description common to both of the deeds immediately hereinbefore mentioned is as follows:

"Commencing at the north line of the saloon lot known as J. M. Horton's saloon and running thence north and parallel with the main street in the town of Bishop Creek, one hundred (100) feet; thence west and parallel with the schoolhouse street one hundred (100) feet to the line of said saloon lot formerly owned by J. M. Horton; thence east and along the line of said saloon lot one hundred (100) feet to the place of beginning."

The present action is one by the plaintiff, the widow of Cohn, the grantee named in the last foregoing deed, to quiet her title to the lot of land described as follows:

"Commencing at the southwest corner of the intersection of West Line street, formerly known as Schoolhouse street, with Main street in said town of Bishop, and running thence north eighty-nine degrees (89°) and thirty minutes (30') west one hundred and two-one-hundredths feet (100.02 ft.) along said West Line street; thence south one hundred nine and six-tenths feet (109.6 ft.); thence north eighty-nine degrees (89°) and twenty-six minutes (26') east one hundred feet (100 ft.) to said Main street; thence north along Main street one hundred seven and seventy-five one-hundredths (100.75) feet to the place of beginning."

[1-3] The defendant, Mary A. Clarke, surviving wife of John B. Clarke, hereinbefore mentioned, has been served with summons, and, having failed to appear and answer, her default was duly entered. Some 20 years after the deed by Clarke and wife to Briggs, a

map was filed by the Clarkes in the office of the county recorder of Inyo county in which they certify: "I hereby certify that the above is a true map of what the title of said map claims it to be." This so-called map in law has no evidentiary value, and is only referred to because of the fact that there is delineated on said map a lot, 23 and a fraction feet in width, upon which appears the name of John Clarke, which said lot is placed north of the lot owned by the plaintiff and between that lot and School or West Line street. It is this lot that is claimed in this action by the defendant Leffingwell as the grantee of the Clarke interest. When Briggs purchased from Clarke he erected a store building on the northerly side of the lot. When Cohn came into possession of the lot as grantee of Briggs he built a sidewalk on the north side of the building as well as on the Main street side. The evidence is overwhelming that at all times subsequent to the erection of the Briggs store and down to the present time all the land north of that building and between it and a lot known as the Black lot on the opposite side of School or West Line street was used as a road, street, and highway by the public generally, and with the knowledge and acquiescence of the Clarkes. The road and street was improved by the county as a road and by the town of Bishop after its incorporation as a street, and Clarke, the grantee of plaintiff's predecessor, was employed to perform labor, and did perform labor, and was paid for performing work and labor thereon. The testimony relied upon by appellant as negating this state of facts is so meager and inconsequential that it does not raise a doubt in the mind of an impartial investigator as to the utter lack of merit in the appellant's contention in this respect. Under this state of facts and the law applicable thereto there can be no doubt that this land was dedicated to a public use during all these years. The evidence is equally conclusive that the plaintiff and her predecessors have been in the possession and ownership of the land immediately abutting on this street for a period of more than 40 years next preceding the commencement of this action. From this the conclusion is inevitable that there could be and was no land north of plaintiff's lot out of which could be carved the Leffingwell lot. We believe that the foregoing discussion is determinative of this case.

[4] However, we feel that the same result obtains from a fair consideration and construction of the Clarke deed to Briggs. It will be observed that in this deed the first course runs 100 feet north from the line of the Horton saloon lot, and, as he states, parallel with Main street and 100 feet west, and, as he states, parallel with School street, which street was subsequently known as West Line street. No one questions the fact that the word "parallel" as used with reference to the

course on Main street meant, and the parties intended it to mean, 100 feet along the property line of that street. Why should any different meaning be given to the word in distinguishing the course along School street? Clarke named this street in his deed, and designated the course the same as he had done on Main street. In this connection it may also be mentioned that as early as 1872 Clarke initiated proceedings before the supervisors of Inyo county to dedicate a street 60 feet wide which ran along the north side of the quarter section hereinbefore described. Whether this dedication was ever consummated in accordance with the requirements of law is not disclosed by the record. The record does not disclose by legal or satisfactory evidence the exact location of the line of the Horton lot from which the first call in the deed to Briggs was started. Neither is there anything in the record to indicate the exact location of the northern quarter section line or the corner of the northwest quarter of said section 7. The record does show, however, that in the deed from Clarke to Hoover, who was the predecessor of Horton, the Horton lot is described as follows:

"* * * All that certain lot, piece or parcel of land, situate, lying and being in the town of Bishop Creek, county of Inyo, state of California and bounded and particularly described as follows, to wit: Fifty (50) feet fronting on the west side of the Main street and one hundred (100) feet in depth, said lot being about one hundred (100) feet south of the northeast corner of the fence on the northwest quarter of section number seven (7) township number seven (7) south, range number thirty-three (33) east."

[5] This is extremely significant in view of the language in the deed from Clarke to Briggs on a course along Main street 100 feet from the Horton line. The Horton lot is described as being 100 feet south of the quarter section line, clearly indicating that it was the intention of the parties and their understanding that there was no more than 100 feet intervening between the Horton line and the quarter section line. There can be no doubt that the extreme northerly limit of Clarke's land was the northerly line of this northwest quarter, and that he owned no land north of or beyond that line. The deed to Briggs conveyed a lot 100 feet square situated on the northeast corner of that particular quarter section. His deed to Hoover conveyed a lot 100 feet south of the northern line of that section. These are Clarke's declarations in his deeds, and there is no evidence in the record definitely or at all impeaching this status as made by him. It definitely shows what the parties intended to accomplish and what they actually did effectuate. It seems to us that this amounts to a practical demonstration that the Clarkes owned no land north of the Cohn lot from which to carve the land

described in the Leffingwell deed. There appears to be a few feet more than the 100 feet called for by the original deed in the engineer's draft of a description as contained in the amended complaint. This, no doubt, arises from the fact that the description was probably taken to include the sidewalk area on the north of the Cohn store, the title to which, of course, in fee would be in the plaintiff, subject, however, to the easement vested in the town of Bishop for street purposes. The plaintiff and his predecessors have been continuously in possession of this sidewalk area, subject to the undoubted rights of the inhabitants of the town of Bishop to use the same for street purposes.

[6] Complaint is made by appellant that the court excluded assessment lists of the Cohn property over a period of years, which referred to the so-called Clarke map. The offered evidence was purely negative in character, not connected with any map recognized by law, and was properly excluded; it was incompetent and immaterial.

The judgment is affirmed.

We concur: CRAIG, J.; THOMPSON, J.

83 Cal. App. 485

SARGENT et al. v. JAEGLING et al. ★
(Civ. 5801.)

District Court of Appeal, First District, Division 2, California. June 1, 1927.

Hearing Denied by Supreme Court July 28, 1927.

1. Adjoining landowners ⇐—Landowner has no interest in title to adjoining lot, because of right of lateral support (Civ. Code §§ 801, 802, 832).

Plaintiffs, because of their right as owners of land adjoining defendants' land of lateral support of land in its natural state, have no interest in the title to defendants' lot, such right being a natural right, and not an easement, and not resting in grant, express or implied, but being one of the owner's enjoyments of property incident to his ownership, and so far as it may be said to be a right in land being a right in the supported land, and not in the supporting land, and the common-law rule not being changed or enlarged by Civ. Code § 832, and the right not being one of the easements or servitudes permitted by sections 801, 802, but section 801, subd. 13, by including in the enumeration of easements the right of receiving more than natural support from adjacent land, emphasizing the exclusion therefrom of the ordinary right of support.

2. Quieting title ⇐10(1)—Landowner, because of right to lateral support of land in natural state, cannot maintain action to quiet title to interest in adjoining land.

Landowner, merely because of right to lateral support of his land in its natural state,

cannot maintain action to quiet title to interest in adjoining land, having no interest in the title.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by George Clark Sargent and another against Julius P. Jaegeling and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

George Clark Sargent, of San Francisco, for appellants.

August L. Fournier, of San Francisco, for respondents.

KOFORD, P. J. Plaintiffs appeal from a judgment following an order sustaining defendants' demurrer to their amended complaint without leave to amend. The complaint purports to state a cause of action to quiet title, and deals with the rights of adjoining landowners.

The allegations in the complaint are as follows: Plaintiffs are the owners of a 25-foot sand lot on Lake street designated as lot A. Defendants own the 25-foot sand lot called lot B, immediately east and adjoining lot A. No buildings have ever been erected on either lot. Plaintiffs, as owners of lot A, have "an interest" in lot B to the extent of a right defined by specifications of plaintiffs' rights as abutting landowners to defendants. In stating defendants' alleged adverse claim, the complaint alleges that defendants "claim that these plaintiffs have no right of any kind in said parcel B, and that they, said defendants, own said parcel B free and clear of all interest of the plaintiffs therein to said lateral and subjacent support and abutment right."

The prayer is that it be decreed that plaintiffs or their successors have a perpetual right in parcel B to the extent of lateral and subjacent support of the soil of A by the soil of B and a right therein as an abutment for parcel A; that, in case defendants remove any portion of B furnishing support to A, said defendants or their successors in interest will be under the duty of simultaneously and permanently supporting the soil of lot A in its present and natural state, etc., and for such other relief as may be just and in accordance with law.

The complaint also alleges that within two years last past the defendants have permitted excavations to be made, not on B, but on the lot east of B, whereby the surface of B has caved off in such a manner that in one place the easterly line of natural level of A has receded one foot six inches, depth not stated; that, by reason of the passage of persons over said parcels A and B, and by reason of the action of the elements, the easter-

ly line of the natural surface level of A will continue to be broken down, etc. Appellant disclaims any desire to sue for damages for tort, and so we need not point out the insufficiency of the complaint in that respect. But it should be noticed in passing that defendants are not charged with having excavated their own lot, but with permitting the landowner on their east side to excavate that lot.

Respondents state that a lis pendens was filed against lot B by appellants. The record does not show it, but the complaint is of a nature to indicate that such might be done. It is apparent that plaintiffs claim an interest in lot B. They do not seek to quiet title to their own lot, but to their neighbors' lot.

[1] Conceding them all the rights due them as landowners adjoining defendants' land B, nevertheless they have no interest in the title to lot B. The right of lateral support of land in its natural state is a natural one, and is not an easement. It does not rest in grant express or implied, but is one of the owner's enjoyments of property incident to his ownership. *Humphries v. Brogden*, 12 Adolph. & Ellis (N. S.) 739, 64 Eng. Law Rep. 738; *Solomon v. The Vintners' Company*, 4 H. & N. 585, 157 Eng. Reprints, 970; *Gale on Easements*, c. 6; *Tiffany on Real Property* (2d Ed.) §§ 335, 345, 346. So far as it may be said to be a right in land, it is a right in the supported land, not in the supporting land. 4 *Harvard Law Review*, 15; 13 *Harvard Law Review*, 664, 665, 667.

The common-law rule was not changed or enlarged by the adoption of Civil Code section 832. *Sullivan v. Zeiner*, 98 Cal. 346, 33 P. 209, 20 L. R. A. 730. This right is not one of the easements or servitudes permitted or enumerated by Civil Code, §§ 801 and 802. These sections, however, do include in the enumeration of easements the right of receiving *more* than natural support from adjacent land. Civ. Code, § 801, subd. 13. This emphasizes the exclusion of the ordinary right to support. It is in accord with the common law that the right to the support of a building could be acquired by grant or prescription, but not the right to the support of land in its natural state.

Appellant cites two California cases which refer to this right as an incident to the land or to the plaintiffs' ownership: *Green v. Berge*, 105 Cal. 52, 57, 38 P. 539, 45 Am. St. Rep. 25; *Aston v. Nolan*, 63 Cal. 269, 272. The expression has even been used that a landowner has an interest in the adjoining land for lateral support of his soil. This expression is not to be understood as a declaration that he has an interest in the *title* to his neighbor's land. While the right is an incident to the ownership of land, it is an incident to one's own land, not his neighbor's. It is his right to enjoy his own land free from trespass and injury.

[2] We conclude that the demurrer was properly sustained.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.



CALIFORNIA REPORTER

257 PACIFIC REPORTER

201 Cal. 327

TAYLOR et al. v. COLE et al. (S. F. 12485.)

Supreme Court of California. June 8, 1927.

1. Municipal corporations 46—Concurrent resolution of Legislature ratifying charter amendments held conclusive as to contents of charter and performance of acts adopting resolution (Const. art. 11, § 8).

Legislature's adoption of concurrent resolution ratifying amendments to city charter pursuant to Const. art. 11, § 8, was conclusive to extent of placing beyond courts any further inquiry as to contents of charter and performance by Legislature of acts necessary to adoption of concurrent resolution thereon.

2. Statutes 286—Legislative act, properly authenticated, conclusively establishes due performance of steps requisite to its passage.

An act of the Legislature properly enrolled and authenticated conclusively establishes, not only the contents of the law, but due performance of all steps requisite to its passage by the Legislature.

3. Evidence 31—Municipal charter amendment, ratified by concurrent resolution of Legislature, constitutes "legislative enactment," of which courts take judicial notice (Const. art. 11, § 8).

Amendment to municipal charter pursuant to Const. art. 11, § 8, ratified and approved by concurrent resolution of the Legislature, constitutes legislative enactment, in that it has effect of repealing general laws of state inconsistent therewith, and courts are required to take judicial notice of its provisions.

4. Municipal corporations 46—Conclusion of Legislature, by resolution approving charter amendment, that election was regular, may not be questioned in court, in absence of fraud (Const. art. 11, § 8).

Conclusion of Legislature, as expressed by concurrent resolution approving and ratifying

amendment to city charter pursuant to Const. art. 11, § 8, that election had thereon was regular, is not open to question in court proceedings, in absence of fraud; Legislature having duty of seeing that proceedings were regular in all respects, and to withhold ratification if jurisdictional defects existed.

5. Municipal corporations 46—Citizens or officials may not question validity of charter amendment ratified by Legislature pursuant to certification of adoption (Const. art. 11, § 8).

Existence and validity of amendment to city charter under Const. art. 11, § 8, are not open to question by individual citizens or officials of such city after approval and ratification by concurrent resolution of the Legislature pursuant to proper certification showing adoption of amendment by regular proceedings.

In Bank.

Original application for writ of mandate by Clayton R. Taylor and others, prayed to be directed to Franklin B. Cole and others, members of the Board of Directors of the City of Pasadena, and another, to compel canvassing of election returns. Writ granted.

John Perry Wood, of Los Angeles, for petitioners.

Milton H. Silverberg, of Los Angeles, M. C. Sloss and Sloss & Ackerman, all of San Francisco, for respondents.

PRESTON, J. Petitioners, each a resident and elector of the city of Pasadena, had their names, by regular proceedings to that end had, placed on the ballot as candidates for the office of director under the charter of said city at the general election held therein on April 7, 1927.

They allege that at said election each received the requisite number of votes for election to their respective offices; that defendants are incumbent members of the board of directors of said city who have neglected and refused to comply with the requirements of said charter which direct the canvassing of the returns of said election and declaring the result thereof; and that by their failure so to act petitioners are kept from their respective offices, and defendants are unlawfully holding over as incumbents of same. In fairness it should be stated that the acts of defendants as a board are controlled by four incumbents who are directly affected by the election, and some of the others at least are not participating in the action being taken by the majority. Petitioners, with a strong showing that public welfare of the city and its people is involved, have asked for a writ of mandate to compel said incumbent directors as said board to canvass the returns of said election and declare the result thereof.

The sole legal question involved is in reality the degree of strength and the radius

of influence which attaches to a concurrent resolution of the two houses of the Legislature approving and ratifying charters and amendments to charters of cities which have availed themselves of the benefits of section 8 of article 11 of the Constitution, which section in such behalf reads as follows:

“* * * If a majority of the qualified voters voting thereon at such general or special election shall vote in favor of such proposed charter, it shall be deemed to be ratified, and shall be submitted to the Legislature, if then in session, or at the next regular or special session of the Legislature. The Legislature shall by concurrent resolution approve or reject such charter as a whole, without power of alteration or amendment; and if approved by a majority of the members elected to each house it shall become the organic law of such city or city and county, and supersede any existing charter and all laws inconsistent therewith. One copy of the charter so ratified and approved shall be filed with the secretary of state, one with the recorder of the county in which such city is located, and one in the archives of the city; and thereafter the courts shall take judicial notice of the provisions of such charter.”

Amendments to existing charters are in all substantial respects in the same situation, and subject to the same procedure, as the original charters themselves.

Defendants assert that the general election of April 7, 1927, in said city was grounded solely upon some five certain alleged radical amendments to the charter of said city approved at an alleged special election held therein on November 2, 1926, and later certified to the Legislature, and in January, 1927, regularly ratified by appropriate concurrent resolutions of that body. But it is asserted that said underlying special election of November 2, 1926, was null and void by reason of the express failure of defendants themselves, as the board of directors of said city, to comply with a provision of section 8 of article 11 of the Constitution requiring advertisement of a notice in a newspaper of general circulation, until the date fixed for the election, that copies of said amendments to said charter might be had upon application. It is not contended that any of the various other requirements were omitted. It is also necessary to state that defendants themselves, as the board of directors of said city, were charged with the duty of causing said special election of November 2, 1926, to be held, and with the further duty of seeing that all legal requirements with respect thereto were carried out and performed. If any requirement was omitted, the responsibility for such omission lies with them. There is, of course, no issue of fraud in any way involved in any of the election proceedings here to be considered.

As such board they duly canvassed the returns of said special election, and declared

the said amendments adopted. Later, as required by law, the chairman of the said board and the city clerk duly and promptly certified to the state Legislature as follows:

"That in accordance with the provisions of section 8 of article 11 of the Constitution of the state of California, on its own motion, the board of directors of the city of Pasadena, being the legislative body thereof, duly submitted to the qualified electors of the said city of Pasadena certain proposals for the amendment of the charter of said city to be voted upon by said qualified electors at the special municipal election held in said city on the 2d day of November, 1926, which said proposals were and each of them was in the words and figures as follows, to wit."

The certificate further recites that the amendments were "published and advertised in accordance with the provisions of section 8, article 11, of the Constitution"; that copies of the proposed amendments were printed in convenient pamphlet form; and that notice that they might be had was published "until the date fixed for the election," "and as required by law"; that the election was duly held, the result canvassed, and that a majority of the electors voted in favor of ratification. Thereafter the Legislature embodied said certificate, which contained copies of said amendments, in a concurrent resolution, and duly adopted the said resolution, which had for its preamble the following:

"Whereas, proceedings have been taken and had for the proposal, adoption, and ratification of five amendments hereinafter set forth to the charter of the city of Pasadena, a municipal corporation in the county of Los Angeles, state of California, as set out in the certificate of the chairman of the board of directors and city clerk of the said city of Pasadena, as follows, to wit."

An authenticated copy of said amendments to said charter was duly filed in the office of the secretary of state, in the office of the county recorder of the county of Los Angeles, and in the archives of said city of Pasadena. After ratification and approval of said amendments, the defendants, as the board of directors of said city, proceeded to act thereunder and duly called and caused to be held the general city election of Pasadena, which occurred on April 7, 1927. Indeed, four of the defendants were candidates to succeed themselves at said election. Since said date the said board has continuously failed, refused, and neglected, and now fails, refuses, and neglects, to canvass the returns of said election or to declare the result thereof. This action, as pointed out above, is based solely upon their own alleged failure to properly advertise, in the proceedings resulting in said special election, a notice in the newspaper for the period prescribed by law designating the place where printed copies of said amendments might be obtained.

No showing is made that these defend-

ants did not know of this omission, if there was such, before certifying the result of said election to the Legislature, and no excuse is offered for not raising the question prior to the general election in the city had on April 7, 1927. That publication of such notice was deemed a necessary step is certain because it was duly certified that such publication had in fact been made for the period and in the manner that it is now alleged said act was not done.

[1, 2] Defendants freely admit that the adoption by the Legislature of the concurrent resolution ratifying said amendments was efficacious and conclusive to the extent of placing beyond the courts any further inquiry as to the contents of the charter and as to the performance by the Legislature of the acts necessary to the adoption of a concurrent resolution thereon. It is also conceded that an act of the Legislature, i. e. a statute, properly enrolled and authenticated, conclusively establishes, not only the contents of the law, but the due performance of all steps requisite to its passage by the Legislature. This is the general law, and has long been the rule of decision in this state. *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, and *County of Yolo v. Colgan*, 132 Cal. 265, 64 P. 403, 84 Am. St. Rep. 41.

But defendants deny that in a proceeding for the ratification of a charter by the Legislature any statute or law is in fact enacted in the primary sense of that word. They also assert that, even if the resolution be in fact an enactment of a statute, it is not sufficient to foreclose legal judicial inquiry into the question as to whether or not mandatory jurisdictional steps were followed in the election which indorsed and proposed said charter amendments.

Petitioners, on the contrary, contend that the ratification by the Legislature, the deposit of an enrolled copy with the secretary of state, and the filing of a copy with the county recorder of the proper county, together with deposit of a copy in the archives of the city, clothed the charter amendments with all the dignity of an ordinary statutory enactment, and entitled them to all the verity and presumptions which attend and protect such statutes. Further, that, if this premise be conceded, it is without the power of the court by judicial inquiry to impeach the regularity of any of the special proceedings in said election, and the adoption by the Legislature of the certificate respecting the regularity of said special election foreclosed any further inquiry as to the validity of the steps taken therein.

Petitioners further contend that, confirming the amendments by resolution, after a consideration thereof, conclusively presupposes that the validity of said election proceedings was examined, proof taken thereon, and findings made that said election was in all respects regular; that in any event it is,

not for defendants to complain of failure to observe all the requirements respecting said special election. As said amendments on ratification and filing become effective as such, quo warranto proceedings only would reach defects therein, and defendants are therefore without the right to invoke this extraordinary remedy which lies only in the name of the people of the state.

A careful consideration of the law applicable brings us to the firm conclusion that petitioners are correct in their contentions above noted, and that defendants are without any legal justification for the position they have taken.

[3] As noted above, section 8 of article 11 of the Constitution provides that such ratified charter "shall become the organic law of such city or county, and supersede any existing charter and all laws inconsistent therewith"; also that "thereafter the courts shall take judicial notice of the provisions of such charter." What element of the dignity of a statute is wanting? It has the effect of even repealing general laws of the state which may be inconsistent with it. The courts take judicial notice of its provisions, and it supersedes any other charter that the city may have had. With these distinct attributes, how can it be denied the verity of an ordinary legislative enactment? Failure in some instances to accord such verity to the charters adopted in this manner has been the seat of some of the confusion found in previous decisions of this court. If any authority other than the plain words of the Constitution is needed to give such a charter the rating of an act of the Legislature, it may be found in the following cases: *Frick v. Los Angeles*, 115 Cal. 512, 515, 47 P. 250; *Clark v. Los Angeles*, 160 Cal. 30, 45, 116 P. 722; *Teachout v. Bogy*, 175 Cal. 481, 485, 166 P. 319; and *Spaulding v. Desmond*, 188 Cal. 784, 790, 207 P. 896.

We then conclude without further comment that the ratification and promulgation of said charter amendments had all the essence of a plain legislative enactment. These views, of course, are admittedly in conflict with the pronouncement of this court in the early case of *People v. Gunn*, 85 Cal. 238, 248, 24 P. 718, 720, where it was said:

"In this case the Legislature was not the lawmaker; it did not frame or pass the law. It simply passed a resolution approving it. It was not charged with any duty, and to it was not delegated any power, either in framing or adopting the law. Its act was not the enactment of a statute."

The doctrine of *People v. Gunn*, supra, however, on the point above noted and also upon the question as to the effect of the adoption of a concurrent resolution of the Legislature, has been considered in several other cases. In *Ex parte Sparks*, 120 Cal. 395, 398, 399, 52 P. 715, 716, it is said:

"This charter prescribes a rule of evidence for all the courts of the state, and extends its process throughout the state. It seems necessary that this should be so. In many respects its charter and its ordinances have force outside of the limits of the municipality. Yet it has been said that, in respect to the charter, 'the legislature is not the lawmaker; it did not frame or pass the law. It was not charged with any duty, and to it was not delegated any power, either in framing or adopting the law.' *People v. Gunn*, 85 Cal. 238 [24 P. 718]. See, also, *People v. Toal*, 85 Cal. 333 [24 P. 603]. To this conclusion may be traced most of the complications and difficulties in regard to freeholders' charters, and it constitutes the embarrassment in this case.

"These cases were decided under the provisions of the Constitution as they then stood. The conclusions were reached after mature deliberation, and for the embarrassments which necessarily resulted ill-advised legislation was solely responsible.

"But the later amendments to the Constitution seem to have been adopted with a view to relieve from the embarrassment, so that I think that in the present condition of our state organic law the question should be deemed at least an open one. It is now expressly provided that the charter may be approved by concurrent resolution, and that then such charter 'shall become the organic law thereof'—that is, it is a special mode for the enactment of a law by the Legislature. It is clear that it is made a law by the Legislature, and becomes a law by this expression of the sovereign will of the state. It prevails and has force as a law of the state, and is not made a law by the people of the municipality by virtue of authority delegated to them. It is proposed by the municipality, and is accepted and passed into a law by the Legislature or rejected, as it shall see fit."

In *Fragley v. Phelan*, 126 Cal. 383, 403, 58 P. 923, 931, in a concurring opinion by Mr. Justice Temple, it is said:

"But I think we are neither authorized nor required to determine whether the municipal elections were duly and regularly conducted. That was settled by the Legislature when it enacted the charter into a law. This position is admitted in *People v. Gunn*, 85 Cal. 238 [24 P. 718] if the Legislature, as to the charter, is the lawmaking power. It is there said, however, that as to the charter the Legislature is not the lawmaking power. This question was again reviewed in *Ex parte Sparks*, 120 Cal. 395 [52 P. 715]; some of the justices, though not constituting a majority of the court, held that since an amendment was made to the Constitution, providing that the charter may be approved by joint resolution, such charter becomes the law of the state through the action of the Legislature. It was said: 'It prevails and has force as a law of this state, and is not made a law by the people of the municipality or by virtue of authority delegated to them. It is proposed by the municipality, and accepted and passed into law by the Legislature, or rejected as it shall see fit.' Many reasons additional to these stated in *Ex parte Sparks*, supra, might be given, but it is unnecessary, for all the attorneys in this case admit that such is the law—that the doc-

trine laid down in *Ex parte Sparks*, supra, is the true doctrine."

Ex parte Fedderwitz, 6 Cal. Unrep. 562, 565, 62 P. 935, 936, announces the same conclusion, where it was said:

"At the date of that resolution it was necessary that a city should have a population of at least 3,500 before it could frame a freeholders' charter (Const. art. 11, § 8, as amended in 1892), and it was the undoubted right and duty of the Legislature to ascertain the population of Berkeley before acting upon the proposed charter. This the Legislature did, and in the preamble to the resolution ratifying the charter it recited and proclaimed the fact that the town of Berkeley contained a population of more than 10,000 inhabitants. This resolution with the charter which it establishes is a law of the state, and is conclusive as to the fact so recited in the preamble."

The value of these cases is somewhat impaired by the fact that in neither of the three cases did four justices concur in both the opinion and judgment pronounced. It is also true that in *Spaulding v. Desmond*, 188 Cal. 783, 795, 207 P. 896, the court weakened the cases to some extent by failure to declare the case of *People v. Gunn*, supra, overruled on the point here discussed. But we are entirely satisfied with the reasoning in said above-mentioned cases, and hold that as to the point above discussed said case of *People v. Gunn*, supra, need no longer be followed. We do this with the more security because we feel that it necessarily follows from the doctrine early announced in this state that, where the existence of a fact is necessary to support the validity of a legislative enactment, it will be conclusively presumed in support of such enactment that evidence was heard and facts ascertained which authorized the Legislature to proceed. In other words, questions of law, only unmingled with questions of fact, will be considered in determining the validity of a legislative enactment.

In the case of *Stevenson v. Colgan*, 91 Cal. 649, 652-653, 27 P. 1089, 1090 (14 L. R. A. 459, 25 Am. St. Rep. 230) this question was given careful consideration, and it was there said:

"We therefore hold, that in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice. If the law, when thus considered, does not appear to be unconstitutional, the court will not go behind it, and, by a resort to evidence, undertake to ascertain whether the Legislature, in its enactment, observed the restrictions which the Constitution imposed upon it as a duty to do, and to the performance of which its members were bound by their oaths of office."

Cooley on Constitutional Limitations, p. 187, states the rule as follows:

"If evidence was required, it must be supposed that it was before the Legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be equivalent to such finding."

The rule above announced has been continuously applied in this state for many years, and this, too, where provisions of the Constitution were involved. For example, in *People v. Sacramento Drainage District*, 155 Cal. 373, 386, 103 P. 207, 214, the court said:

"Where the Legislature has itself spoken in the creation of a district such as this, and where the legislative determination may be deemed to depend upon a question of fact, it is conclusively presumed that the Legislature took evidence in its determination, and the decision which it has reached will not be subject to review by the courts. The latter will confine themselves exclusively to questions appearing upon the face of the statute itself. *Stevenson v. Colgan*, 91 Cal. 649, 27 P. 1089 [14 L. R. A. 459], 25 Am. St. Rep. 230; *Lewis v. Colgan*, 115 Cal. 529, 47 P. 357; *Smith v. Mathews*, post [155 Cal.] p. 752, 103 P. 199. Says Judge Cooley (Constitutional Limitations, p. 220); 'If evidence was required, it must be supposed that it was before the Legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding.' This court has said, commenting upon this language: 'This view seems to be sustained by the decisions of the highest courts of other states and is in harmony with the central idea of the Constitution in prescribing the independence and equality of the three great departments of the state.' *Stevenson v. Colgan*, 91 Cal. 649, 27 P. 1089 [14 L. R. A. 459] 25 Am. St. Rep. 230."

[4] In the case before us, the Constitution placed upon the Legislature the plain duty of seeing that the proceedings by which the charter amendments were proposed were regular in all respects. If jurisdictional defects existed, it was the duty of the Legislature to reject the documents tendered as a whole and withhold ratification. The Legislature saw fit to accept the certificate of the defendant board and such other evidence as it may have taken and its conclusion that the election was regular is not open to question in court proceedings, at least in the absence of fraud.

[5] We also hold that in any event the existence and validity of the said amendments are not open to question by defendants either individually or as the board of directors of said city. The admitted facts are that a proper certification showing adoption of said amendments by regular proceedings was made and forwarded to the Legislature. It is also without question that that Legislature adopted said amendments by proper concurrent resolution, and, as above stated, said resolution was duly enrolled and filed as prescribed by law. Thereafter any pro-

ceedings taken under said amendments were valid. This fact under all the authorities makes the integrity of said city election and the results thereof with absence of fraud free from any attack by individual citizens, property owners, or officials of said city. If this were not true, the sovereignty of any city operating under this provision of the Constitution could be questioned at any time or place when performing any corporate act. Indeed, the very existence of the city government could be questioned as in this case by those who have accepted the duty of directing its official course.

In *Gray v. Cardiff Irr. Dist.*, 51 Cal. App. 304, 305, 306, 197 P. 389, it was said:

"This action was brought by plaintiff to have it determined that proceedings for the enlargement of defendant irrigation district were void, and that an assessment levied by the defendant district upon plaintiff's property, in consequence, was invalid. * * * The grounds alleged, generally stated, were that fraud had been committed by the promoters of the plan by which the boundaries of the original Cardiff irrigation district had been extended to include the land of the plaintiff and of others. * * * A demurrer was interposed to the complaint, and the point was urged, among others, that plaintiff had not the capacity to sue for the relief demanded, for the reason that an action such as this could only be maintained at the suit of the people of the state. The court sustained the demurrer, and the plaintiff appealed from the judgment of dismissal which followed."

In rendering judgment sustaining the demurrer, the court held:

"The district had at least a de facto existence, and that was enough to make it immune from an attack by an individual property owner or any number of such owners. * * * It calls into question the existence of the district itself and denies the right of the district to exercise its corporate authority over the annexed territory. Such a cause of action may only be maintained at the instance of the people of the state. *Quint v. Hoffman*, 103 Cal. 506 [37 P. 514, 777]; *Reclamation Dist. v. Turner*, 104 Cal. 334 [37 P. 1038]; *Hamilton v. County of San Diego*, 108 Cal. 273 [41 P. 305]; *Keech v. Joplin*, 157 Cal. 1 [106 P. 222]. In another case (*People v. Cardiff Irr. Dist.*, post [51 Cal. App.] p. 307, 197 P. 384), which was properly brought as a quo warranto proceeding, we have considered the main questions affecting the same district, which is attempted to be raised on this appeal. As to this action, however, it is plain that the plaintiff has not the capacity to sue for the relief demanded." See, also, *Coe v. City of Los Angeles*, 42 Cal. App. 479, 183 P. 822.

In *Quint v. Hoffman*, 103 Cal. 506, 507, 37 P. 514, 515, it was said:

"Corporations organized under the act of the Legislature, popularly known as the Wright Act, being public corporations, it is immaterial whether they be corporations de jure or de facto. That is a matter which cannot be inquired into upon a collateral attack; and in a case like the present, where the validity of an assessment levied by such a corporation is the subject of litigation, the validity of such assessment does in no way rest upon the fact of the de jure character of the corporation. This principle must be considered settled law in this state. *Dean v. Davis*, 51 Cal. 411; *Reclamation District v. Gray*, 95 Cal. 601 [30 P. 779]; *Swamp Land District No. 150 v. Silver*, 98 Cal. 53 [32 P. 866]."

In *Keech v. Joplin*, 157 Cal. 1, 14, 106 P. 222, 228, the court said:

"The evidence abundantly shows that the district has been organized and that it has been acting as a district. In other words, that it is a de facto district. It is a public corporation of a similar character to irrigation districts and reclamation districts. The law is well settled that the validity of the organization of such a district cannot be questioned by private individuals, but only in a proceeding in quo warranto at the suit of the state. *Quint v. Hoffman*, 103 Cal. 506 [37 P. 514, 777]; *Reclamation District v. Turner*, 104 Cal. 335 [37 P. 1038]."

In *Marin Municipal Water Dist. v. Dolge*, 172 Cal. 724, 726, 158 P. 187, 188, the court said:

"The auditor, holding office as he does under authority of the district, cannot in his official capacity dispute its existence or the validity of its organization. *Ayers v. Newark*, 49 N. J. [Law] L. 174, 6 A. 659. Its validity cannot be questioned except in an action in quo warranto by or on behalf of the state. *Keech v. Joplin*, 157 Cal. 1, 14 [106 P. 222]; *Quint v. Hoffman*, 103 Cal. 506 [37 P. 514, 777]. The auditor, like the city clerk in the *Los Angeles* case, is a purely ministerial officer of the district, and he must obey the orders of the board of directors, regardless of his views on the above-mentioned questions."

Petitioners have made several other points which they contend are sufficient to sustain the validity of said municipal election against the attacks made thereon by the defendants, but, in view of our conclusion as above announced, it is unnecessary to consider any of the further propositions urged upon us.

Let the writ of mandate issue as prayed for.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

I concur in the judgment: LANGDON, J.

201 Cal. 290

PEOPLE v. VUKICH. (Cr. 2928.)

Supreme Court of California. June 1, 1927.

1. Witnesses $\S$ 268(3)—Cross-examination in murder case may develop conversation alluded to in direct examination.

Cross-examination of witness for defendant in murder case for purpose of developing a conversation alluded to in direct examination is proper.

2. Witnesses $\S$ 268(3)—Cross-examination of defendant's witness concerning conduct of accused at conversation alluded to in direct examination held proper under insanity defense.

Cross-examination of witness for defendant in murder case for purpose of developing conversation alluded to on direct examination, and showing that at such conversation the defendant became abusive, is proper where defense was insanity.

3. Homicide $\S$ 179—District attorney's question to defendant concerning trouble with employer other than one killed held proper on issue of insanity.

District attorney's question to defendant, accused of killing former employer, whether he had trouble with another employer held proper on issue of insanity.

4. Criminal law $\S$ 1170½(2)—District attorney's question to defendant concerning trouble with employer other than one killed held harmless where answered in negative.

District attorney's question to defendant, accused of killing former employer, whether he had trouble with another employer held harmless, if not proper on issue of insanity, where defendant answered question in negative.

5. Witnesses $\S$ 268(3)—Entire conversations alluded to in direct examination and defendant's conduct at time are proper subjects of cross-examination where defense is insanity.

Entire conversations referred to in direct examination of defendant's witness and defendant's actions, conduct, appearance, and degree of understanding at the time are proper subjects of cross-examination, in murder case defended on ground of insanity.

6. Criminal law $\S$ 398(1)—Excluding letter concerning accused held proper where writer testified to same things he had written.

Excluding witness' letter respecting conversation with accused and expressing conclusions concerning his mental condition held proper where witness testified to same things he had written, in prosecution for murder defended on ground of insanity.

7. Criminal law $\S$ 656(3)—Court's statement of valid reason for excluding letter was not error where jury were not informed of contents.

Court's statement of valid reason for excluding letter written by witness, who testified to same things he had written, was not error where jury was not informed of letter's contents.

8. Criminal law $\S$ 656(3)—Court's statement of valid reason for excluding letter was not error where jury were instructed to disregard argument.

Court's statement of valid reason for excluding letter written by witness, who testified to same things he had written, was not error where court instructed jury to disregard argument over its admissibility.

9. Homicide $\S$ 311—Instructions that social interest requires punishment for taking of life in vengeance for failure to pay obligations held proper.

Instructions that employee's grievances because of employer's failure to pay wages and futility of efforts to enforce payment by lawful means would not justify taking of life, but that social interest requires punishment for taking life in vengeance for private grievances, held proper.

10. Homicide $\S$ 253(3)—Evidence of lying in wait and shooting from wall held to sustain conviction of murder in first degree (Pen. Code, $\S$ 189).

Evidence that former employee, after prolonged and futile effort to collect wages, secreted himself on premises and killed former employer by shooting from behind wall held to sustain conviction, under Pen. Code, $\S$ 189, making homicide by lying in wait murder in first degree.

In Bank.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Millan Vukich was convicted of murder in the first degree, and he appeals. Affirmed.

Geo. E. Foote, of Sacramento, and W. J. Burns, of Auburn, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SHENK, J. The defendant was charged with the murder of one Richard T. Stone, on September 27, 1925, in Placer county. He was convicted and sentenced to suffer the extreme penalty. He has appealed from the judgment and an order denying his motion for a new trial. The facts leading up to and attendant upon the killing are briefly as follows: The deceased had charge, management, and control of the Alta Lumber Company's sawmill located on the Baker ranch, on the Foresthill divide, in said county. The defendant, a Montenegrin, about 36 years of age at the time of the trial, was sent to the Baker ranch, for employment as a mill hand from an employment office in Sacramento, in June, 1923. He worked at miscellaneous jobs on the ranch and about the mill until September, 1923, when, following a controversy and a personal encounter with Stone, he was discharged and ordered off the premises. The defendant thereupon demanded the wages due him and was given a time check for \$161, which he claimed was 65 cents

short. The time check was directed to a bank at Roseville. He immediately went to the district attorney at Auburn and complained about an alleged attack on him by Stone, and also about not receiving cash for his wages. He was informed by the district attorney that nothing would then be done with reference to the matter of the fight, but that if he were not paid his wages by September 6th proceedings would be commenced against Stone. The defendant went to the bank at Roseville, where payment on his time check was refused on the ground that there were no funds in the bank to pay the same. He again consulted the district attorney, proceedings were taken against Stone in the justice's court, and he was fined \$100, but the defendant did not collect his wages. He then consulted attorneys with a view to obtaining a money judgment, but without avail. He sought relief through the office of the labor commissioner at Sacramento and the district attorney of the city and county of San Francisco. He sought the aid of the Attorney General of the state and endeavored to enlist the assistance of the Governor in the redress of what he conceived to be a great wrong done him by Stone. He worked intermittently and traveled about during 1924 and 1925, at times resuming his efforts to collect his wages from Stone. He finally decided to take the law into his own hands, as he expressed it. He went to Reno, purchased a rifle, a pistol, a dirk, and ammunition, at a cost of about \$50, and made his way to the Baker ranch, arriving there about 2 o'clock of the morning of September 27, 1925. He first went into the bunkhouse and then into the boiler room of the mill, where he remained until between 6 and 7 o'clock, at which time he heard voices emanating from the Stone residence and concluded that Stone was in the house. He then went into the bathhouse, which adjoined the sawmill, and was about 100 yards distant from the residence. He cut gaps in the cracks in the bathhouse in such manner that he could see through the same without being seen. Stone was living with his wife in the residence and a Mrs. Horten from San Francisco was visiting them. At about 10 o'clock the three came out of the house for the general purpose of looking over the mill and lumber yard, and for the more particular purpose of having Stone point out to Mrs. Stone certain lumber which was to be sold during a contemplated absence of Stone. The three walked across the lower part of the yard, conversing as they went. As they approached the mill Stone stepped up to and upon a sill and turned and reached out his hand to assist Mrs. Stone. As he turned he was facing the bathhouse, where the defendant was in hiding. At that moment the defendant fired. The bullet passed through Stone's heart, and he died almost immediately.

ly. The defendant fired another shot and emerged from the bathhouse, carrying his rifle before him, where he was in plain view of Mrs. Horten.

The defendant left the scene of the shooting, went into the mountains, traveled about for some time in such manner as to indicate beyond question that he was endeavoring to avoid apprehension, and finally found his way into Mexico. In returning to the United States he was arrested at the border and brought back to Auburn for trial. At Yuma, on October 23, 1925, the defendant made a lengthy statement, which was taken down in shorthand, transcribed, and signed by him on the next day, in which the killing of Stone under the circumstances above related was admitted. A second and similar statement, reported in shorthand and transcribed, was made by the defendant after his arrival at Auburn on October 26, 1925. These statements were received in evidence.

The defense was insanity. The jury found the plea unsustained. An examination of the evidence discloses that there was abundant evidence to sustain the verdict. In fact, the defendant does not claim that the evidence was insufficient to sustain the verdict rejecting his plea of insanity and finding him guilty of murder in the first degree.

A reversal of the judgment is sought upon three grounds: (1) Alleged prejudicial misconduct on the part of the district attorney which prevented the defendant from having a fair trial; (2) prejudicial misdirection of the jury by the court in matters of law in its instructions and (3) certain alleged prejudicial errors by the court in its rulings upon the admission and rejection of evidence and in alleged comments on certain evidence.

In support of the first contention, it is urged that the district attorney violated the substantial rights of the defendant in the cross-examination of the defendant's witness Arthur L. Johnson. In the direct examination of this witness the defense had elicited the substance of certain conversations between the witness, who was a deputy state labor commissioner, and the defendant during the time that the defendant was endeavoring to enforce collection of his wages.

[1, 2] On cross-examination, the district attorney endeavored to draw from the witness more of the conversation by asking him if the defendant had ever discussed with him any claim of the defendant against a Dr. Galen. The court overruled the defendant's objection to the question on the ground that the conversation alluded to in the direct examination could be fully developed on cross-examination. The witness answered that the defendant had made complaint of his inability to collect \$52 from Dr. Galen as wages; that the doctor owed him that amount, but was willing to pay him only \$48.50, or \$3.50 less than his claim. When the witness stat-

ed to the defendant that the small difference did not seem to be of sufficient consequence to justify the office of the labor commissioner in intervening under the circumstances shown, the defendant became abusive and criticized the office of the labor commissioner for not taking action to collect the full claim. We find no error in this cross-examination for two reasons. The first was correctly stated by the court when it overruled the objection; and, secondly, this cross-examination might properly be deemed relevant to the issue of insanity interposed by the defendant.

[3, 4] It is further urged that the district attorney was guilty of prejudicial misconduct in the cross-examination of the defendant wherein it was sought to discover whether the defendant had had any trouble with employers other than Stone. The question was asked, "Did you have a fight with the boss at Los Angeles and have to go to court about it?" Before an objection was interposed the defendant answered, "No, sir; not that I remember." Defendant's counsel then objected to the question, and the court dismissed the objection by stating, "It has been answered in the negative." We think the cross-examination was proper on the issue of insanity, but in any event, the question was answered in the negative, and we discover no injury to the defendant resulting therefrom.

Further misconduct is charged against the district attorney in his closing argument. We have examined with care those portions of the argument especially objected to and find therein nothing prejudicial to the substantial rights of the defendant.

It is next insisted that the court incorporated in its instruction No. 1, relating to the duties of the jurors, the following language: "And unless you do your duty, laws may as well be stricken from the statute books," and that in doing so reversible error was committed. It is clear that counsel for defendant has proceeded on the mistaken assumption that such language was included in the instruction. We have examined fully the said instruction as it appears in the clerk's transcript, and such language does not appear therein, either in substance or effect, nor in any instruction given by the court. The instruction as included in the record is a correct exposition of the law.

Exception is also taken to that part of instruction No. 10 on reasonable doubt and the degree of proof required in criminal actions. Without quoting the same, it may be said that said instruction was in conformity with approved instructions on the subjects referred to. Numerous other instructions given or proposed by the prosecution, and given as modified are set forth in the defendant's brief. These instructions have been carefully examined and we find no valid objection to any of them. Nor do we find error in the refusal of the court to give certain

designated instructions proposed by the defendant. The charge was full and fair and no legitimate criticism may be directed to any portion thereof.

[5] It is next contended that the court committed prejudicial error in rulings on the admissibility of evidence during the cross-examination of the defendant's witness Lionel B. Browne wherein it was sought by the prosecution to develop the entire conversations referred to in the direct examination and to disclose the actions, conduct, appearance, and degree of understanding of the defendant at the time. These were proper matters of cross-examination. Objection is also made to the rulings of the court in sustaining objections to certain questions propounded by counsel for the defendant on the direct examination of witnesses Pope, Burner, Loc Yen, and Jenkins, wherein the character, reputation, and disposition of the deceased for peace and quietude was attempted to be put in issue. No question of self-defense was involved in the case, but assuming that the character of the deceased in the respects referred to could nevertheless be made an issue under the facts disclosed by the record, still it appears that the objections to the questions were properly sustained for the reason that the necessary foundations for the questions had not been laid.

[6, 7] Finally, it is contended that the court overstepped legal bounds in enlarging on the reasons for refusing to admit in evidence a certain letter dated September 29, 1925, addressed to the district attorney of Placer county, and signed by Walter G. Mathewson, state labor commissioner, by his attorney and deputy, Arthur L. Johnson. This letter contained a list of the names of the men who had filed labor claims against the deceased. It also gave a general history of the activities of the defendant so far as known to the state labor commissioner and expressed certain conclusions concerning the mental status of the defendant, which his counsel undoubtedly believed were favorable to the defendant on the issue of insanity. The witness Johnson, the writer of the letter, was examined in chief on behalf of the defendant and testified to much that was set forth in the letter, and to nothing at substantial variance with anything stated therein. Counsel for defendant demanded the production of this letter, whereupon the district attorney stated to the court that the letter was in his possession and would be produced upon the suggestion of the court that it was competent evidence. Undoubtedly the court then read the letter, as the remarks of the court in ruling upon the admissibility of the same plainly indicate. The ruling was adverse to the defendant, and, later, in reviewing the reasons for the ruling, the court stated, in part:

"* * * As I understand the matter, a certain witness testified on the stand as to what he observed in relation to the defendant, and as to what the defendant said to him in a certain conversation he had with the defendant; that from that he formed and expressed an opinion here as a witness for the defense; that it also appeared that he had written the same thing to some other person, * * * written the same thing he had testified to. Now, of course, we can see, if that is permitted, the witness could bolster up his testimony by writing to a number of persons and calling them in and asking if they received such a letter from him, and that is, I understand, only corroboration, and, in the second place, not competent because, in fact, self-serving or bolstering up his testimony given by the witness on the stand. If he had made some other statement on the stand other than what he wrote, on cross-examination it would be proper to confront him with the letter to contradict him."

Objection is made to that portion of the court's statement to the effect that, if a witness could write a letter to a third party concerning the facts in the case and could later use the letter as evidence, the same would be no more than an attempt to bolster up his own testimony given on the stand, and would be self-serving and incompetent. It is insisted that the remarks of the court in sustaining the objections to the introduction of this letter in evidence were improper comments of the court on the evidence in the case. There is no merit in the objection, for the reason that the letter was not received in evidence and the jury was not apprised of its contents except as it might draw the conclusion that it contained statements in substance the same as the testimony of the witness on the stand.

[8] The ruling of the court was correct in point of law, and the fact that valid reasons for the ruling were given in the presence of the jury clearly could not have been prejudicial to the defendant. Furthermore, the court was at pains to instruct the jury to disregard the arguments on the point, and not to treat the same in any wise as evidence.

[9] Without question, the defendant was incensed and exasperated to a high degree because of his failure, after persistent efforts, to obtain payment of his wages from Stone, but the court correctly instructed the jury that such grievances would not justify the aggrieved party in taking the law into his own hands and destroying human life; that the laws of the land are conclusively presumed to afford protection against such grievances; that persons may not administer relief to themselves by killing those believed to have violated their rights; that civilized society could not exist for a great length of time if human life was subjected to the jeopardy which would necessarily follow if it were once understood that men might execute their own vengeance by killing

their fellow men for private grievances, either real or imaginary; that the laws of the land as well as the peace and good order of society demand that, when human life is taken for the gratification of private malice or vengeance, the punishment prescribed by law for the commission of intentional homicide shall be administered to the guilty parties.

[10] The evidence was sufficient to justify the jury in finding under the instructions of the court that the homicide committed by the defendant was "by lying in wait," and as such was by statute made murder of the first degree (section 189, Pen. Code), and the matter of fixing the penalty was, of course, exclusively the function of the jury.

The judgment and order are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

201 Cal. 248

MAHONEY v. CITY and COUNTY of SAN FRANCISCO et al. (S. F. 11177.)

Supreme Court of California. May 27, 1927.

1. Municipal corporations §889—Putting San Francisco's revenue and income into separate funds is mandatory (Charter of City and County of San Francisco, art. 3, c. 2).

Under Charter of City and County of San Francisco, art. 3, c. 2, apportionment and setting apart of city's revenue and income into separate funds is mandatory, and transfer of moneys from one fund to another or use thereof for any purpose other than that for which they are raised, except as specifically provided, is forbidden.

2. Municipal corporations §864(1)—City's contract attacked as violation of debt limitation held one of lease, and not for purchase of land.

In taxpayer's suit to cancel, as violative of constitutional and charter limitations, instruments executed by city, one contract in question relating to city's acquiring use of land for golf links held lease, and not contract for purchase of land.

3. Vendor and purchaser §3(2)—Agreement of parties that instrument should be called lease cannot change its character, which is determined by its terms.

Agreement of parties to instrument that it should be characterized as lease cannot change its true character, which is controlled by evident intent and purpose of makers as disclosed by terms of instrument.

4. Municipal corporations §864(1)—Contract by city relating to renting land held one to purchase land as affecting debt limitation.

Contract with city relating to renting land containing provision that city could purchase property for stated sum, to be reduced by cred-

iting payment on rents at exercise of option to purchase, *held* contract to purchase as respects determination of question of expenditures within debt limitation.

5. Pleading ⚡207—Failure of complaint to cancel contracts by city to show what portion of alleged expenditures for improvements would be expended under first contract, and what under second, should have been raised by special demurrer (Charter of the City and County of San Francisco, art. 3, c. 2, § 13; art. 16, § 29; Const. art. 11, § 18).

In view of Charter of City and County of San Francisco, art. 16, § 29, and article 3, c. 2, and especially section 13 thereof, governing administration of city's finances, in suit to cancel contracts by city relating to use of land on ground that they would require expenditure exceeding yearly income without two-thirds vote of qualified electors at special election, contrary to Const. art. 11, § 18, failure of complaint to show what portion of alleged expenditures required on land by contracts would be required under first contract, and what portion required under second, should have been raised by special demurrer.

6. Municipal corporations ⚡1000(5)—Complaint to cancel instrument by which city gained use of land, on theory of excessive expenditures, *held* good on demurrer (Const. art. 11, § 18; Charter of City and County of San Francisco, art. 16, § 29).

In taxpayer's suit to cancel instrument whereby city obtained use of certain land, complaint showing that, if city failed to make expenditures in accordance with certain plans and specifications, owner might enter and make improvements charging expense to city and county, plus 10 per cent., in view of other allegations that obligation so incurred exceeded annual income and revenue of city and county, contrary to Const. art. 11, § 18, and Charter of City and County of San Francisco, art. 16, § 29, was sufficient on demurrer thereto, which should have been overruled.

7. Municipal corporations ⚡864(1)—Contracts with city for use of land *held* sufficiently certain and definite to be enforceable as affecting debt limitations.

As respecting question of expenditures in excess of limitations, contracts by city and county of San Francisco for use of land for golf links and other purposes *held* sufficiently definite and certain as to mutual obligations and duties assumed by parties thereto to be enforceable.

8. Municipal corporations ⚡864(1)—Manner in which indebtedness beyond lawful limits is created is immaterial, in taxpayer's suit to cancel contracts (Const. art. 11, § 18; Charter of City and County of San Francisco, art. 16, § 29).

In taxpayer's suit to cancel instrument executed by city of San Francisco on theory of its calling for expenditure of more than city's yearly revenue without special election, as required by Const. art. 11, § 18, and Charter of City and County of San Francisco, art. 16, § 29, manner in which indebtedness is created is immaterial if result is to subject city to present

liability, direct or indirect, which taxpayer will eventually be called upon to meet.

9. Municipal corporations ⚡864(1)—City and county of San Francisco *held* not authorized to contract for purchase of land calling for expenditure of more than yearly revenue without special election (Const. art. 11, § 18; Charter of City and County of San Francisco, art. 16, § 29).

Under Const. art. 11, § 18, and Charter of City and County of San Francisco art. 16, § 29, city of San Francisco had no power, as matter of law, to enter contract designated as one for lease of land, but containing provision that city and county must make extensive improvements, expense of which was probably in excess of annual income, and which provided that on failure to make expenditures lessor might enter and make improvements called for, charging expense to city and county, plus 10 per cent. interest.

10. Municipal corporations ⚡1000(5)—Taxpayer's complaint to cancel lease of land to city *held* good on demurrer (Const. art. 11, § 18; Charter of City and County of San Francisco, art. 16, § 29).

Complaint to cancel lease of land to city and county of San Francisco, alleging liabilities thereby assumed caused incurring indebtedness in excess of annual income without special election, contrary to Const. art. 11, § 18, and Charter of City and County of San Francisco art. 16, § 29, *held* good on demurrer.

11. Pleading ⚡129(1)—After overruling demurrer to complaint, in absence of answer denying allegations of complaint, they must stand admitted.

After overruling demurrer to complaint, in absence of answer denying allegations of complaint to cancel instrument, they must stand admitted.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Margaret Mahoney against the City and County of San Francisco and others to cancel instruments and for other relief. From a judgment sustaining demurrers to the complaint, plaintiff appeals. Reversed.

C. K. Bonestell, H. W. Hutton, J. C. Flannery, and William P. Hubbard, all of San Francisco, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent Spring Valley Water Co.

John T. Pigott, John J. O'Toole, present City Atty., Dion R. Holm, Asst. City Atty., George Lull, former City Atty., and John J. Dailey, Asst. City Atty., all of San Francisco, for other respondents.

SEAWELL, J. This action was inaugurated in the court below by plaintiff, Margaret Mahoney, a resident taxpayer of the

city and county of San Francisco. The prayer of the amended complaint was for a decree of the court directing the delivery into court for cancellation of two certain instruments of even date purporting to be leases entered into by the Spring Valley Water Company, a corporation, and the city and county of San Francisco, upon the ground and for the reason that said instruments were in violation of article 11, § 18, state Constitution, and article 16, § 29, Charter of the City and County of San Francisco, which provide generally and specifically, respectively, that said city and county shall not incur any indebtedness or liability for any purpose exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof voting at an election held for that purpose, and are, therefore, null and void and wholly without legal effect; also, that said Spring Valley Water Company, designated in said instruments as lessor, and said city and county of San Francisco, designated therein as lessee, be perpetually enjoined from taking any further action or proceedings or exercising any right or privilege claimed to have been granted or conferred under or by virtue of said instruments or agreements, and that the city and county of San Francisco and certain of its officers be restrained and enjoined from auditing or approving any claim or demand or expending or paying out of the public funds of said city and county any sum or sums of money whatsoever claimed to be due or owing on account or by virtue of the terms or covenants contained in said instruments; and that the auditor and treasurer of said city and county be required to repay into the city treasury the sum of \$24,000, with interest thereon, paid by said city and county to said Spring Valley Water Company as the first installment of rent as by the terms of one of said instruments provided, and to repay any and all other sums that may thereafter be paid, audited, approved, or allowed by the agents of said city and county under said instruments. The complaint closes with a prayer for general relief and costs. The defendants Spring Valley Water Company and the city and county of San Francisco appeared separately and demurred to the amended complaint upon general grounds. The demurrer as to each defendant was sustained with leave to amend, and, the plaintiff refusing to further amend, judgment was entered against her. The appeal is taken from the judgment thus entered.

The major question presented by the appeal is whether the terms and provisions of the instruments before us—be they agreements of purchase or leases of real property—are violative of either the organic law of the state as expressed by article 11, § 18, state Constitution, or of article 16, § 29, Charter of the City and County of San Fran-

cisco, or of the letter or spirit of the law as expressed in other provisions of said charter.

Article 11, § 18, state Constitution, provides:

"No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. * * *

Article 16, § 29, Charter of the City and County of San Francisco, provides:

"When the supervisors shall determine that the public interest requires the acquisition of any land or lands or the construction or acquisition of any permanent building or buildings, improvement or improvements, the cost of which, in addition to other expenses of the city and county, will exceed the income and revenue provided for the city and county for any one year, they must, by ordinance, submit a proposition or propositions to incur a bonded indebtedness for such purpose or purposes to the electors of the city and county at a special election to be held for that purpose only. * * *

[1] The apportionment and setting apart of the city's revenue and income into separate funds is mandatory, and the transfer of moneys from one fund to another or the use thereof for any purpose other than that for which the same were raised, except as specifically provided, is forbidden. Article 3, c. 2, Charter. Each demand must show the fiscal year within which the indebtedness was incurred and the name of the specific fund out of which it is payable, and have written or printed upon it a statement that the same can only be paid out of the income and revenue provided, collected, and paid into the proper specific fund in the treasury for the fiscal year within which the indebtedness was incurred. Article 3, c. 2, § 13. Again, the incurring of liabilities against the treasury which cannot be paid out of the income provided, collected, and paid into the proper fund as its proportion of the same for the fiscal year, or permitting liabilities or indebtedness incurred in any one fiscal year to be a charge upon or paid out of the income or revenue of any other fiscal year, is prohibited by article 3, c. 2, § 13, of said Charter.

With the provisions of the organic law before us, it becomes necessary, for a determination of the question as to whether or not the terms, conditions, and covenants of said instruments or agreements, or either or

any of them, are violative of the state Constitution and said charter, to consider in connection therewith the substance of said instruments, which are annexed to and made a part of the complaint and marked Exhibits A and B, respectively. In both instruments the Spring Valley Water Company is denominated the lessor, and the city and county the lessee. For the sake of convenience we adopt the same identification references. By Exhibit A the lessor demises and lets unto the lessee all that certain real property situate, lying, and being in the city and county of San Francisco, and described as a tract of land containing 170 acres, more or less, being a portion of that certain tract of land containing 811.13 acres of the so-called Lake Merced ranch of the Spring Valley Water Company, adjacent to the municipal golf course as now located. The lease term is 15 years, beginning on July 1, 1922, and terminating on June 30, 1937. The rentals for the term total \$102,000 and are apportioned with reference to an ascending scale. The first installment of \$2,000 became payable on July 1, 1925, and the remaining installments thereafter in gradually increasing amounts are payable on July 1 of each succeeding year, the last installment, amounting to \$15,000, falling due July 1, 1936. In addition to said installments aggregating \$102,000, the lessee agrees to pay annual installments equal in amount to the installments of all taxes, assessments, and other municipal or governmental charges levied upon said real property or any part thereof before the same shall become due. The leased property shall be used for a public golf links and playground only and shall be maintained for such purposes. The golf course is to be constructed according to a plan annexed to the lease and may be altered with the written approval of the lessor, except in the particular as to fairways. The construction shall include seeding to grass of all greens and fairways. The lease contemplates the construction by the lessee upon the premises of children's play-grounds and pedestrian and equestrian paths and trails. The lessee agrees at all times to keep and maintain said golf course, playgrounds, paths, and trails in good condition and repair, and to cultivate the grass on all greens and fairways until a suitable grass sod has been developed and thereafter to maintain the same in a condition suitable for a golf course. The location and character of any clubhouse which the lessee may erect upon the demised premises shall be subject to the approval of the chief engineer of the lessor and the work of erecting the same shall not be commenced until such written approval has been obtained. Said lessee agrees to plant suitable shrubs and trees upon said premises according to a planting plan or schedule through a series of years and to care for the same.

An adequate sewerage system of a sanitary type shall be constructed by the lessee in such locations as may be approved by the city board of health and by the chief engineer of the lessor. The lessee shall not, without the consent of the lessor, place upon said premises any building, fences, structures, or improvements except as expressly provided in the lease or as designated upon a plan of construction marked Exhibit A, which is not before us for inspection. No disturbance or change of the surface of the ground is permissible, except as expressly permitted or contemplated by the plans as shown by said Exhibit A, or without the written approval of the lessor's chief engineer. All work to be done or improvements to be made as provided by the lease, or otherwise permitted, shall be done at the sole expense of the lessee, and it is liable for all claims on account of materials and labor used or furnished in connection with the plan or scheme of improvement. The lessee agrees to police the premises at its own expense, protect the water and watersheds of the lessor from pollution, and also to protect the pipes, ditches, flumes, and other property of the lessor now used or hereafter to be constructed by it upon said premises, and to comply with all public health laws and requirements which the lessor may prescribe with respect to the use and occupation of said premises. Reservations of rights of way for pipes, ditches, flumes, conduits, structures, etc., on, upon, and through the premises, and the right to enter and do any and all things necessary to manage, control, and protect the premises as a part of its water system and to develop the water supply upon or in the same, are expressly made by the lessor. The lessee agrees to provide printed rules and regulations, which are to govern the conduct of all persons using said premises. The lessee also agrees to pay to the occupants of the premises, who will be required to vacate the same by reason of the entry of said lessee, actual damages sustained by said tenants, which are to be fixed by the agreement of the lessor and said tenants. Said lease provides that all repairs are to be made at the expense of the lessee, and the lessor has the right of entry for inspection purposes at all times. The lessor covenants that, during the term, "the lessee may peaceably have and hold the demised premises subject to the agreements, covenants, and conditions therein contained without hindrance by the lessor." In the event that the lessee fails or neglects to do or perform any act or thing on its part to be done or performed, the lessor may, after notice, do or perform said act or thing at the expense of said lessee. Forfeiture of the lease by the lessee is provided in case of noncompliance with the terms and conditions of the lease, with right of re-entry by the lessor without prejudice to any other reme-

dy which it might have for arrears of rent or for damages for breach of covenant or condition broken. Neglect of the lessor to take advantage of any act, omission, or breach which would constitute grounds for the termination of the lease shall not be deemed to be a waiver of any subsequent cause or breach that might arise. In the event that the lessee shall purchase a larger tract of land of which the demised premises form a part, the lease shall terminate. The lease contains the usual nonassignable clause without the written consent of the lessor, and a further provision that should the Railroad Commission refuse to authorize the lessor to enter into said lease it shall be deemed void and of no effect.

By Exhibit B the lessor demises and lets to the lessee a tract of land consisting of about 60 acres, situate in the city and county of San Francisco, and more particularly described in an exhibit referred to but not before us. The lease term is 10 years, beginning on July 1, 1922, and ending on June 30, 1932. The covenants for the payment of rent are: \$24,000 upon the date of the agreement, the receipt of which is acknowledged; \$36,960 on July 1, 1923. The balance of the annual installments are made payable on the first day of July of each successive year, apportioned on a slightly descending scale through the life of the lease, aggregating \$304,000 for the 10 years' term. The lessee agrees to pay as additional annual rental installments an amount equal to the installments of all taxes, assessments, and other municipal or governmental charges that may be levied upon or assessed against said real property. It is agreed by the parties that said real property shall be used for public park purposes only, and that the lessee shall, before October 1, 1922, commence the construction of a park and playground, including a wading and swimming pool, and diligently prosecute the same to completion, and, on or before July 1, 1924, complete the same. The construction of the park and playground and swimming pool shall conform to a plan which is not before us for examination, but which, it is alleged, will call for large annual outlays of the city's income, which are not provided for in any manner. In those features not herein specially noted, except as to the provisions granting the option to purchase, which will presently receive attention, said two leases in form and substance are quite similar. The material departure is found in that portion of the lease which grants the option to purchase. It is thereby provided that the lessee may at any time during the lease term, provided the lessee is not in default in payment of rent or in the performance of any of its covenants, purchase said real property for the sum of \$240,000, with interest at the rate of 6 per cent, per annum from and after the 1st day

of July, 1922, by the payment of said purchase price at once or at any time thereafter. Said purchase price shall be reduced by crediting such payments as have been made on account of rents as therein provided. If the lessee elects to exercise said option, it is required to notify the lessor in writing to that effect, and within 60 days after such notice said lessee shall pay to the lessor the purchase price, and the latter shall then concurrently with said payment deliver to the lessee a deed of grant conveying to the lessee "*the title which the lessor has to said real property*, free and clear of liens and incumbrances hereafter created by the lessor, except the lien of taxes not then delinquent." (Italics supplied.) In the event that the option is exercised, each annual installment of rent shall be credited and applied, first, to the account of interest accrued at the date of the payment of such installment of rent, and the balance shall be applied to the principal of said purchase price as of the date upon which such installments were severally paid. Installments of rent in the amount of taxes, assessments, and governmental charges shall not be credited on said purchase price.

[2] It will be seen upon an inspection of the instrument that Exhibit A is in all essential features, upon its face, a hiring of real property and an agreement between the parties limiting its use to certain purposes and reserving to the lessor certain proprietary rights as to its control and maintenance in connection with its use as a part of a public utility engaged in furnishing and supplying said city and county with water for domestic, manufacturing, and general commercial and useful purposes. There is nothing appearing upon the face of the lease and agreement that would justify us in holding, as a matter of law, that Exhibit A is an agreement or contract for the sale and purchase of said described 170 acres. Reference is made, however, to paragraph 26 of said lease, which provides that in the event the lessee shall purchase certain tracts of real property, of which said 170 acres is a part, the lease and agreement shall terminate therewith. The total amount of rentals to be paid to the lessor, to wit, \$102,000, equals \$40 per acre, per year, during the full term. The additional sums agreed to be paid by the lessee on account of taxes, assessments, and municipal and governmental charges to which the property may be subject or liable, and costs and expenses by reason of enforced compliance with the comprehensive program of construction, planting of trees and shrubs, laying out playgrounds, construction of a sanitation and sewerage system, and other obligations assumed by the lessee, are not capable of exact calculation. The allegations of the complaint are that said rentals, costs, and expenses will run into very large

amounts and exceed the revenue that was or could have been provided to meet the accruing indebtedness for the fiscal year 1922-23. No data by which the cost of the improvements, such as a clubhouse and other necessary buildings, which the city is given the permissive right to erect and which in the contemplation of the parties will be erected by the lessee, appears anywhere in the record before us. Conceding that Exhibit A may fairly be classed as a lease, the remaining question left for determination is whether the future income and revenues of the city may be burdened by obligations such as are imposed upon the municipality by the lease. In short, do the obligations therein provided come within the meaning of the term "indebtedness or liability," which is expressly forbidden to be incurred by the organic law of both state and city, except in those cases where the procedure of said organic law in such cases provided has been observed? If this question may be answered in the negative, the further question arises as to whether the fixed installments of interest and other costs and expenses provided for by the lease and agreement may be said to be in excess of the reasonable ability of the municipality acting within its charter limitations as to taxation and considered with relation to the necessary costs and expenses of the administration of the city government in the performance of strictly municipal affairs, thereby contravening the provisions of the city's charter and the state Constitution. The undisputed allegations of the complaint are that such a result will ensue.

[3] Exhibit B is in form a lease, but not quite as distinctly such in phraseology as Exhibit A. The agreement of the parties to the instrument that it should be characterized as a lease cannot change its true character. The evident intent and purpose of the makers as disclosed by the terms of the instrument must in such cases control. In *re City and County of San Francisco*, 195 Cal. 426, 233 P. 965.

[4] That it is, in effect, an agreement of purchase is impelled by the language of the instrument and the logic of the situation. This conclusion is strengthened by the plan and scheme of the projectors to acquire additional outdoor areas for recreation and amusement to those which the city now possesses. There is sufficient in each exhibit or lease to indicate that the municipality is contemplating the carrying forward of a very comprehensive plan, which, from necessity, would require ultimately the ownership of practically all of the lands described in the complaint, and possibly of other lands therein referred to. The plans as disclosed by the contracts irresistibly suggest interrelation and joint operation of one area with the other in the accomplishing of a common plan and purpose. This suggestion, however, is rebuttable and may be overcome by evidence

that either one of said tracts of land is desirable for the purposes set forth in said respective instruments, notwithstanding a failure in an attempt to acquire both. We are of the opinion that the District Court of Appeal, First district, Division 2 (Nourse, J.), adequately and correctly analyzed the effect of Exhibit B in a decision handed down by said court upon transfer made by this court of said cause for decision. We therefore adopt as a part of this opinion the reasoning and conclusion reached in fixing the legal status of Exhibit B:

"Turning to the second contract [B], we find that though this is denominated a lease and the contracting parties are referred to throughout the agreement as 'lessor' and 'lessee,' it is in its very nature and purpose, nothing more than a contract of purchase and sale whereby the city and county, by payments which are denominated in the agreement as 'annual installments of rentals,' actually has contracted to purchase the property through the payment of installments running over a period of 10 years. By the terms of this contract the sum of \$24,000 was required to be paid at the time of the execution of the agreement on July 1, 1922. The full purchase price, for which the option to purchase was granted, was the sum of \$240,000, plus interest thereon at the rate of 6 per cent. per annum from the date of the execution of the agreement. The annual payments which were specified in the contract covered a period of 10 years, which, upon examination, appear to be made up in the following manner: The sum of \$240,000 was divided into 10 equal parts of \$24,000 each. This was the payment required to be made upon the execution of the contract. On the 1st of July, 1923, the sum of \$36,960 was to be paid, and this sum consists of the sum of \$24,000, plus \$12,960, which is interest at 6 per cent. on the balance remaining due on the purchase price after the first payment had been made. On the 1st day of July, 1924, the sum of \$35,520 was specified to be paid, and this appears to be made up as follows: \$24,000 on the principal and \$11,520, being the interest on \$192,000, the balance of the principal then remaining due. This method of computation and specification of the annual payments which are required to be made has been carried all through the 10-year period until the total sum of \$304,800 is required to be paid, which, again, is found to be \$240,000, plus 6 per cent. per annum from July 1, 1922, on the remaining principal decreasing at the rate of \$24,000 a year.

"In considering a similar contract which was also denominated a lease, and which called upon the city and county to make annual payments termed rentals, and which obligated the city and county to make vast expenditures of money for improvements, the Supreme Court in the so-called *Marina Case*, 195 Cal. 426,¹ held that the option to purchase the real property on the condition that all the covenants of the so-called lease had been met became 'in effect an increasing compulsion upon it to consummate such purchase, since not to do so would result in the irrevocable loss to the municipality not only of the primary and succeeding annual payments, which it is bound to make under this agreement, but also of the entire usufruct of the property

¹ 233 P. 965.

during the period of its occupation, and also of the property itself.' In that case the Supreme Court carefully analyzed the provisions of the agreement under consideration which were in all material respects similar to the terms of the agreement found in Exhibit B and held that it must be construed to be an agreement for purchase, and not merely a lease as denominated by the parties. Having thus construed the agreement and having found that the obligations incurred thereby exceeded the income and revenue of the city and county for the year in which the obligation was incurred, and that no provisions had been made for meeting such indebtedness as required by section 18 of article 11 of the Constitution, the Supreme Court held that the agreement was void as in contravention of the express limitations of that section. In so holding the court relied upon *Higgins v. City of San Diego*, 131 Cal. 294, 298, 63 P. 470, and *Chester v. Carmichael*, 187 Cal. 287, 201 P. 925.

"The Marina Case arose on a petition for a writ of mandate to compel the auditor of the city and county to audit and approve a warrant for one of the payments called for by the contract. In the course of the opinion the Supreme Court took occasion to refer to the fact that the petition for the writ was silent as to whether the creation of the liability under the agreement exceeded the income and revenue provided for that year, but the court held that, inasmuch as it appeared that this was one of the grounds stated by the auditor for his refusal to audit and approve the warrant, it was incumbent upon the petitioners to show affirmatively that the objection was not founded in fact. In the amended complaint before us it is alleged affirmatively that the expenditures required by the two agreements in suit exceeded the income and revenue provided by the city for the year 1922, and that no provision was made for the payment thereof through the proceeds of bonds issued for that purpose, and that the assent of two-thirds of the qualified electors of the county had not been procured before said indebtedness was incurred. It is also alleged that, in addition to the specified sums required to be paid annually under the two contracts, the city and county obligated itself to make certain improvements upon the two tracts of land, aggregating between two and three million dollars."

[5] "Though it does not appear from the complaint what portion of this sum of two or three million dollars is required to be expended under the first contract and what portion is covered by the second, that is a question which should have been raised by special demurrer. Thus it may be that the first contract is nothing more than a lease calling for annual payments of rentals in addition to the cost of improvements upon the property, and that this cost is not in excess of the constitutional limits. But if this is so the complaint states a better cause of action for equitable relief in relation to the second contract, as the expenditures required to be made under that contract would be the greater in excess of the constitutional limits. Thus we have the question squarely presented in the complaint that by the terms of the two agreements the city has become obligated in a sum in excess of its annual income and revenue without having provided any method of meeting payment thereof, as required by section 18 of article 11 of the Constitution, and such allegation must be met by answer

* * * in order to take the contracts out of the inhibitions of that section of the Constitution.

"The defendants rest their case upon *McBean v. City of Fresno*, 112 Cal. 159, 44 P. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191, *Smilie v. Fresno*, 112 Cal. 311, 44 P. 556, *Doland v. Clark*, 143 Cal. 176, 76 P. 958, and cases from other jurisdictions which need not be referred to. The distinction between the *McBean* Case and others just cited is pointed out in *Chester v. Carmichael*, 187 Cal. 287, 201 P. 925, approved in the *Marina* Case, 195 Cal. 426, 441,² where it is said that the earlier case involved contracts for the furnishing to the city in the future of service, materials, etc., and that no indebtedness or liability, within the meaning of the constitutional provisions, was incurred until this service had been made."

[6] "In the *Marina* Case, as well as in the second contract here under consideration, the liability of the city and county is not one arising each year during the life of the contract to pay the stipulated sums due that year, but the city and county has at the outset obligated itself to make extensive improvements upon the land, which the complaint alleges are far in excess of the annual income and revenue of the city and county. In the particular contract under consideration it will be noted that if the city fails to make these expenditures in accordance with the plans and specifications agreed on, then the 'lessor' may enter into the premises and make all the improvements called for, charging the 'expense' thereof to the city and county, plus 10 per cent. interest. This feature of the contract, taken in view of the allegations of the complaint that the obligation thus incurred is in excess of the annual income and revenue of the city and county, is sufficient to take the contract out of the rule of *McBean v. Fresno* and following cases, and for that reason the demurrer to the complaint should have been overruled."

[7] The reasoning of counsel in an attempt to convert the contract herein into the "contingency" class, such as is discussed in *Doland v. Clark*, 143 Cal. 176, 76 P. 958, *McBean v. Fresno*, 112 Cal. 159, 44 P. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191, *Smilie v. Fresno*, 112 Cal. 311, 44 P. 556, *State v. McCauley*, 15 Cal. 429, and others treating of similar situations, is fundamentally unsound. If the contracts in the instant case are not certain, definite, and fixed as to the mutual duties and obligations assumed by the parties thereto, it would be difficult, if indeed not impossible, to state a transaction that would be vulnerable to the remote, unusual, and unlikely contingencies suggested by appellants. Only such contingencies as might reasonably be expected to occur in the usual and ordinary course of business transactions or human relations or reasonably within the purview of the contracting parties were considered in the case last above cited and relied upon by appellants and not those which are remote or not within the contemplation of the contracting parties or beyond the foresight of ordinary prudent persons in dealing with the subject of the particular transactions. To

² 233 P. 965.

hold, as an illustration, that the possibility of failure of title in the lessor of the demised lands is sufficient to create a contingency which would absolve the lessee from all liability to perform its covenants, and thereby afford the means to avoid the constitutional and charter prohibitions by bringing the instant case within the rule announced in the decisions last above cited, would require the further anomalous holding that the contracts are valid for the purpose of creating a contingency, but invalid for any other purpose.

We do not understand that the force and effect of the constitutional restrictions may be avoided—however beneficial such an avoidance may appear to be to the municipality by permitting it to carry forward its plans—that expenditures may be incurred for improvements and for other public uses for which the municipality is liable, and which, though not definitely fixed or even estimated, will inevitably exceed the income and revenue provided for the fiscal year in which the contract is entered into, or any future year, because, perchance, the question of the ability of the municipality to meet its obligations is left in a state of doubt or uncertainty occasioned by the phraseology of the contract, or upon the theory that the possible occurrence of an event which in all probability will not happen may happen, or the possible failure of a condition which must from the logic of the situation be performed will not be performed. If this be the rule of construction, the restriction provisions of the Constitution and charter would become practically nullities, and there would be no opportunity for the taxpayers to be heard as to the incurring of indebtedness or liability that would become a charge upon the future income or revenue of municipal and public corporations. It would practically put an end to bond issues as provided by the Constitution with respect to the incurring of future indebtedness or liability. If a vast indebtedness or liability may be incurred by contract whereby the payment is postponed to a future year, and which would, beyond question, exceed the income that could or would reasonably be expected to be provided for, a condition would be brought about similar to that stated in *Arthur v. City of Petaluma*, 175 Cal. 216, 165 P. 698, which affords a striking example of the hardship that follows a failure to observe the organic law, and which should be avoided in the interests of a sound public policy. The reason for the constitutional restriction is fully set forth in the case last cited, and its purpose and wholesomeness have been too frequently elaborated by this court to require further comment. It is true that some color of justification for the inurrence of the liability herein attempted is to be gleaned from *McBean v. Fresno*, *Doland v. Clark*, *Smilie v. Fresno County*, and *State v. McCauley*. The first of these cases was a case of an emergency nature, and involved

the exercise of the police power in its highest sense, to wit, the preservation of the public health. In *re City and County of San Francisco*, 191 Cal. 172, 215 P. 549, was likewise a health case, involving the care of persons afflicted with tuberculosis. The *McBean Case* was, no doubt, written under the urge of the necessities of the situation, and this court has since been careful not to extend the rule beyond the facts therein stated, and has, as a matter of fact, distinguished that case from subsequent cases, thereby giving effect to the constitutional provisions. The *Smilie Case*, reported in the same volume as the *McBean Case*, was rested absolutely on the authority of the latter case. The *McBean Case* also dominated the decision in the *Doland Case*. The *McBean Case* was definitely distinguished from *Chester v. Carmichael*, a case similar to the instant case. The outstanding facts of that case and legal principles announced therein cannot be distinguished from this case, nor do the minor differences of detail minimize its force as an authority here. We do not deem it necessary to state the facts in detail. Two parties executed a conveyance of a tract of land to the city of Sacramento to be used as a park and playground. The conveyance was subject to nine conditions subsequent, which were, generally, for the laying out and improvement of the grounds suitable to the purposes for which they were conveyed; an agreement for the payment by the city of any assessments that might be levied against it and the payment of the taxes for the year 1919; the expenditure by the city of a minimum sum of \$5,000 for improvements during the year 1920, and a like expenditure each year thereafter until the entire property had been improved as a park; a forfeiture clause in the event the city failed to comply with the conditions therein and a reversion of the property to the grantors. The cost of the construction work exceeded the sum of \$50,000 and the cost of maintenance \$5,000 per annum. The conveyance, which was accepted by the city, was dated December 1, 1919, and all of the funds for the year 1919 were exhausted before December 31, 1919. There had been no assent on the part of the qualified electors to the carrying out of the proposed plan. This court held that the doing of the work with a prescribed minimum expenditure for each year was the purchase price for the land, payable in yearly installments, the grantors having fully performed their part by conveying and delivering the land. Notwithstanding the absence of any liability for damages for failure to perform and the fact that the obligation could not be specifically enforced, there was an obligation in favor of the grantors involving the expenditure in a certain way and for certain purposes of the revenues of the city, accompanied by what was in substance a pledge of the property conveyed as security for its perform-

ance. That the matter was cast in the form of conditions subsequent was deemed unimportant. In substance and effect, the transaction was as above stated. The transaction was held to fall within the inhibition of section 18, art. 11, of the Constitution, which precludes any city from incurring "any indebtedness or liability in any manner or for any purpose" exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof.

[8] The city, as it was there said and as is true in the instant case, "must either expend all the money necessary to complete the work from its future revenues or lose the property with all it may have paid to the time of loss in improving the same. * * * The manner in which the indebtedness is created is immaterial if the result is to subject the city to a present liability, direct or indirect, which the taxpayer eventually will be called upon to meet. It seems to us that such will be the result of the ingenious scheme that has been devised in the present case. We think the statute cannot be evaded in the manner proposed." The distinction between that case and the McBean, Smilie, and Doland Cases, supra, is pointed out. The latter cases cited involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made, while in the former the full liability was created upon the acceptance of the deed. Here the consideration was the execution and acceptance of the contract of purchase and the putting of the city and county of San Francisco into possession of the property.

[9] The last expression of this court upon a situation similar to the one at hand is the so-called Marina Case, decided subsequent to the decision made by the trial court in the instant case. The principles of law therein announced are applicable to the facts as alleged by the amended complaint in the present case so far as Exhibit B is involved on the hearing of the demurrer and compel the same conclusion as was reached in that case. In other words, the city in the instant case did not have the power, as a matter of law, to enter into the contract designated as Exhibit B.

[10, 11] The allegations of the complaint tender issues of fact which ought to be considered in determining the validity of Exhibit A. It is alleged that the liabilities thereby assumed by the city do by both direct and indirect methods incur an indebtedness in excess of the income or revenue provided by said city and are, therefore, void as being in violation of the state Constitution and city charter. In the absence of an answer denying said allegations they must stand admitted. We do not deem it necessary to pass upon said issues at

the present time as they may be more properly and orderly disposed of after the proofs have been made in accordance with the issues tendered.

Judgment reversed.

We concur: WASTE, C. J.; CURTIS, J.; TYLER, Justice pro tem.; RICHARDS, J.; PRESTON, J.

201 Cal. 376

DUDLEY et al. v. LOWELL, Dist. Atty., et al.
(Sac. 3790.)

Supreme Court of California. June 11, 1927.

1. Aliens ⇨6(1)—Proposed contract with Japanese person held "cropping contract," specifically forbidden by Alien Land Law (St. 1921, p. lxxxiii, as amended by St. 1923, p. 1020).

Proposed contract between owner of land and Japanese person for cultivation, harvesting, and delivering of crops to be grown on the land held a cropping contract, specifically forbidden by Alien Land Law (St. 1921, p. lxxxiii, as amended by St. 1923, p. 1020).

2. Constitutional law ⇨209—States have wide discretion in matter of classifying for legislative purposes.

In the matter of classification for legislative purposes, states have a wide discretion.

3. Aliens ⇨10—Alien Land Law is not arbitrary because eligible aliens who have failed to declare their intention to become citizens are not included in prohibited class (St. 1921, p. lxxxiii, as amended by St. 1923, p. 1020).

Alien Land Law (St. 1921, p. lxxxiii, as amended by St. 1923, p. 1020), held not arbitrary or unreasonable because it does not extend the prohibited class so as to include therein eligible aliens who have failed to declare their intention to become citizens of the United States.

In Bank.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Suit by J. F. Dudley and another against Orrin J. Lowell, District Attorney in and for the County of Placer, and another, to enjoin interference with the consummation of a cropping contract. From a judgment dismissing the suit after sustaining of demurrer without leave to amend, plaintiffs appeal. Affirmed.

Dozier, Kimball & Dozier, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., Frank English, Deputy Atty. Gen., and Orrin J. Lowell, Dist. Atty., of Auburn, for respondents.

PRESTON, J. This is an appeal from a judgment of dismissal after general demurrer sustained to the complaint without leave to amend.

Plaintiff J. F. Dudley, alleges himself to be the owner of a tract of land and desires to enter into what he calls a contract of employment with one Y. Hayakawa, a Japanese subject and resident of this state, for the cultivation, harvesting, and delivering of the crops to be grown on said property for the year beginning October 1, 1924, and ending September 30, 1925. The usual allegations appear which show that defendants, the Attorney General of the state, and county of Placer, are threatening to cause the property to be taken without due process of law, and to escheat it to the state, if said contract be entered into, and also to prosecute parties plaintiff criminally for violation of a statute of November 2, 1920 (Stats. 1921, p. lxxxliii), as amended, known as the California Alien Land Law.

[1] A proceeding of this character has been sanctioned by our court on several occasions, and no citation of authorities need be made in this connection. The contract the subject of the action is made an exhibit to the complaint, and plaintiffs assert that it is not a cropping contract within the meaning of our holdings under several well-considered cases and particularly not violative of said statute above referred to as amended in 1923 (Stats. 1923, p. 1020).

The contract in short provides that the landowner furnish certain elements of the cropping process such as water for irrigation, spraying solution, young trees for replanting, horses and their feed, and tools for carrying on the work, including boxes, nails, and packing material. The alien is then "to do and perform, or cause to be done and performed, at his own cost all labor of every kind, nature and description which is herein specifically set forth and which may be necessary in the planting, cultivation and irrigation of said land and in the harvesting, picking, packing and delivering of the crops and products to be grown thereon as aforesaid."

The contract then has the following further significant features:

(1) It neither specifies the hours, days or season of employment, nor is occupancy of the land at all times by the alien and his employees forbidden, but is on the contrary impliedly essential.

(2) Neither the number or class of employees nor their wages are specified in the contract.

(3) In case any of the work horses furnished are permanently disabled or killed, the alien must pay the value thereof to the owner.

(4) The same covenants exist respecting the loss or theft of farming implements.

(5) The alien is to be personally responsible for any industrial accidents occurring during the term of occupancy.

(6) The alien must at his own expense keep

all help employed by him covered with accident and employers' liability insurance.

(7) Lastly, the alien gets one-half the net proceeds resulting from a sale of the products of the land, and net profits are defined by specifying the nature of the items of deduction, which include horses lost or permanently disabled and loss of implements misplaced or stolen and various other items such as packing material, horsefeed, water charges, repairs, blacksmithing, freight refrigeration and commission charges.

In short, the contract lets the alien into possession of the land, with complete control of the cultivating, harvesting, handling and delivery of the crop grown thereon, as an independent contractor or operator, with unlimited discretion as to hours and seasons of labor, the number, class, residence, and wages of his employees, with independent liability for injury and damage to equipment and independent responsibility for industrial accidents, and insurance of all appropriate types is demanded of him. It is clear, therefore, that these covenants make an out and out cropping contract and one specifically forbidden by the 1923 amendment to the said Alien Land Act.

In *Terrace v. Thompson*, 263 U. S. 197, 221, 44 S. Ct. 15, 20 (68 L. Ed. 255), in construing a law of the state of Washington, similar to our statute, the court said:

"In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself."

[2, 3] Note that the concern of the state does not stop with ownership or control of agricultural lands, but extends to occupancy thereof as well. In the same cause the contention that the statute is in conflict with the treaty between the United States and Japan is effectively disposed of by the holding that the treaty does not purport to give nationals of Japan any rights whatsoever respecting agricultural lands, and this is broad enough to include occupancy of this class of land. On the authority of that case, the case of *Porterfield v. Webb*, 262 U. S. 225, 232, 44 S. Ct. 21, 68 L. Ed. 278, was decided. It involved the very act controlling us in the case at bar, and there it was said:

"The treaty between the United States and Japan (37 Stat. 1504, 1509), does not confer upon Japanese subjects the privilege of acquiring or leasing land for agricultural purposes."

Concluding, the court further said:

"This case is similar to *Terrace v. Thompson*, supra. In that case the grounds upon which the Washington Alien Land Law was attacked included those on which the California act is as-

sailed in this case. There the prohibited class was made up of aliens who had not in good faith declared intention to become citizens. The class necessarily includes all ineligible aliens and in addition thereto all eligible aliens who have failed so to declare. In the case now before us the prohibited class includes ineligible aliens only. In the matter of classification the states have wide discretion. Each has its own problems, depending on circumstances existing there. It is not always practical or desirable that legislation shall be the same in different states. We cannot say that the failure of the California Legislature to extend the prohibited class so as to include eligible aliens who have failed to declare their intention to become citizens of the United States was arbitrary or unreasonable. See *Miller v. Wilson*, 236 U. S. 373, 383, 384 [35 S. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829], and cases cited."

Later, in *Webb v. O'Brien*, 263 U. S. 313, 323, 324, 44 S. Ct. 112, 68 L. Ed. 318, the court had before it a California cropping contract, being for all practicable purposes the same kind of a contract as is here involved. The court again said:

"As applied to this case the act may be read thus: 'Ineligible aliens may own or lease houses, manufactories, warehouses and shops, and may lease land for residential and commercial purposes. These things, but no possession or enjoyment of land otherwise, are permitted.'

"The term of the proposed contract, the measure of control and dominion over the land which is necessarily involved in the performance of such a contract, the cropper's right to have housing for himself and to have his employees live on the land, and his obligation to accept one-half the crops as his only return for tilling the land clearly distinguish the arrangement from one of mere employment. * * * The practical result of such contract is that the cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee. Conceivably, by the use of such contracts, the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its

strength and safety. *Terrace v. Thompson*, supra. We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders."

In *Porterfield v. Webb*, 195 Cal. 71, 82, 231 P. 554, 558, this court with all the foregoing cases before it gave the question here involved thorough consideration, and among other things, it clearly distinguished the case of *In re Okahara*, 191 Cal. 353, 216 P. 614, and cited with approval the above quotations from *Webb v. O'Brien*, supra, saying:

"It is apparent that the decision rests largely upon broad principles of national safety and public welfare. Unquestionably the farming of lands by ineligible aliens would give them a use, occupancy, and benefit of agricultural lands which in effect would amount to a deprivation of its use, enjoyment, and occupancy by the citizen. Any other theory would be incompatible with the occupation of husbandry. To all practical purposes this would, pro tanto, constitute a withdrawal of agricultural lands from the use, occupancy, and benefit of the citizen."

In *Carter v. Utley*, 195 Cal. 84, 231 P. 559, this holding was reaffirmed. The same question, with slight variation, was again before the court in *Jones v. Webb*, 195 Cal. 88, where the same conclusions were vigorously reasserted.

Still again in *Re Nose*, 195 Cal. 91, 231 P. 561, which involved a so-called employment contract with an ineligible alien, which actually fixed the days and hours of labor and a monthly wage, and, as "an additional wage," agreed to give for industry and efficiency a certain percentage of the net profits of the crop to be grown and harvested by the alien, the doctrine was reasserted and the law applied to vitiate such contract.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

201 Cal. 299

SLAVICH et al. v. HAMILTON, Acting Chairman of Board of Supervisors.
(S. F. 12432.)

Supreme Court of California. June 2, 1927.

1. **Mandamus** ⚡83—Mandamus will lie to compel chairman of supervisors to execute properly authorized contract for veterans' memorial.

Mandamus is proper remedy to compel acting chairman of board of supervisors to execute contract for erection of veterans' memorial hall and building and to enter lease for property to be used as site therefor, since such facts present case of public officer refusing to perform ministerial duty involving no discretion.

2. **Dedication** ⚡64—Land dedicated as public park cannot be used for other purposes.

General rule is that land which has been dedicated as public park must be used in conformity with terms of dedication, and it is without power of municipality to divert or withdraw land from use for park purposes.

3. **Evidence** ⚡5(2)—It is public knowledge that hotels, museums, art galleries, zoological and botanical gardens, conservatories, and like are commonly erected in public parks.

It is matter of public knowledge that erection of hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories, and the like in public parks is common.

4. **Dedication** ⚡57—Dedication of land for park purposes by individual will be more strictly construed than dedication by municipality.

Individual's dedication of land for purposes of public park will be construed strictly according to terms of grant, while dedication by municipality after purchase or condemnation of land will be less strictly construed.

5. **Dedication** ⚡57—Deed of two pieces of property to city held to show donors' intention to dedicate property for park purposes.

Deed of two tracts of land to city held to show express intention by donors to dedicate property for park purposes only, though such requirement appeared in deed between descriptions of the two parcels of land.

6. **Deeds** ⚡93—Intention of grantors is to be gathered from consideration of entire deed, though immediate object of inquiry is meaning of isolated clause.

In construing deed, intention of grantors is to be gathered from consideration of entire instrument of conveyance, although immediate object of inquiry is meaning of isolated clause.

7. **Dedication** ⚡57—Where deed is but one of circumstances surrounding implied dedication of land for park purposes, all other circumstances may also be considered.

Facts and circumstances surrounding transaction may be looked to for solution of question of intention of grantors, and, when deed is but one of circumstances surrounding implied dedication of property for park purposes, all other circumstances may be considered together

with deed, and implication, if any, is implication of fact.

8. **Dedication** ⚡57—Land held completely dedicated to public use for park purposes, in view of conveyance to city and subsequent resolution of city council.

Land conveyed to city held completely dedicated to public use for park purposes, in view of deed indicating such intent by grantors and subsequent resolution of city council designating land as park.

9. **Deeds** ⚡101—Indefinite deed may be made certain by practical construction of parties.

Deed or contract indefinite in terms may be made definite and certain by practical construction of parties to it.

10. **Dedication** ⚡58—Owner of land having dedicated it for park purposes cannot authorize any other use.

Where dedication of property for park purposes is complete, it becomes public property, and owner, having lost all control over it, cannot authorize any other use.

11. **Dedication** ⚡64—Land dedicated to city park purposes may properly be leased to county as site for veterans' memorial hall and building (St. 1909, p. 1322; St. 1925, p. 1416).

Land given to city of Oakland for park purposes and dedicated to and used for such purposes may properly be leased to county as site for veterans' memorial hall and building, especially in view of St. 1909, p. 1322 and St. 1925, p. 1416.

12. **Dedication** ⚡64—Erection of veterans' memorial hall and building is for "public purposes."

Erection by county of veterans' memorial hall and building is for "public purposes."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Purpose.]

In Bank.

Application by John F. Slavich, in behalf of the associations and individual members of the Grand Army of the Republic, Veterans of Foreign Wars, United Veterans of the Republic, Disabled Veterans of the World War, and the American Legion, and others, for a writ of mandate prayed to be directed to William J. Hamilton, Acting Chairman of the Board of Supervisors of the County of Alameda, to compel him to execute a contract for the erection of a veterans' memorial hall and building and to enter into a lease with the city of Oakland for the property to be used as a site therefor. Writ granted.

Markell C. Baer and Breed, Burpee & Robinson, all of Oakland, for petitioners.

Earle Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Frank M. Ogden, Deputy Dist. Atty., all of Oakland, for respondent.

WASTE, C. J. Application has been made on behalf of the members of the Grand Army of the Republic, the Veterans of Foreign Wars, the American Legion and other patriotic organizations of the city of Oakland, and the city itself, for the issuance of a writ of mandate to compel the respondent, as chairman of the board of supervisors of Alameda county, to formally execute a contract, duly awarded by the board under public bid, for the erection of a veterans' memorial hall and building, and to enter into a lease with the city of the property to be used as a site for the proposed structure.

[1] The facts present a case of a public officer refusing to perform a ministerial duty involving no discretion, and mandamus is the proper remedy. *Williams v. City of Stockton*, 195 Cal. 743, 235 P. 989. The necessary parties are before the court, and they have agreed to submit as the sole question presented by the application, and as one of law to be determined on the demurrer to the petition, whether or not land given to the city for and dedicated to and used for park purposes may properly be appropriated as a site for a memorial building.

The proposed veterans' memorial building is one of a number of like buildings and halls which the county of Alameda has undertaken to erect at various places in the county for the purpose of stimulating and promoting patriotism, and to provide meeting places and memorial halls for patriotic associations and their members throughout the county, and particularly in cities wherein they may be located. There is, in the city of Oakland, separated from Lakeside Park and Lake Merritt by Grand avenue, a parcel of land which was deeded to the city by Edson F. Adams, John Charles Adams, and Julia P. A. Prather, and which was converted by the grantors into a park. The city, by resolution of the council, accepted the gift, designated the property as "Adams Park," and has since maintained it as part of the general park system of the city.

[2, 3] Adams Park was selected as a suitable location for the Oakland memorial building. The board of supervisors of Alameda county, the council of the city of Oakland, the Oakland planning commission, and the board of park directors of the city approved the location and the erection of the building on the site chosen. Pursuant to the provisions of the Oakland city charter, the council invited proposals for the leasing of as much of the park property as is required for the site of the building, for a period of 25 years. The county of Alameda made the highest bid, and the council thereupon, by ordinance, authorized a lease of the property, which was executed by the city through its board of park directors, and accepted by the county. In the meantime, the board of supervisors of the county took legal

steps for the erection of a suitable memorial building on the site, at a cost of approximately \$250,000, and authorized the execution of the necessary building contract. The chairman of the board refused to authenticate and execute the lease, or to enter into the contract. He whole-heartedly concedes that a veterans' memorial hall, such as is here contemplated, would serve a noble, patriotic cause, and admits, as held by this court in *Allied Architects' Association v. Payne*, 192 Cal. 431, 435, 221 P. 209, 30 A. L. R. 1029, that the erection of such a building, to the extent that it would serve as a stimulus to patriotism, would be for a public purpose, but, in justification, of his position, relies upon the well-settled principle of law that land which has been dedicated as a public park must be used in conformity with the terms of the dedication, and it is without the power of a municipality to divert or withdraw the land from use for park purposes. *Archer v. Salinas City*, 93 Cal. 43, 51, 28 P. 839, 16 L. R. A. 145; *Mulvey v. Wangenheim*, 23 Cal. App. 268, 137 P. 1106.

There can be no dispute as to the general rule relied upon by the respondent, but the real question seems to be whether the use in a particular case, and for a designated purpose, is consistent or inconsistent with park purposes. It is a matter of public knowledge that the erection of hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories, and the like in public parks is common. *Spires v. City of Los Angeles*, 150 Cal. 64, 66, 87 P. 1026, 11 Ann. Cas. 465. The court was not, at the time that case was before it, nor has it since been, "pointed to any authority where it has been regarded as a diversion of the legitimate uses of the park to establish them, but, on the contrary, their establishment has been generally recognized as ancillary to the complete enjoyment by the public of the property set apart for their benefit."

[4] The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, that is, whether dedicated by the donor, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted. *Harter v. San Jose*, 141 Cal. 659, 75 P. 344; *Spires v. City of Los Angeles*, supra. In the *Harter Case* it was held that the use of a small portion of a park of several hundred acres, for hotel purposes, in such a way as not to in any manner restrict or interfere with the free use of the park by the public, the lease being for the evident benefit of the public, was not a use of the property inconsistent with its public character. In the *Spires Case*, supra, it was held that the erection of a building for a

public library in a public park was a legitimate use of a portion of the property, but that the use of the building for other municipal purposes would amount to a diversion from the use to which the property was dedicated. In neither of these cases was dedication made by a private individual for a specific purpose.

[5] The property here in question was conveyed to the city of Oakland by a deed of the donors made in the year 1899. The instrument purports to remise, release, and forever quitclaim to the city of Oakland two pieces of property, which may be referred to as "parcel 1" and "parcel 2." Parcel 1 lies south of Grand avenue and borders on Lake Merritt, part of it apparently being salt marsh at the time it was given to the city. The description in the deed of parcel 1 is followed by the declaration that:

"Conveyance is made only upon the express condition that said property shall be used forever for the purpose of a public water park, and said property shall be entirely dredged up to the line of the property of the parties of the first part on the southeast, so that the same shall abut upon said water park."

Then followed the description of parcel 2, which is the present Adams Park property, and which includes the proposed site of the memorial building. After acceptance of the property, the city dredged parcel 1 to conform to the requirements of the deed of gift.

[6, 7] We must agree with the respondent that the clause in the deed to the effect that the conveyance is made upon the express condition that the property shall be used forever as a public water park, although inserted immediately following the description of parcel 1, and immediately preceding the description of the parcel including the land here in question, does not in any way indicate, except possibly by virtue of its position in the deed, that the restriction as to the use of the property "for the purpose of a public water park" was limited to the first parcel of land. The deed, by its recitals, purports to convey to the city "all those certain lots, pieces or parcels of land * * * bounded and particularly described as follows, to wit," and the habendum clause provides that the premises, which refer, of course, to both parcels, are to be held "upon the conditions hereinbefore [in the deed] set forth." Parcel 2 is directly opposite the northerly shore of and faces Lake Merritt. But for the location of Grand avenue, it would abut on the lake and on parcel 1. The intention of the grantors is to be gathered from a consideration of the entire instrument of conveyance, although the immediate object of inquiry is the meaning of an isolated clause. *Coon v. Sonoma Magnesite Co.*, 182 Cal. 597, 600, 189 P. 271; 9 Cal. Jur. 255. The facts and circumstances surrounding the transaction may be looked to

for a solution of the question, and, when a deed is but one of the circumstances surrounding an implied dedication, all the other circumstances may be considered together with the deed, and the implication, if any, is an implication of fact. *Dougan v. Greenwich*, 77 Conn. 444, 59 A. 505; *Mayor of Baltimore v. Northern, etc., Ry. Co.*, 88 Md. 427, 41 A. 911.

[8] The facts and circumstances surrounding the transaction involving the deed here appear to show very clearly an express intention on the part of the donors to dedicate the property to the city of Oakland for park purposes. Some four and a half years after the acceptance of the deed to the property and its recordation by the city of Oakland, the city council, referring to parcel 2, adopted a resolution which seems so pertinent here that we recite it in full, to wit:

"Whereas, a parcel of land located at Grand avenue and Montecito avenue was dedicated to the city by Edson F. Adams, John Chas. Adams, and Julia P. A. Prather on January 12, 1899; and

"Whereas, the grantors of said land have converted the grounds into a beautiful park, adorned with a conservatory, containing potted plants, tropical trees, etc.; and

"Whereas, Edson F. Adams, John Chas. Adams, and Julia P. A. Prather on July 13, 1903, donated to the city said conservatory with plants, tools, and implements:

"Resolved, that the thanks of this council, on behalf of the city of Oakland, be extended to the generous donors for their gift; and be it further

"Resolved, that said park be and it is hereby designated and shall be known as Adams Park."

[9] It is, of course, well settled that a deed or contract indefinite in terms may be made definite and certain by the practical construction of the parties to it. *Grant v. Bannister*, 160 Cal. 774, 780, 118 P. 253. We are satisfied that the acts of the parties, in full accord with their intention, amounted to a complete dedication of the land, referred to as parcel 2, to public use for park purposes.

[10] Petitioners claim that, even though it may have been the intention of the grantors of the Adams Park property to dedicate it to the city for park purposes, the restrictions imposed by the original conveyance have been released by reason of the fact that, as a precautionary measure, and for the apparent purpose of forestalling any question as to what was intended by the original deed, the successors in interest of the original grantors have executed an instrument, in writing, by which they purport to "give, grant, alien, and confirm unto the [city of Oakland] and to its assigns and successors forever, the right and privilege to erect or cause to be erected for the county of Alameda, upon said public park, such memorial hall as the council of the city of Oakland may deem fitting." But, if the dedication of the property for park purposes was com-

plete in the first instance, the property thereby became public property, and the owners lost all control over it. If the dedication was complete by their acts, whether express or implied, it was thereafter irrevocable by them, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on their part. The property dedicated has become public property, impressed with the use for which it was dedicated. *Archer v. Salinas City*, supra. Then, again, the city of Oakland had the power to irrevocably dedicate the Adams Park property for park purposes, and we are satisfied that it has done so. *Harter v. San Jose*, supra.

[11, 12] The immediate question, therefore, to be determined is whether the purpose for which it is now desired to lease a part of the property to the county of Alameda for 25 years is consistent with such dedication. The building proposed to be erected, according to the petitioners, will "be used primarily as a meeting place and memorial hall for organizations whose membership is composed of soldiers, sailors, and marines who have served the United States of America honorably in any of its wars." While it is well settled that the erection of such a building is for public purposes (*Allied Architects' Ass'n v. Payne*, supra; *Barrow v. Bradley*, 190 Ky. 480, 227 S. W. 1016; *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; *Hill v. Roberts*, 142 Tenn. 215, 217 S. W. 826), it does not necessarily follow that the use of the land on which it is to be located is consistent with the purposes for which the park was dedicated. A use for a public purpose may be utterly inconsistent with a use for park purposes. Under the well-settled principle of law generally applicable, if the city were undertaking to establish in Adams Park a city hall, fire engine station, hospital, or jail, endeavoring to devote the property to the erection of municipal buildings or offices for use in the transaction of public business, we would have little hesitancy in saying that such purposes would be entirely inconsistent with the use of the property for park purposes. *Spires v. City of Los Angeles*, supra, page 67 (87 P. 1027). In this connection, petitioners contend that the city of Oakland is not subject to the general rule. Section 65 of the charter of the city (Stats. 1909, p. 1322; Stats. 1925, p. 1416) provides that the board of park directors of the city shall have the complete and exclusive control, management, and direction of parks, squares, and grounds within the city, and shall have the exclusive right to erect and superintend the erection of buildings and structures thereon pertaining to park purposes, subject to the provision that the city council "may erect or cause to be erected any municipal building or buildings thereon." Under this provision, it would seem that the city

of Oakland has the undoubted right to construct any kind of a municipal building on park property. Whether such a building as is here contemplated is, or is not, a municipal building does not need to be decided, for we have reached the conclusion that the use of a part of the Adams Park property for a veterans' memorial hall, under the restrictions placed by the city upon its construction and use, is not a use inconsistent with park purposes.

By the express terms of the lease, the "premises shall be used exclusively for the erection and maintenance" of the veterans' memorial hall. When the hall is completed, the lease of the site, according to its terms, will cover only the land actually occupied by the building—a minor part of Adams Park. The remainder of the so-called "site," in common with the rest of the park property, will be devoted to lawns, flowers, and shrubs, and otherwise conducted in the manner usual to the maintaining of the park. The proposed veterans' memorial hall, "of a beautiful ornamental and architectural design," will face Grand avenue, the water park maintained by the city, known as Lake Merritt, and the public park surrounding it, known as Lakeside Park, which consists of more than 230 acres of land. It will be visible from a large part of the shore lines of the lake and the public streets, avenues, and parks surrounding it, "thereby," according to the petition, "adding greatly to the beauty and attractiveness of the city of Oakland and forming a conspicuous and magnificent monument to the cause of patriotism and sacrifices of those who have fought and died in the wars of the United States." In casting about for a suitable location whereon to erect the memorial hall, the Oakland city planning commission, the city council, and the board of park directors acted jointly and in harmony. The planning commission, "being fully advised in the premises," approved and ratified the "selection of the said Adams Park for the proposed memorial hall, as being fully in accord with the future development and beautification of the city of Oakland in respect to Lake Merritt and its environs and in keeping with the public purpose of the Lake Merritt system of parks." The city council, in the resolution approving the selection of the site, recited that "a veterans' memorial hall erected upon the said Adams Park would most fittingly serve the municipal and public purposes manifested in its construction, would be centrally located and conveniently accessible to the greater number of veterans, and, as a monument symbolic of the soldiers' spirit of sacrifice, would greatly add to and enhance the beauty and attractiveness of the shores of Lake Merritt as a public park." The resolution of the city council awarding the lease to the county of Alameda, and directing its execution, provides that the building shall

be so constructed, according to plans and specifications approved by the city council and the park commission, as to conform to the general objects and purposes for which the land is held. The board of park directors of the city shall have the right to enter at all times upon the premises so leased, and the building shall be used for park pleasure purposes only. While any effort on the part of those interested to escape from the imposition of restrictions and limitations placed upon the property dedicated to the city for park purposes only would be futile, if an intended use would, in effect, be a diversion from the uses and purposes for which the property was dedicated, it definitely appears, in the instant case, that the intention has been to keep the use of the property within due bounds with regard to its use for park purposes. The erection of monuments and memorials in public parks has long been recognized as a use consistent with park purposes. *Brahan v. Meridian*, 111 Miss. 30, 71 So. 170; *Parsons v. Van Wyck*, 56 App. Div. 329, 67 N. Y. S. 1054. While no case involving the question of the use of a public park as a site for a memorial building has come to our notice, we are of the view that the erection of the veterans' memorial hall, as here proposed, will not interfere with the enjoyment by the community in general of Adams Park, and will not be such a diversion of the property from its use for park purposes as to amount to an invasion of the settled principles of law relied on by the respondent. He should therefore execute and authenticate the lease with the city of Oakland. No legal objection being made to appear why the lease should not be entered into, and no contention being made that the contract for the erection of the memorial building authorized by the board of supervisors was in any way illegal, its due execution should also be attested by the respondent.

Let a writ of mandate issue as prayed for.

We concur: PRESTON, J.; LANGDON, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

201 Cal. 341

PEOPLE v. SIEBER. (Cr. 2929.)★

Supreme Court of California. June 9, 1927.

Rehearing Denied July 7, 1927.

1. Homicide ☞250—Evidence held to sustain conviction for murder.

Evidence in prosecution for murder held sufficient to sustain conviction.

2. Criminal law ☞1160—Jury's finding approved by trial court on motion for new trial will be disturbed only when not supported by evidence as matter of law.

Supreme Court may disturb a finding by jury in a criminal case approved by trial court on motion for new trial only when it can be

said as a matter of law that there was no evidence to support verdict.

3. Homicide ☞170—Admitting testimony as to identification of defendant when seen near decedent's home on day of homicide held not error.

In prosecution for murder, admitting testimony of witness concerning identity of the defendant when seen near home of decedent on day of homicide and as to his having been able to subsequently identify a coat said to have been worn by defendant on that occasion held not erroneous.

4. Witnesses ☞274(2) — Cross-examining defense character witness as to knowledge of reports of acts inconsistent with character attempted to be proved held not erroneous.

In prosecution for murder, cross-examining character witness for defense relative to witness' knowledge of reports of particular and specific charges and acts inconsistent with character which witness was called on to prove held not erroneous.

5. Criminal law ☞1170½(2)—Cross-examining character witness held not prejudicial, in view of negative answer and that fact sought to be proven was properly shown by other evidence.

In murder prosecution, cross-examining character witness for defense relative to witness' knowledge of reports of particular and specific charges and acts inconsistent with character which witness was called on to prove held not prejudicial, where question was answered in the negative and same fact was properly shown by other evidence, including that given by defendant himself.

6. Criminal law ☞1036(2)—Cross-examining defense character witness as to knowledge of decedent's fear that defendant would kill her held not reversible error without objection or request for instruction.

In prosecution for murder, cross-examining character witness for defense relative to knowledge as to deceased's fear that defendant would kill her held not reversible error, in absence of objection, until after answer thereto in the negative and failure to request instruction to disregard question.

7. Criminal law ☞1163(3)—Erroneous admission of testimony as to defendant's mother destroying sweater while defendant was in jail did not require reversal without showing prejudice.

In prosecution for murder, erroneous admission of testimony that while defendant was in jail awaiting trial his mother burned a certain sweater belonging to him held not to require reversal, in absence of showing by defendant that he was in any way prejudiced thereby.

8. Witnesses ☞271(1)—Refusal to permit defendant's counsel to use on cross-examination statement shown to witness for prosecution while testifying held erroneous (Code Civ. Proc. § 2047).

In prosecution for murder, refusal to compel prosecution to allow counsel for defense to use on cross-examination statement shown to

witness while on the stand testifying for prosecution *held* erroneous, under Code Civ. Proc. § 2047.

9. Criminal law ⚡1170½(5)—Refusal to allow defendant's counsel to use on cross-examination statement shown to witness for prosecution *held* not prejudicial error.

In prosecution for murder, erroneous refusal by trial court to compel prosecution to allow defendant's counsel to use on cross-examination statement shown to witness for prosecution while testifying *held* not to have resulted in miscarriage of justice, in view of thorough cross-examination to which witness was subjected, showing that counsel must have been well informed as to contents of statement which they examined when it was first shown to witness.

10. Criminal law ⚡1043(2)—Objection to testimony will not be considered, where defendant did not point out reason for being inadmissible or how it prejudiced him.

Objection to testimony by prisoner who was placed in same cell as defendant while awaiting trial cannot be considered by Supreme Court on appeal, where defendant did not point out in what manner evidence was inadmissible or in what manner its admission tended to prejudice him.

11. Criminal law ⚡741(1), 742(1)—Credibility of witness testifying to conversations between himself and defendant and weight to be attached to his testimony *held* for jury.

Credibility of witness, placed in same cell as defendant while awaiting trial, and testifying to certain conversations between himself and defendant, and weight to be attached to such testimony, were matters addressed to consideration of jury.

12. Criminal law ⚡1170(4)—Refusal to permit cross-examination was not prejudicial, where questions were subsequently fully answered.

Refusal to permit counsel for defendant to ask certain questions of witness on cross-examination to show interest and bias *held* not prejudicial, where questions were subsequently asked and were fully answered.

13. Criminal law ⚡363—Certain blueprint found near deceased's body *held* admissible as *res gestæ* in murder prosecution.

In prosecution for murder, certain pieces of blueprint found near body of deceased *held* admissible as part of *res gestæ*, particularly in view of evidence tending to connect defendant with them.

14. Criminal law ⚡691—Objection that answer is not responsive can be made only by party asking question.

Objection that answer is not responsive can be made only by party who asks the question if answer is otherwise admissible.

15. Criminal law ⚡1168(4)—Improperly striking testimony as unresponsive answers *held* not prejudicial error, where relating only to collateral matter.

In prosecution for murder, improperly striking out testimony on motion of prosecu-

tion, on ground that answers were not responsive, *held* not prejudicial error, where answers related only to collateral matter of no particular import to defendant's case.

16. Homicide ⚡166(1)—Defendant, in prosecution for murder of wife, was properly cross-examined as to supporting her during certain period.

In prosecution for murder of wife, defendant was properly cross-examined relative to whether he had supported his wife during a certain period.

17. Criminal law ⚡1170½(1)—Erroneous refusal to permit impeachment of witness on material matter *held* not prejudicial, in view of other evidence.

In prosecution for murder, erroneous refusal to permit impeachment of witness for prosecution on a material matter did not require reversal, where prejudice did not result therefrom in view of other testimony, including that of defendant, relative to matter as to which witness was claimed to have made contradictory statement.

18. Criminal law ⚡720(6)—Counsel in discussing merits of case may state fully his views as to what evidence shows and conclusions to be drawn therefrom.

Counsel in discussing merits of case both as to law and facts has right to state fully his views as to what evidence shows and as to conclusions to be fairly drawn therefrom.

19. Criminal law ⚡1037(2)—Ordinarily counsel must call attention to misconduct of district attorney to complain thereof on appeal.

Ordinarily, when district attorney is guilty of misconduct in trial of criminal case, counsel for defense must call attention of court thereto and assign it as misconduct, or request court to instruct jury to disregard it in order to complain thereof on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Charles Sieber was convicted of murder in the first degree, and he appeals. Affirmed.

Cooper & Collings, John S. Cooper, T. P. Toomey, Hugh L. Dickson, and Herman Greenschlag, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

WASTE, C. J. Charles Sieber was indicted by the grand jury of Los Angeles county for the murder of his wife, Minnie Sieber. The trial jury returned a verdict of murder in the first degree, without recommendation. After motion for a new trial made and denied, judgment of death was pronounced, and an appeal was taken to this court. Appel-

lant's first contention is that the evidence is insufficient to sustain the verdict, for the reason that there is no evidence showing a motive, or tending to connect the defendant with the crime with which he was charged.

The appellant and his wife were married in 1912, and, within the ensuing year, a daughter was born to them. Shortly thereafter the parents separated, but resumed marital relations in 1914. In 1916 they again separated and never afterward lived together. Sieber enlisted in the United States Army during the World War, and soon after its close went to live in Los Angeles, where he entered the service of the city as a bricklayer. Mrs. Sieber had also gone to Los Angeles to reside, and in 1924, apparently under some compulsion, appellant began to pay \$25 per month toward the support of his daughter. In November, 1925, Sieber instituted a divorce action against his wife. Mrs. Sieber filed an answer, and on January 7, 1926, early in the morning, Sieber was served with an order to show cause why he should not pay alimony and attorney's fees in the action. The evidence establishes the fact that Mrs. Sieber was murdered within 5 minutes after 9 o'clock on that day. The deceased lived at 512 Avenue 28, Los Angeles, with her daughter, who attended school, leaving home shortly before 9 o'clock in the morning. Mrs. Sieber worked as a janitress in an office building from 4 to 8 o'clock in the morning, and in the afternoon. Appellant had learned from the daughter, a few days before the murder was committed, of the time his wife returned home from work, and at what time the daughter went to school. On the morning in question, the girl left for school about 25 minutes to 9 o'clock, leaving her mother alive and alone in the house. Shortly after 3 o'clock in the afternoon she returned with two girl companions and found her mother dead. She had been beaten to death in a most fiendish manner with some "powerful instrument," wielded with terrific force. A dent made by some blunt instrument, and in which was a strand of hair, was found on the door of the room. It was not there when the daughter left for school in the morning. In the room in which the body was discovered there were found several scraps of blueprint, which were identified by witnesses as being parts of a blueprint for a certain sewer manhole, which had been constructed by the appellant.

While there were no eyewitnesses to the homicide, it is the theory of the prosecution that Sieber became angered on being served with the order to show cause in the divorce action and went immediately to the home of his wife and killed her in a most brutal fashion. The prosecution relies upon several series of circumstances established by the evidence, from any one of which, it argues,

the jury was warranted in inferring that the appellant committed the crime with which he was charged. When the several series of circumstances are considered together, the prosecution contends, the inference of appellant's guilt becomes well-nigh irresistible.

[1] The claim that the evidence is legally insufficient to support the verdict is without foundation. The record discloses that, in the discharge of his duties, the appellant worked at and supervised the work of installing sewer manholes, which were constructed according to blueprint specifications furnished to him. His working crew consisted of three men. On the morning of January 7th, the day on which the decedent was killed, Sieber left his home, riding in his own Chevrolet automobile, and reported at the municipal yard shortly after 8 o'clock. Immediately on entering the yard he was handed the order to show cause procured by his wife in the divorce action. According to the testimony of the process-server, Sieber showed no anger when served with the order, but made a disparaging remark about his wife, and said he would "go to jail" before he paid her any alimony. A fellow workman testified, however, that about that time Sieber, carrying a roll of blueprints in his hand and looking at the ground, seemed excited and angry.

Sieber was last seen at the yard between 8:10 and 8:30 o'clock. About half past 8 o'clock, his crew, having loaded a truck with brick, sand, and cement, left the corporation yard and went to the vicinity of Twenty-First and Toberman streets, where they arrived about half an hour after leaving the yard. Sieber was not there, but, according to the testimony of the workmen, arrived at the manhole about 25 minutes after 9 o'clock. Shortly before 9 o'clock, according to the testimony of a witness, Reendres, Sieber was seen walking on Avenue 28, near the residence of the decedent, about $2\frac{1}{10}$ miles from the municipal yard. A small automobile was parked in front of the adjoining lot. At 9 o'clock, Mrs. Chambers, a neighbor, left her home three doors away, and started for the car line. As she passed the house of the decedent she heard "four terrible screams," which appeared to be the screams of a woman, and "three or four terrible knocks," which the witness said sounded like some one kicking or hammering on the front door. Another witness testified to seeing Sieber and his mother, some time after 9 o'clock, in the backyard of Sieber's home, about a mile and a half from the scene of the homicide, with a long-handled shovel between them.

According to the testimony of the men comprising appellant's working crew, there was nothing unusual in his demeanor and appearance when he appeared at the manhole on Twenty-First street, about five miles from

the scene of the killing, some time after 9 o'clock. Sieber testified he was sure he arrived earlier than at the time fixed by the men. After working in silence for a while, according to the testimony of the workmen, Sieber, without any apparent reason, looked up from the manhole and said: "If anything would happen to my wife they would sure get me." The divorce action brought by Sieber against his wife was the subject of conversation during the day, as it had been at other times. On previous occasions, Sieber had said, so the same witnesses testified, that he desired to get rid of his wife; that he hated her "bad enough [he] would kill her"; that he had been trying to get a divorce long enough and "now he was going to have it"; that he was going to marry a young girl 16 or 17 years old. At noon on the day of the homicide, Sieber consulted his attorney concerning the divorce action, after which he told one of the workmen that he would "rot in jail" before he would pay alimony to his wife. The appellant was arrested at his home about 5 o'clock in the afternoon. When accosted by the arresting officers, who were not in uniform, he started to run. When caught and asked why he ran, he said: "I figured if you were policemen you would shoot me." The arresting officers did not tell him he was under arrest, nor why they wanted him, but, when a neighbor asked him if he could do anything for him or "bail him out," he replied that he did not think it was a case in which he could be bailed out, and that the officers would probably not let him talk to any one. He was taken at once to the scene of the crime and into the room where the body of his wife lay on the floor. At first he said he did not recognize the deceased, but, when asked if it was not the body of his wife, he said it was. According to the testimony of one of the police officers, who was then present, the appellant was asked "if he had come down that morning and killed her and he said 'No.' * * * At first his knees trembled—his body lowered a little. Then he wavered; then he stood straight up again."

We deem it unnecessary to say much more about the evidence. In addition to that which we have summarized, and evidence of purported statements made by the defendant while in jail awaiting trial, many facts and circumstances, which it is not necessary here to detail, were brought out, all tending to support the theory of the prosecution. The appellant testified in his own behalf. He specifically denied having any connection with the homicide, and gave what appears from the record to be a clear account of his entire movements during the day in question. He denied making a number of the incriminating statements attributed to him, and explained others. There was evidence concern-

ing the clothing worn by him on the day of the homicide, and the absence of blood on the clothes. Witnesses testified to the distance necessary to be traveled in going from point to point, material to the theory of both the prosecution and the defense.

[2] Appellant characterizes the theory of the prosecution as a "weird story," entitled to a place in fiction, and contends that it was humanly impossible for him to have traveled the necessary distances and to have done the things charged by the prosecution within the time specified. All questions arising from the situation pictured by the appellant were addressed to the consideration of the jury. We must assume in favor of the verdict the existence of every fact which it could have reasonably deduced from the evidence, and, among them, that it was possible for the defendant to commit the crime in the manner charged. The finding of the jury was approved by the trial court on motion for a new trial. The findings of court and jury are conclusive upon the subject and upon this court, as we may disturb a finding only when we can say, as a matter of law, that there was no evidence to support it. *People v. Erno*, 195 Cal. 272, 232 P. 710. This is not such a case. There was testimony that the general reputation of the appellant for peace and quiet was good, and other testimony, in rebuttal, that it was bad. Enough has been set forth to demonstrate that there was sufficient evidence to sustain the verdict, if it was believed by the jury to be true. In some respects the facts in this case are like those in *People v. Larson*, 167 Cal. 751, 141 P. 374, in which the court said:

"While it is true that no living person saw the actual killing of deceased other than the perpetrator of the homicide, and that the evidence was entirely circumstantial, it is idle to assert that there was not enough in the evidence to warrant the conclusion beyond all reasonable doubt on the part of the jurors that the defendant was guilty as charged."

[3] Appellant contends that the trial court erred in admitting testimony of the witness, Reendres, concerning the identity of the appellant when seen near the home of the decedent on the day of the homicide, and as to his having been able to subsequently identify a coat said to have been worn by the appellant on that occasion. He contends that the prosecution was permitted to "bolster up" the testimony of the witness by showing that, on a prior occasion and at the police station, he had done the same thing. The record does not bear the construction placed upon it by appellant, and we find nothing objectionable in the evidence admitted.

[4-6] It is next contended by appellant that the court erred in permitting the district attorney to ask, and that the district attorney

was guilty of serious misconduct in asking certain questions in cross-examining Miles Gregory, one of the character witnesses for the defense. He had testified that the defendant had "a good reputation as a peaceful law-abiding citizen," and on cross-examination was asked if he knew that Sieber had lived with a woman who was not his wife, and had held her out to be his wife, if he knew Mrs. Sieber, during the last two years of her lifetime, feared Sieber would kill her, and that she communicated her fear to her neighbors. Appellant contends that the purpose of asking the questions was an attempt to degrade the defendant by incompetent evidence and in an indirect manner. The first question asked was admissible under the rule that a character witness may be cross-examined as to his knowledge of reports of particular and specific charges of the commission of acts inconsistent with the trait or character (in this case that the appellant was a law-abiding citizen) which the witness was called upon to prove. *People v. Hightower*, 65 Cal. App. 331, 340, 224 P. 110. Furthermore, no prejudice resulted to the defendant, because the question was answered in the negative, and the same fact was properly shown by other evidence, including that given by the defendant himself. No objection was made to the question concerning the fear of the decedent, which was admittedly improper cross-examination, until it was answered, also in the negative. The objection was not made on that ground, no motion was made to strike out the answer, and counsel did not request the court to instruct the jury to disregard the question, but cited the action of the district attorney as misconduct. The third question, which was likewise improper as asked by the district attorney, was objected to, and the objection was properly sustained. The court, of its own motion, instructed the jury, in effect, to disregard the question, and that it was not to assume anything as a fact because it might be implied in the questions which were asked but not answered.

[7] Another contention of the appellant is that the trial court erred in permitting the prosecution to show that, after the defendant was arrested and while he was in jail awaiting trial, Mrs. Sieber, his mother, burned and destroyed a brown sweater appellant was said to have worn. We are unable to perceive, from the record, on what theory the prosecution was allowed to introduce the evidence. It is not shown that the defendant, if the sweater were his, wore it on the day of the homicide, and no attempt was made to connect it in any way with the commission of the offense. The testimony should not have been offered or admitted, but, beyond saying that the admission of the evidence was erroneous and contrary to law, appellant

has not shown that he was in any way prejudiced by the testimony.

[8] Appellant's next contention is that the trial court erred in refusing to compel the prosecution to allow counsel for the defense to use, on cross-examination, a statement shown to a witness while on the stand and testifying for the prosecution. During the examination of William Cobleigh, a witness for the prosecution, the deputy district attorney, for the purpose of refreshing the witness' recollection, produced and showed to him a phonographic report of a statement made by him at the office of the district attorney about ten days after the death of Mrs. Sieber. Counsel for the defense expressed a desire to examine the document, and the record indicates that he was given full opportunity to do so. The defense did not at that time exercise its right to examine the witness as to the circumstances and conditions under which the statement was made, or what it contained, but allowed the examination to proceed. When the attorney for the defense took the witness on cross-examination he requested that the deputy district attorney hand him the statement with which Cobleigh had refreshed his recollection, in order that he might "properly cross-examine the witness." Before the deputy district attorney could comply, and without any objection being made by the prosecution, the court, of its own motion, ruled that the defense was not entitled to the statement, for the reason that it was not in evidence, that it was a private affair, and it had been permitted to be used by the witness to enable him to refresh his memory. On counsel attempting to state the purpose for which he desired the statement, the court declined to hear him, and directed him to proceed with the examination. Later, and upon several occasions during the cross-examination of Cobleigh, the defense made further demands on the prosecution for the production of the statement. Each was met by the arbitrary refusal of the trial court to accede to the request. We are of the view that, as conceded by the Attorney General, the court committed error. Section 2047 of the Code of Civil Procedure provides that a witness is allowed to refresh his memory respecting a fact by anything written under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew the same was correctly stated in writing. "But in such case," the section provides, "the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury." We are unable to agree with the argument of the district attorney of Los Angeles county, based upon a considerable quotation from the rec-

ord, that, because the witness on direct examination must have read only a small portion of the statement for the purpose of refreshing his recollection, the defense was not entitled to use the whole of it. He appears to take the position that, because counsel for the defendant had full opportunity to see the statement, and presumably became acquainted with its contents, the provisions of section 2047, supra, had been fully complied with. The district attorney is contending for an undue limitation of the procedure permitted by the Code section. It therefore remains to determine whether or not the error of the trial court caused any such prejudice to the cause of the appellant as to warrant a reversal of the judgment.

[9] We do not think the ruling of the court, though erroneous, resulted in a miscarriage of justice. Cobleigh had testified on direct examination that he had last seen Sieber at the yard between 8:20 and 8:30 o'clock, that it took approximately half an hour to drive to Twenty-First and Toberman streets, and that Sieber arrived at about 25 minutes past 9. He stated that he testified as to time without having seen a watch or clock, and could not compute time if he had nothing to go by, and that, in his testimony, he had not stated any exact time. It would seem, from the record, that the main purpose of the defense in demanding the right to use the statement made by Cobleigh at the district attorney's office was to enable it to cross-examine the witness on the matter of time. We have read with care the record of the cross-examination, and are of the view that little more, if anything, could have been accomplished by the use of the statement, or any number of statements, than was accomplished in the minute and particular cross-examination to which the witness was subjected. The record indicates that the defendant's counsel must have been well informed as to what was in the statement, and no doubt they were, from the examination made when it was first shown to the witness. Cobleigh's recollection of every point of time material to the movements of the appellant and his ability to state the time were thoroughly gone into, and we are satisfied, from the entire record relating to the incident, that no prejudicial error resulted from the refusal of the court to direct the production and delivery of the statement to the counsel for the defense.

[10-12] While the appellant was incarcerated in the county jail awaiting trial, another prisoner by the name of Mortimer was placed in the same cell. He was permitted, over objection, to testify to certain conversations between himself and the appellant. Beyond contending that the testimony was incompetent, and not within the exception to rule as being a declaration or admission against

the defendant, the appellant has not pointed out how, or in what manner, the evidence was inadmissible, or in what manner its admission tended to prejudice him. We are therefore unable to consider the objection. The credibility of the witness and the weight to be attached to his testimony were matters addressed to the consideration of the jury. The contention that the court erred in permitting the prosecution to introduce certain portions of the testimony of the witnesses Ingmire, Glenn, and Herrera is without foundation. It is next contended that the court erred in restricting the cross-examination, by counsel for the appellant, of certain witnesses for the prosecution, for the purpose of testing the witnesses' power of observation with relation to certain matters testified to. We have carefully examined the record as to each of these specifications of error, and are satisfied that the court did not abuse its discretion in limiting the cross-examination as it did. The appellant had ample opportunity in this respect to fully develop his theories and to get from the witnesses under cross-examination everything to which he was properly entitled. The contention that the trial court erred in refusing to permit counsel for the defense to ask the witness Mortimer certain questions on cross-examination, tending to show interest and bias, is without merit. The record discloses that the questions were subsequently permitted to be, and were, fully answered.

[13] Another assignment of error is predicated upon the action of the trial court in allowing the prosecution to introduce in evidence the pieces of blueprint found near the body of the deceased. The pieces of blueprint were part of the *res gestæ*, having been found on the floor of the room in close proximity to the dead body and, as such, were admissible. There was also evidence which tended to connect the appellant with them. Less than an hour before the killing appellant was seen with a roll of blueprints in his hand, and it was shown by testimony of the witness, Ingmire, that at a considerable time before the homicide he had given Sieber a blueprint in connection with their common employment which had never been returned to him. The witness recognized the tracing on at least one of the pieces of blueprint found near the body of the deceased, and testified that it looked something like the map he had given to the appellant on that occasion.

[14-16] During the course of the trial counsel for the defense asked certain questions of witnesses, which were answered in a manner not responsive to the questions. In two instances here complained of, and on motions of the prosecution, the court improperly struck out the testimony on the ground that the answers were not responsive. An ob-

jection that an answer is not responsive is one that can be made only by the party who asks the question, if the answer is otherwise admissible (*Hirshfeld v. Dana*, 193 Cal. 142, 148, 223 P. 451); but appellant was not prejudiced by the action of the trial court. The answer of the defendant that the witness Mortimer "said he was in [jail] for throwing pepper in the cop's eyes," while indirectly responsive to a question, related to a collateral matter of no particular import to the case of the appellant. The other answer, concerning a package of meat which the appellant took home on the day of the homicide, was but a repetition, in substance, of an answer that had been previously given, and which was permitted to remain in the record. The objection of the appellant to the question asked him on cross-examination, if he had supported his wife during a certain period, was properly overruled, although the criticism to the form of the question is not entirely without merit.

[17] The witness Cobleigh, one of the crew working under appellant and a witness for the prosecution, testified that he and the other two men comprising the crew loaded the truck at the city yard on the morning of the homicide. Counsel for appellant sought to impeach Cobleigh's testimony by saying that he had made, at other times, statements inconsistent with his testimony given at the trial. The witness had been interviewed by Mr. Toomey, an attorney for the appellant, and on cross-examination, testifying as to what occurred on that occasion, said he did not tell the attorney that he saw Sieber help load the truck. On further cross-examination, after laying the foundation for impeachment, counsel asked the witness " * * * whether or not at the same time and place [he] did not tell [Toomey] that Charles Sieber helped [him] load the truck." The witness answered, "No; I did not tell him." The answer was allowed to remain in the record, but, after argument, the court sustained an objection of the prosecution that the defense was attempting to impeach on a collateral matter. We are not in accord with the ruling of the trial court. The actions and movements of the appellant, during the time he claimed to be at the city yard on the morning of the homicide, constituted a most material element in the case. If the witness, Cobleigh, had made contradictory statements concerning the presence of the appellant during that period, the appellant had the right to show the fact, as affecting the weight and credibility to be attached to the witness' testimony. There is much in the record, however, from which it appears to be satisfactorily established that the appellant did not assist his men in loading the truck. He, himself, testified that he only told the men "what to load * * * and was

standing there by the truck until" called to assist a friend (Soroker) make some repairs to an automobile. When he returned "they [his crew] were just about through loading the truck." We cannot therefore say that the cause of the defendant was in any way materially injured by the action of the trial court.

Appellant contends that, throughout the trial, "the trial judge was hasty, unreasonable, and humiliating to the defendant and his counsel," and that "the conduct of the court [was] of such nature and under such circumstances and conditions" as to prevent the defendant from having a fair trial. It is unnecessary for us to comment upon the tension under which able counsel labor in the conduct of a long and tedious trial in the defense of one charged with the most serious of all crimes. The trial judge, in such cases, is subjected to an equally severe burden. We have carefully read the specifications of instances in which it is contended the trial court overstepped the bounds of judicial fairness and decorum, and, while the record indicates that at times friction was engendered between the court and counsel for the defense, we find nothing in the attitude or action of the court to warrant the feeling that the defendant was thereby prejudiced or prevented from having a fair and impartial trial.

[18, 19] Appellant complains of what he terms the "shocking conduct and shameful tactics" of the deputy district attorney who conducted the case for the people in the trial court. The prosecuting officer may have been overzealous at times, but we are not persuaded that he was so unmindful of the duty he owed both to the state and to the defendant as to use his office "as an engine of persecution," as charged by the appellant. We are unable to say that questions charged to have been asked by the deputy district attorney in bad faith were, in fact, improperly propounded. Neither are we convinced that during his argument to the jury that officer purposely referred to matters not in the record, or intentionally made misstatements of law, for the purpose of misleading the jury. The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury. 8 Cal. Jur. p. 263. From the record of the portions of the argument of the deputy district attorney to the jury, to which objections are now made, it appears that there were mutual recriminations between counsel for the state and for the defendant respecting their offi-

cial and professional methods. These occurrences were, as is always the case, unfortunate and ill-timed, but we cannot agree with the appellant that the actions and attitude of the deputy district attorney prejudiced his cause. The record discloses that, while in some instances counsel for the defense assigned the conduct of the deputy district attorney as error and misconduct, in many other instances they merely noted an exception to what the attorney did. The rule is that when a district attorney is guilty of misconduct in the trial of a criminal case, it is ordinarily the duty of counsel for the defense promptly to call the attention of the court thereto and assign it as misconduct, or request the court to instruct the jury to disregard it. Such assignments and requests are necessary as a foundation for a complaint to this court. *People v. Routh*, 182 Cal. 561, 567, 189 P. 436; *People v. MacDonald*, 167 Cal. 545, 551, 140 P. 256; *People v. Bishop*, 134 Cal. 682, 685, 66 P. 976. There may be cases in which the act done or remark made is of such a character that a harmful result cannot be obviated by any retraction or request. For the same reason, the want of an assignment of misconduct cannot affect appellant's rights, where such assignment could not have led to the curing of the harm done. *People v. MacDonald*, supra. A careful reading of the record, however, satisfies us that the present case is not within these exceptions to the general rule.

The order denying the motion for a new trial and the judgment appealed from are and each is affirmed.

We concur: CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.

201 Cal. 209

PEOPLE v. SCHWARZ et al. (Cr. 2978.)

Supreme Court of California. June 3, 1927.

1. Criminal law § 1069(6)—Appeal from judgment, not having been taken orally at time of entry thereof or within 2 days thereafter, must be disregarded (Pen. Code, § 1239).

Appeal from judgment on plea of guilty of improper attempt to influence a juror, not having been taken orally at time of entry thereof or within 2 days thereafter, was abortive, in view of Pen. Code, § 1239, and must be disregarded.

2. Criminal law § 1032(1), 1044—Timely appeal from judgment because indictment was insufficient cannot be considered, where sufficiency of indictment was not tested by demurrer on motion.

Timely appeal from order refusing to vacate judgment of conviction on ground that indictment failed to state public offense cannot avail defendant, where she failed to test sufficiency

of indictment by demurrer or by motion in arrest of judgment.

3. Criminal law § 1023(12)—Order refusing to vacate judgment, and denying right to withdraw plea of guilty and re-enter plea, held appealable.

Order refusing to vacate judgment of conviction and right to withdraw defendant's plea of guilty and re-enter plea of not guilty, being timely, was appealable.

4. Criminal law § 998—Supreme Court may reverse order denying motion to vacate judgment and change plea induced by fruitless promise of immunity.

Where defendant, charged with improper attempt to influence a juror, on promise of immunity withdrew plea of not guilty and pleaded guilty and was sentenced and probation denied, the Supreme Court may reverse an order made after judgment, which denied motion to vacate judgment and grant permission to defendant to withdraw plea, where defendant's substantial rights were taken from her without an opportunity for hearing on the merits.

5. Criminal law § 274—Defendant, deprived of right of trial on merits because of duress, fraud, or overreaching of his free will, may withdraw plea of guilty.

Where on account of duress, fraud, or fact overreaching defendant's free will and judgment he is deprived of right of trial on merits, court may, after judgment and time for appeal has passed, grant privilege of withdrawal of plea of guilty and of reassuming situation occupied before plea was entered.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Bernard Schwarz and F. Amy Wallington were convicted of improper attempt to influence a juror, and defendant F. Amy Wallington appeals from the judgment and from an order refusing to vacate the judgment for insufficiency of the indictment and from an order denying a motion to vacate the judgment and to permit her plea of guilty to be withdrawn. Order denying motion to vacate judgment and to permit plea to be withdrawn reversed. Order refusing to vacate judgment for insufficiency of the indictment affirmed. Appeal from judgment dismissed.

Max Schleimer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

PRESTON, J. Appellant and one Bernard Schwarz were, on April 7, 1925, jointly indicted under the provisions of section 95 of the Penal Code, the indictment alleging that they did " * * * willfully, unlawfully, feloniously, and corruptly attempt to influence the said juror (naming him), in respect to his verdict, opinion, and decision as such juror

therein, by an oral communication then and there made to him. * * *

On June 22, 1925, the defendant Schwarz pleaded guilty to count 1 of said indictment and received in punishment a fine to the extent of \$250, the second count being accordingly dismissed. Appellant was arrested on December 7, 1925. On December 10, 1925, she regularly entered her plea of not guilty to the indictment. On February 3, 1926, she changed her plea from not guilty to guilty, and applied for probation, which application was denied on March 25, 1926, and judgment of conviction was entered against her on said date. On March 29, 1926, four days afterward, she gave notice of appeal from said judgment. On April 1, 1926, she presented a motion to the superior court to set aside the judgment and sentence on the ground that the court was without jurisdiction to impose the judgment, asserting that the indictment did not state a public offense. This motion the court denied on April 5, 1926. Thereupon, in open court on said day, appellant gave notice of appeal from said order denying said motion. On April 9, 1926, basing her application upon a proper affidavit, appellant made application to the court for an order setting aside the judgment and granting her permission to withdraw her plea of guilty and to plead not guilty to the indictment upon the ground that she had been induced to change her plea from not guilty to guilty under duress and fraud.

The court denied this motion out of hand and, evidently thinking it was a repetition of the proceeding which ended in the order of April 5, 1926, ruled as follows:

"This application was heretofore made to department 21 and after argument denied on April 5, 1926. Its attempted presentment to the presiding judge, is a violation of rule 35 and contemptuous. It is refused. Burnell, Judge."

[1] The appeal from the judgment not having been taken orally at the time of the entry thereof, or within two days thereafter, was abortive and must be disregarded. Penal Code, § 1239.

[2] The appeal from the order refusing to vacate and set aside the judgment upon the ground that the indictment failed to state a public offense was taken in time, but, under the state of the record, this contention will not avail the appellant, as she failed to test the sufficiency of the indictment by demurrer or by motion in arrest of judgment *People v. Welton*, 190 Cal. 236, 238, 211 P. 802. "The case is one of an imperfect allegation of a material fact rather than of a total failure to set forth an essential element." *People v. Fuski*, 49 Cal. App. 7, 192 P. 552; *People v. Griesheimer*, 176 Cal. 44, 167 P. 521; *People v. Votaw*, 38 Cal. App. 714, 718, 177 P. 485; *People v. Hinshaw*, 194 Cal. 1, 23, 227 P. 156.

[3] The appeal, however, from the order

refusing to vacate the judgment and refusing to defendant the right to withdraw her plea of guilty and re-enter her plea of not guilty was taken in time and said order was appealable. 8 Cal. Jur. 494, § 509; *People v. Perez*, 9 Cal. App. 265, 98 P. 870.

[4] The record shows the grounds upon which said motion was based to be substantially as follows:

That appellant was a stenographer in the employ of her codefendant, Bernard Schwarz; that at the time mentioned in the indictment and at the instigation of said Schwarz and one Miller, she was induced to approach a juror during the progress of a criminal trial, in which Schwarz and others were defendants, and to say to said juror in effect that all the defendants were human; that the judge was showing prejudice against them by his rulings, and she wanted them to have a square deal. By the second count of the indictment she was accused of making similar statements to a second juror in the same cause. The juror or jurors reported the matter to the trial court, and the subject was taken up by the office of the district attorney with the grand jury. It appears that neither the deputy district attorney in charge of the matter nor the grand jury intended that the defendant be prosecuted, but planned that her indictment along with that of her codefendant would be the means of inducing her to tell what she knew about the first case, the criminal case against Schwarz, Doan, et al., and she could also be used as a witness for the prosecution against Schwarz in the second case, in return for which she would be granted immunity. With this purpose in mind, the indictment was obtained. Appellant was evading arrest for some time thereafter. Meanwhile, the defendant Schwarz was permitted to plead guilty and received as a punishment only a fine of \$250.

Finally, however, Mr. A. M. Williams, chairman of the criminal complaints committee of the grand jury, with the full knowledge and consent of the deputy district attorney in charge of said matter, induced appellant, through her attorney, to surrender to the law, with the idea of using her testimony as above set forth, and with the assurance that she would receive in return either out and out immunity or, at most, no greater punishment than had been received by Schwarz in the same cause. Appellant did return and surrender herself and at first entered a plea of not guilty. Later, while these promises were still held out to her, she was taken before the district attorney, to whom she made a complete statement. It was shown from her testimony that she did not really know anything about the first case, and had merely acted through a false sense of loyalty to her employer, who had worked upon her sympathies to further his own ends. No complaint is made that she did not fully disclose all

facts within her knowledge. Neither was anything said at any time indicating a change of policy upon the part of the prosecution officers.

Following this interview, appellant withdrew her plea of not guilty and entered a plea of guilty, making application for probation. Probation was denied her by the court, who had before him all of the foregoing facts. He not only imposed a penitentiary sentence for the time prescribed by law, but also recommended that parole be withheld for the period of three years, and this in the face of the fact that appellant's codefendant and employer, who without doubt was the guiding spirit in the matter, had been allowed to go with a mere fine of \$250.

The question here presented is, May we interfere to reverse an order made after judgment, which denied a motion to vacate the judgment and to grant permission to defendant to withdraw her plea of guilty, with the right to take such action as she might be advised without hindrance by said former plea? The facts as alleged fully warrant the conclusion that substantial rights of the defendant have been taken away from her without an opportunity for a hearing on the merits, and this by those persons charged with the enforcement of the law. While no personal blame may attach to any one connected with the matter, yet, if said allegations be true, the failure of the court to adopt the covenants made by the district attorney and grand jury with defendant amounted in legal effect to the absorption of her legal rights by at least legal fraud. Certainly, in such case it can be truthfully said that on account of the conduct of those in charge of her prosecution she surrendered valuable legal rights under a misapprehension of the situation.

Too much may not be done to purify and keep pure the administration of justice. If a defendant may not rely upon a covenant made with her by the head of the committee of the grand jury and the office of the district attorney, then, indeed, would our whole system of legal procedure be brought under the cloud of suspicion. It is far better that one woman go unpunished than that it be said that the officers of the law in charge of the prosecution of crimes may play fast and loose with their promises to defendants under indictment. Precedent for procedure for relief under these circumstances, where the facts warrant it, is found in the following cases: *People v. Perez*, 9 Cal. App. 265, 98 P. 870; *People v. Mooney*, 178 Cal. 525, 529, 174 P. 325; *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435.

[5] It may be stated from the above authorities that it is now well settled in this state that where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits, the court in

which he was sentenced may after judgment and after the time for appeal has passed, if a properly supported motion is seasonably made, grant him the privilege of withdrawing his plea of guilty and of reassuming the situation occupied by him before a plea of any kind was entered. It should be noted, however, that where statutory remedies are provided this method of relief may not be resorted to, and that this exceptional remedy applies only where no trial has been had on the merits and only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes.

The case of *People v. Miller*, 114 Cal. 10, 16, 45 P. 986, 987, it is said, supports the action of the trial court, but it is not in the same category with the case before us as to the facts thereof. There the defendant was led by the advice of his counsel to believe that he would get less punishment if he changed his plea to guilty than he would receive if he stood trial and was convicted. In this hope, however, he was disappointed. The court rightly held that with full knowledge of the consequences which might follow he should not be permitted to speculate upon the action of the court. But even in that case the court said:

"The law seeks no unfair advantage over a defendant, but is watchful to see that the proceedings under which his life or liberty is at stake shall be fairly and impartially conducted. It holds in contemplation his natural distress, and is considerate in viewing the motives which may influence him to take one or another course. Therefore, it will permit a plea of guilty to be withdrawn if it fairly appears that defendant was in ignorance of his rights and of the consequences of his act, or was unduly and improperly influenced either by hope or fear in the making of it."

Neither is *People v. Lennox*, 67 Cal. 113, 7 P. 260, a parallel case, for there the defendant relied upon the mere expressed opinion of the deputy sheriff and his attorney as to the prospects for leniency. But neither of these persons were identified in any way with the policy that obtains in the prosecution of criminal cases.

Had the district attorney in either of the above cited cases, in consideration of the promise of immunity, received a full statement or confession from the defendant, and the defendant, relying upon such promise, entered a plea of guilty, which the court refused to permit him to change, this court doubtless would have given defendant speedy relief in both cases.

The purported appeal from the judgment is dismissed. The order of April 5th is affirmed. The order of April 9, 1926, denying the motion to vacate the judgment and grant permission to withdraw plea is reversed and the cause is remanded to the court below, with directions to entertain said motion, and if the material allegations made in support

thereof are sustained, that said defendant be accorded the right to withdraw said plea of guilty, and for such further proceedings not inconsistent with this opinion as may seem meet and proper.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

201 Cal. 392

MARINI v. SOUTHERN PAC. CO. et al.
(S. F. 11524.)

Supreme Court of California. June 17, 1927.

1. Appeal and error $\S$ 989—In reviewing nonsuit for contributory negligence in railroad crossing collision, question is whether plaintiff was guilty of contributory negligence as matter of law.

In action against railroad for collision at crossing, in which negligence of guard was admitted, where at conclusion of plaintiff's evidence defendants' motion for nonsuit because of plaintiff's contributory negligence was granted, sole question on appeal is whether plaintiff was guilty of contributory negligence as matter of law.

2. Railroads $\S$ 350(16)—Evidence of automobilist's contributory negligence at railroad crossing held not to warrant nonsuit.

In action by automobilist for damages in railroad crossing collision, plaintiff's uncontradicted testimony that he stopped to shift into intermediate gear and was proceeding cautiously over tracks at time of accident held to show that he was not guilty of contributory negligence as matter of law, and to render nonsuit at close of plaintiff's evidence for contributory negligence error.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by M. Marini against the Southern Pacific Company and others for damages from personal injuries. From a judgment of nonsuit, plaintiff appeals. Judgment and order of nonsuit reversed.

J. E. Hood and H. S. Craig, both of Oakland, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondents.

PRESTON, J. This is an appeal by plaintiff below from a judgment of nonsuit in an action for damages for personal injuries sustained by him as the result of a collision between his automobile and a Southern Pacific electric train at the Fruitvale avenue crossing near East Fourteenth street in Oakland, Alameda county, Cal.

It appears that for many years the railroad company had maintained at the crossing a

signal tower, gates, and signal bells, but on the particular occasion of this accident the tower man was telephoning and forgot to lower the gates and sound the bells upon approach of the train. His negligence is admitted. It further appears that for 9 or 10 years past appellant had driven over this crossing many times daily and had learned to depend upon the signals and gates. The railroad right of way was 70 feet in width, and the territory level. The accident occurred on a dry, clear day. Appellant contends that his view of the approaching train was obstructed by something, although he does not know what it was. Before crossing the tracks, he stopped the automobile to shift into intermediate gear, and states that he did not proceed until he had both looked and listened for danger. The fact that he drove a closed car may have had something to do with the situation. There were various trees, buildings, fences, pillars, and other objects in the vicinity, but, according to the testimony of several witnesses for respondent, they were in such a position that they could not have interfered with appellant's view of the tracks.

[1] Upon the ground of plaintiff's contributory negligence, at the conclusion of his evidentiary showing, motion by defendant for nonsuit was granted, and judgment duly entered. Hence the sole question to be considered on this appeal is whether or not plaintiff was guilty of contributory negligence as a matter of law.

The first case coming under the rule governing guarded crossings is *Koch v. Southern Cal. Ry. Co.*, 148 Cal. 677, 84 P. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795. There verdict for defendant was upheld, because it was shown that plaintiff failed to exercise any care whatsoever for his safety, but relied wholly upon the invitation of the open gates in crossing the track. The court said:

"The case thus presented is not one as to the degree or amount of care which should be exercised by one about to cross a railroad under the invitation to proceed given by the open gates, but whether under such circumstances a man may fail or decline to exercise any care whatsoever, treating the open gates as a positive assurance of safety. Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury. But where, as here, the unconflicting evidence shows that he exercised no care whatsoever, it becomes a question of law to say whether or not such a plaintiff's case shall be submitted to the jury. * * * Nor is it the law that when a railroad company adopts safety gates or any other appliance for the protection of the public the public is thereby absolved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and while the quantum of care

which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates themselves are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions, as did the plaintiff in this instance. * * *

[2] In the instant case the fact that appellant did not drive blindly and heedlessly into danger, without any care whatsoever for his safety, is made plain by his uncontradicted testimony that he stopped to shift into intermediate gear and was proceeding cautiously over the tracks when the accident occurred. In such case, as above stated, the question of whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury.

In the case of Zibbell v. Southern Pacific Co., 160 Cal. 237, 240, 116 P. 513, 514, the court said:

"Whether or not a plaintiff has been guilty of contributory negligence is similar to the question whether or not the evidence in a criminal case, is sufficient to sustain a verdict of guilty. It is usually a question of fact. It is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence, in the other that there was not sufficient evidence to sustain the verdict. But even in such cases, while the question is said, and properly said, to be one of law, it is never a question of pure law. The real decision of the question by the court is a decision of fact. When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * 'It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520; Seller v. Market St. Ry. Co., 139 Cal. 268, 72 P. 1006; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651."

The case of Gregg v. Western Pacific R. R. Co., 193 Cal. 212, 223 P. 553, falls within the

rule controlling guarded crossings and is squarely in point. It reviews at length the authorities governing us in our decision of the case at bar and distinguishes Koch v. Southern Pac. Co., supra; Jones v. Southern Pac. Co., 34 Cal. App. 629, 168 P. 586, relied upon by respondents here, and Wyseur v. Davis, 58 Cal. App. 593, 209 P. 213. There the judgment and order of nonsuit were reversed, and, among other things, the court said:

"Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiff. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. If contradictory evidence has been given, it must be discarded. Estate of Arnold, 147 Cal. 583, 82 P. 253.' * * * 'It is true, as has often been stated, that a railroad crossing is itself a place of danger and is an effectual warning of danger which must always be heeded and the exercise of ordinary care in traveling over such place is not excused by the negligent omission of the railroad company itself to exercise reasonable care. But it is also true that a railway company will not be permitted to encourage the public to relax its vigil as to the dangers that lurk in railroad crossings by assurances that the danger has been removed or minimized by the adoption of safety devices and measures and at the same time hold a person to the same quantum of care as if no such safety measures had been provided. * * * 'It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury.' Hoff v. Los Angeles Pacific Co. [158 Cal. 596, 112 P. 53], supra, quoting from Seller v. Market St. Ry. Co., 139 Cal. 268, 72 P. 1006."

This case, we believe, should have been submitted to the jury under appropriate instructions by the court, and judgment and order of nonsuit are therefore reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

201 Cal. 405

Ex parte LUNA. (Cr. 2999.)

Supreme Court of California. June 17, 1927.

1. Constitutional law ☞56—Legislature has authority to confer jurisdiction on municipal court over all misdemeanors arising anywhere in county (Pen. Code, § 1462; St. 1925, p. 648; Const. art. 6, §§ 1, 5, 13, and § 11, as amended in 1923).

Pen. Code, § 1462, St. 1925, p. 648, giving municipal court exclusive jurisdiction over all misdemeanors arising anywhere in county in which court is located, held proper exercise of legislative power, under Const. art. 6, §§ 1, 5, and 13, relating to jurisdiction of courts, which power is not forbidden or restricted by Const. art. 6, § 11, as amended in 1923 (see St. 1923, p. 1679), giving municipal courts original jurisdiction in criminal cases amounting to misdemeanors without express limitation as to territory.

2. Constitutional law ☞56—Legislature has power to confer jurisdiction on inferior courts in all cases where jurisdiction is not vested in some other court by Constitution (Const. art. 6, § 13).

Under Const. art. 6, § 13, providing Legislature shall fix jurisdiction of inferior courts, Legislature has power to confer upon such courts jurisdiction in all cases not vested in some other court by Constitution.

3. Criminal law ☞27—No constitutional distinction exists between high and low grade misdemeanors (Pen. Code, §§ 16, 17).

Crimes are divided into felonies and misdemeanors, and high and low grade misdemeanors are not divided as such, there being no constitutional distinction between classes of misdemeanors, in view of Pen. Code, §§ 16, 17.

4. Criminal law ☞88—Superior courts in counties having one or more municipal courts have no jurisdiction over misdemeanors committed within county (Pen. Code, § 1462; St. 1925, p. 658, § 28; Const. art. 6, §§ 1, 5, 13, and § 11, as amended by St. 1923, p. 1679).

Superior courts in counties having one or more municipal courts have no jurisdiction over misdemeanors, high or low, committed in county, under Pen. Code, § 1462, St. 1925, p. 658, § 28, Const. art. 6, §§ 1, 5, 13, and § 11, as amended by St. 1923, p. 1679, as jurisdiction given municipal courts over all grades of misdemeanors is exclusive.

5. Statutes ☞181(2)—That failure to give particular construction to statute may thwart its purpose should be considered in determining legislative intent.

Fact that failure to give legislation particular construction will result in thwarting purpose of legislators is fact to be considered in determining intent of legislators.

In Bank.

Application by Felipe Luna for writ of habeas corpus, prayed to be directed to the sheriff of Los Angeles county to secure the petitioner's release after conviction of a high grade misdemeanor (violation of the Wright

Act). Writ granted, and petitioner discharged.

A. Folsom and Richard L. North, both of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent Traeger.

PRESTON, J. Petitioner was convicted in the superior court of the county of Los Angeles for a violation of the statute known as the Wright Act (St. 1921, p. 79) (a high misdemeanor). He seeks his discharge through habeas corpus upon the ground that jurisdiction of said offense has been divested out of the superior court and invested exclusively in the municipal courts of said county.

Upon this identical conviction petitioner sought his discharge from the District Court of Appeal, Second Appellate District, Division 2. Said matter was heard by that court in conjunction with a similar case and opinion therein delivered sustaining the jurisdiction of the superior court (253 P. 151). While we are unable to concur in the conclusion of said court, we are satisfied with a portion of the decision and adopt the same as a part hereof as follows:

"There are in the county of Los Angeles two municipal courts. Appellant was convicted of what is termed a high grade misdemeanor. The alleged offense was committed in territory of the county which lies outside the territory of the cities within which, respectively, the municipal courts hold their sessions. The ultimate question presented for decision is whether the superior court had jurisdiction of the offense. It is conceded by the parties—and correctly so—that a justice's court has no jurisdiction of such misdemeanors as that with which appellant was charged.

"Section 28 of the act of the Legislature concerning municipal courts (Stats. 1925, p. 648) provides: 'Each municipal court shall have original jurisdiction in all criminal cases amounting to misdemeanor, punishable by fine or imprisonment in the city or county and county, or county jail, or punishable by fine or such imprisonment where the offense charged was committed within the county in which the municipal court is established.' Section 1462 of the Penal Code * * * reads in part: 'Whenever a municipal court shall have been established, * * * such court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment, committed in the city * * * where such municipal court is held. * * * In each city wherein a municipal court shall have been established, such courts shall also have jurisdiction over any misdemeanor committed in the county in which such city is located.'

"These enactments of the Legislature, if they do not infringe the provisions of the Constitution, confer upon the municipal courts a jurisdiction over such offenses as that with which appellant was charged, laying aside for the moment the question whether the jurisdiction

so attempted to be conferred is exclusive, or whether it is concurrent with a jurisdiction resting in the superior court. The jurisdiction over such charges was without doubt vested in the latter courts before the passage by the Legislature of the enactments mentioned.

"Sections 1, 5 and 11 of article 6 of the Constitution are material to a discussion of the questions which arise upon the appeal.

"Section 1 reads: 'The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, superior courts, such municipal courts as may be established in any city or city and county, and such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county.' Stats. 1923, p. 1678.

"Section 5 provides, in part: 'The superior courts shall have original jurisdiction * * * in all criminal cases amounting to a felony, and in all cases of misdemeanor not otherwise provided for. * * *' Stats. 1923, p. 1678.

"Portions of section 11 follow: 'In any * * * city which is governed under a charter * * * containing a population of more than forty thousand inhabitants, * * * a municipal court may be established as in this article provided, anything in this constitution to the contrary notwithstanding. * * * Municipal courts shall have original jurisdiction, * * * in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars or less, and of actions of forcible or unlawful entry or detainer where the rental value is one hundred dollars or less per month, and where the whole amount of damages claimed is one thousand dollars or less, and in cases to enforce and foreclose liens on personal property where the amount of such liens or the value of the property is one thousand dollars or less, and in all criminal cases amounting to a misdemeanor punishable by fine and imprisonment in the city * * * or county jail, or punishable by fine or such imprisonment (which offenses include what are known as high grade misdemeanors). * * * The Legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof except in the particulars otherwise specified in this section, and for the establishment of municipal courts in cities (of the size and character above specified). * * * Upon the taking effect of such general law, a municipal court may be established in such cities (upon the completion of certain preliminary steps).' Stats. 1923, p. 1679.

"If it be conceded for the moment that the above-quoted provisions of section 28 of the Act of 1925 and of section 1462 of the Penal Code are not in excess of the terms of the Constitution upon grounds later to be discussed, it seems plain that the jurisdiction attempted to be conferred upon the municipal courts by them is exclusive and that the sections have ousted the former jurisdiction of the superior courts over the same matters. So much is apparent from *Green v. Superior Court*, 78 Cal. 556, 21 P. 307, 541. In that case it appeared that jurisdiction over certain offenses had been vested by the Constitution (article 6, § 5) in the superior court when 'not otherwise provided for.' Jurisdiction over the

same offenses was later conferred by statute upon the police court of the city and county of San Francisco, which court was created by the Legislature under appropriate provisions of the Constitution. *Green* was indicted in the superior court in and for the city and county of San Francisco for the commission of one of those offenses. He asked the Supreme Court for the writ of prohibition to halt proceedings under the indictment, and contended that the statute conferring jurisdiction on the police court vested an exclusive jurisdiction in that tribunal. The Supreme Court upheld the contention in the following language: 'The evident purpose of the constitutional provision, as evinced by its language, is that the jurisdiction of the superior court shall be conditioned upon the establishment of other courts upon which the same jurisdiction shall be conferred, and when that condition happens, and the jurisdiction is by the Legislature conferred upon such inferior courts, from that time the Constitution itself transfers such jurisdiction from the superior court and vests it in the inferior courts. From that time the jurisdiction is "otherwise provided for," and the jurisdiction of the superior court at once ceases.' That part of section 5 of article 6 of the Constitution which is above quoted is substantially the same as the language of the same section as it stood when it was construed in *Green v. Superior Court*. We are therefore of the opinion that whatever jurisdiction was vested in the municipal courts by section 28 of the Act of 1925, and by section 1462 of the Penal Code is exclusive of a like jurisdiction in the superior court."

[1] Under sections 1, 5, and 13 of article 6 of the Constitution as they read prior to 1923, it was within the power of the Legislature to confer jurisdiction on an inferior court such as a police or justice's court of all misdemeanors, high and low, and such jurisdiction, when so conferred, thereby divested the superior court of all jurisdiction in the premises. *Green v. Superior Court*, supra; In the Matter of the Application of *Westenberg*, 167 Cal. 309, 317, 139 P. 674.

It necessarily follows, therefore, that jurisdiction over all misdemeanors may be conferred by the Legislature upon a municipal or any other lawfully established court and the fact that such court is a court of record and of some greater dignity than an inferior court only makes the more certain the conclusion we have drawn.

It is also incontestably true that if jurisdiction over some misdemeanors may exist in an inferior court as to cases arising outside its territorial limits, but within the county of its location, such jurisdiction may be given over all misdemeanor cases so arising anywhere in the said county. And if it be competent, for example, to confer jurisdiction upon a justice's court or police court of Los Angeles county of any misdemeanor committed anywhere therein, it must be true that jurisdiction over every misdemeanor committed therein may be vested in such inferior courts. And if such jurisdiction may be giv-

en to inferior courts by the Legislature, verily it may be given to municipal courts established under the amendments of 1923 which, although inferior to superior courts, are nevertheless superior to inferior courts.

But it has been expressly held that it is within the legislative power to confer such jurisdiction on justices' courts as to all so-called low misdemeanors arising anywhere in the county wherein the township for such court is located. *Graham v. Mayor, etc.*, of Fresno, 151 Cal. 465, 91 P. 147, and in *re Kaster*, 52 Cal. App. 454, 198 P. 1029, affirmed 185 Cal. 647, 198 P. 1031.

The conclusion irresistibly follows, then, from the foregoing premises, that jurisdiction may be given to a municipal court of all misdemeanors, high and low, arising anywhere in the county where such court is established unless the provisions of section 11 of article 6 of the Constitution, as amended in 1923, expressly forbid this being done. An examination of this amendment not only fails to disclose any such inhibition, but, on the contrary, clearly shows that said section was framed in the light of the conclusion we have above announced. The pertinent language of the amendment is as follows:

"Municipal courts shall have original jurisdiction, except as hereinafter provided * * * in all criminal cases amounting to misdemeanor punishable by fine and imprisonment in the city or city and county or county jail, or punishable by fine or such imprisonment."

No limitation as to territory can be found in this language. The further provision, "The Legislature shall provide by general law * * * for the jurisdiction thereof except in the particulars otherwise specified in this section, * * *" gives to the Legislature power to fix the jurisdiction of said court, subject only to the previous limitations therein announced, but as to misdemeanors no limit is previously fixed. The power of the Legislature as to misdemeanors is therefore practically plenary.

[2] A similar situation was before the court in *Green v. Superior Court*, 78 Cal. 556, 564, 21 P. 307, 309, and it was there said:

"Section 13 of article 6 of the Constitution provides: 'The Legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof.' Under this section the Legislature has power to confer upon such courts jurisdiction in all cases not vested in some other court by the Constitution. *Gafford v. Bush*, 60 Cal. 149."

This interpretation of section 11 seems to be in direct accord with *Tuttle on California Municipal Courts*, § 37, pp. 70-73, where it is said:

"But the constitutional provisions involved in those cases (referring to decisions of other

states) were somewhat different from the Constitution of California not only in the description of the courts with respect to their local nature, but also in the fact that the constitutions there involved contained no general grant of jurisdiction in terms unlimited territorially, as in California."

Again the same author says in section 35, pages 63, 64:

"As we have observed in the preceding sections, in the portion of the Constitution defining the subject-matter of the jurisdiction of municipal courts no express limitation is made with respect to the territorial limits within which the case must arise, but the grant of jurisdiction is in the same general terms as in the case of the superior court. Whether this results in giving to municipal courts as broad a jurisdiction territorially, within the limits of the subject-matter, as is granted to the superior courts depends upon whether any other provisions of the Constitution peculiar to municipal courts operate directly to impose territorial limitations, or indirectly in that regard by permitting the Legislature to do so."

[3] It seems also that section 1462 of the Penal Code has been happily framed in accord with the reasoning above set forth, for this section attempts to confer upon any municipal court jurisdiction of all misdemeanors of all grades arising anywhere in the county. It would certainly be an unjustifiable anomaly to have a municipal court with county-wide jurisdiction as to some misdemeanors but with local jurisdiction only as to all others. After all, our law divides crimes into felonies and misdemeanors, and high and low grade misdemeanors are not known to our law as such. The name is a relic of the common law, and no legal reason exists or can be imagined under our system for a constitutional distinction between classes of misdemeanors. Pen. Code, §§ 16, 17.

[4, 5] We therefore conclude that, as to all misdemeanors committed in counties having one or more municipal courts therein, the superior court has been bereft of its jurisdiction thereof, and as to all such misdemeanors, high and low, so committed, the municipal court or courts have original jurisdiction thereof. The fact that the civil jurisdiction conferred upon municipal courts may not be so broad as that applicable to misdemeanors furnishes no insuperable argument against the conclusion above announced. In counties in which large cities such as Los Angeles are located, where all departments of the superior court are crowded with business, these municipal courts have doubtless been authorized to relieve the congestion by transferring all misdemeanor cases not otherwise disposed of to the new courts. See *Green v. Superior Court*, supra. And if these courts be not given county-wide jurisdiction in such cases, this legislation will have largely failed in its purpose. This fact is entitled to some weight in ascertaining the intent of

the framers of the constitutional amendments and the legislation thereunder.

It is asserted that in *Bakkenson v. Superior Court*, 197 Cal. 504, 241 P. 874, views have been expressed which are opposed to those expressed herein. We cannot concede this assertion to be sound. In that case we had before us a provision of said section 11 which read as follows:

"In any city or in any city and county where such municipal court has been established, and in townships situated in whole or in part in such city or city and county, there shall be no other court inferior to the superior court except as herein provided."

The facts were that a Los Angeles county township lay territorially partly within and partly without the cities of Los Angeles and Long Beach, wherein had been established municipal courts. The point decided was that said township did not lose outright its identity, its existence, nor its ordinary jurisdiction because partly within said cities. It only lost its jurisdiction over that portion of the township territory lying within the cities, but as to that portion lying without it retained its territorial integrity and its ordinary jurisdiction of causes. In answering the contention that such township and its jurisdiction had been obliterated, the court, among other things, said:

"But it nowhere appears from said amendment when considered as a whole that it was the intent of those who framed it to disturb to the extent of destroying the judicial organization within those portions of such affected townships as lay outside of the limits of those municipalities which had decided to set up municipal courts within their said limits. To so interpret the particular language of the portion of said amendment upon which the petitioner relies, and which is above excepted, would be to give to the amendment as a whole the effect of either taking away from the inhabitants of the portion of such townships as lay without the bounds of such municipalities their already established justices' courts, leaving them without tribunals for the institution and trial of causes within the jurisdiction of such court, or of extending the jurisdiction of the municipal courts of contiguous cities over such outlying territory, neither of which results is thinkable as within the intent of the framers of this amendment to the Constitution, since to give it such an interpretation would be to take away from the inhabitants of such outlying territory their already established system of justices' courts and township officers by the vote of the electorate of an incorporated municipality of which they form no part, and to substitute in place thereof a system of municipal courts in the establishment of which and in the selection of the judges and other officers of which they would have no vote or voice."

But the extension of the jurisdiction of the municipal court throughout the township and county as to one set of offenses only is a far different thing from destroying a town-

ship government outright. Indeed, early in said opinion the court, in speaking of the jurisdiction of the municipal courts, said that they were "confined in some respects as to their jurisdiction and functions to the territorial limits of the municipalities thus resolving to establish the same," thereby showing that the court had in mind that they might in some cases have extraterritorial jurisdiction. Again, this transfer of jurisdiction as to high grade misdemeanors takes nothing whatsoever from the jurisdiction of any of the justices' courts; it only subtracts from the jurisdiction of the superior court, which was always county-wide as to the offense here involved.

We are entirely satisfied that petitioner was convicted in a court that had no jurisdiction whatsoever over the offense charged against him.

The petitioner is discharged.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

83 Cal. App. 776

McCAMISH v. GROFF et al. (Civ. 3286.)

District Court of Appeal, Third District, California. June 14, 1927.

Master and servant §258(9)—Complaint not alleging injury to employee resulted from operation of defective tractor held not to state cause of action.

Complaint for injury to operator of tractor to which was attached a defective scraper, not alleging that injury resulted from operation of the tractor in its defective condition, but that plaintiff was injured at a time when the tractor was stopped and he was engaged in simple work of cleaning the tiller wheel with an iron crowbar, held not to state a cause of action.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by George McCamish against W. R. Groff and another, as individuals and as co-partners doing business under the firm name of Groff Bros. From a judgment for defendants, plaintiff appeals. Affirmed.

Atran & Sheets, of Colusa, for appellant.

Thos. Rutledge, of Colusa, for respondents.

FINCH, P. J. The complaint alleges that the plaintiff was employed by the defendants "during the night shift," as engineer and operator of a 75 horse power tractor; that the "tractor was guided by a tiller wheel, which moved to the right or left as the operator gave the direction in a circular frame to which was attached a scraper, devised for the purpose of scraping, and keeping clodded dirt, weeds, stones, straw, and other obstructions from sticking to the steel tread surface of

said tiller wheel"; that at the time of the injury complained of and for a long time prior thereto "said scraper was broken, destroyed, and no longer in use upon said tractor, all of which was known at said time to the defendants"; that the "defendants did prior to and at the time the injury * * * was received, carelessly and negligently require, permit, and cause said Geo. McCamish * * * to operate said tractor in said defective condition and at such times as said tiller wheel ceased to revolve or turn and became clogged, as aforesaid, by reason of clodded dirt, weeds, straw, stones, and other obstructions clinging thereto, to remove and pry the same from said tiller wheel by the use and aid of an iron crowbar"; that the "tractor in said defective condition was extremely dangerous, unsafe, and hazardous to operate," and when the tiller wheel so became clogged it was necessary "that the operator immediately stop said tractor and go around in front of same and lean over the circular frame in which said tiller wheel turned and revolved, and by the use of, and holding a crowbar, jam said crowbar into the clogged dirt, weeds, straw, stones, and other obstructions caked and sticking to the steel tread surface of said tiller wheel and pry, dig, and scrape said clogged dirt, weeds, straw, stones, and other obstructions therefrom, in the nighttime when said cleaning and scraping of said tiller wheel could be seen only dimly and with great difficulty, and in so doing the operator was apt to jam the metal crowbar into the metallic portion of said tractor and said tiller wheel, thereby causing steel splinters to fly back into the face and eyes of said operator, * * * all of which at said time was well known to the said defendants"; that at the time of the injury "the defendants negligently and carelessly permitted, caused and required said Geo. McCamish to operate said defective tractor, * * * and, upon said tiller wheel becoming clogged, * * * to get off from said tractor, go around in front thereof, and, with an iron crowbar in his hands, in the darkness of the nighttime, to lean over the circular frame in which said tiller wheel moved and to pry, dig, and scrape said clodded dirt, weeds, straw, stones, and other obstructions from the steel tread surface of said tiller wheel, and in so doing a splinter of steel was torn loose from the said metallic running tread of said tiller wheel

and deflected and ricocheted into the left eye of the said Geo. McCamish, thereby causing him to lose his sight in said left eye and to lose partial sight in his right eye."

The defendants demurred to the complaint on the grounds of insufficiency of fact to state a cause of action and uncertainty as to the manner in which the defendants' alleged negligence contributed to the injury. The trial court sustained the demurrer and gave the plaintiff ten days in which to amend. The plaintiff elected to stand upon the complaint, and a judgment of dismissal was entered. This appeal is from the judgment.

The only ground urged for a reversal of the judgment is that "the failure of the defendants to keep in use and repair the scraper device was the proximate cause of the injury." In sustaining the demurrer, the trial court said:

"The improperly equipped machine was being worked and no accident occurred in the working, but the machine was stopped as to its working and the operator was doing an independent act and while doing this independent act was then injured."

It is alleged that it was "extremely dangerous, unsafe, and hazardous" to operate the tractor in its defective condition, but there is no allegation that any injury resulted from such operation. If it be conceded that the defendants were negligent in failing to equip the tractor with an effective scraper for the tiller wheel, "there is an entire absence of a sequential relationship of cause and effect between this negligent omission and the injury." *Marovich v. Central California T. Co.*, 191 Cal. 295, 303, 216 P. 595, 599; *Lammers v. Pacific Electric Ry. Co.*, 186 Cal. 379, 385, 199 P. 523; *Schwartz v. California Gas, etc., Co.*, 163 Cal. 398, 402, 125 P. 1044. The injuries involved in the cases relied on by appellant resulted directly from the operation of defective machines or instrumentalities. In this case the alleged danger and hazard of operating the tractor in its defective condition ceased with the cessation of its operation, and at the time of the injury the plaintiff was engaged in the simple work of cleaning the tiller wheel with a simple tool.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

PEOPLE v. DOBLE. (Cr. 1325.)★

District Court of Appeal, First District, Division 2, California. May 19, 1927.

Rehearing Denied June 17, 1927. Hearing Granted by Supreme Court July 18, 1927.

1. Licenses $\S$ 40—Wash sale of treasury stock to individual and through him to public held violation of Corporate Securities Act (Corporate Securities Act, $\S$ 14).

Scheme to sell corporate treasury stock in excess of permits through conspirators to the public through a pretended sale to corporation's fiscal agent in Oregon and a resale by him as a shareholder to the public in California held wash sale and not a bona fide sale, but constituted a violation of the Corporate Securities Act (St. 1917, p. 673), $\S$ 14.

2. Criminal law $\S$ 814(8, 9)—Omission to instruct that delivery of one stock certificate in exchange for another was not sale within Corporate Securities Act held not prejudicial, where conviction of conspiracy did not involve such deliveries.

Where conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), consisted of an agreement to sell stock without a permit in hope that a permit could thereafter be obtained, and when permit was finally denied plan of wash sales of stock by the corporation to its fiscal agent for resale in violation of Corporate Securities Act was adopted, omission in instruction, giving definition of sale within Corporate Securities Act, that delivery of one certificate in exchange for another legally issued should not be construed to be a sale, held not prejudicial.

3. Conspiracy $\S$ 38—Scheme of corporation to sell stock to fiscal agent in another state for resale in California if conceded to be lawful could not affect conviction for conspiracy based on prior unlawful sales.

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), where acts of conspirators in selling treasury stock of corporation without permit were completed before scheme to sell corporation's treasury stock to its fiscal agent in Oregon for resale in California was devised, such scheme even if lawful did not affect specific stock sales completed before scheme was devised.

4. Licenses $\S$ 40—Expectations of receiving permit do not excuse sales without permit in violation of Corporate Securities Act.

Violation of Corporate Securities Act (St. 1917, p. 673), by sale without permit, is not excusable by fact that issuance of permit was anticipated or expected.

5. Conspiracy $\S$ 47—Plan to sell corporate stock to nonresident and through him resell to public held evidence of intent to conceal prior illegal sales (Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), plan of conspirators to sell corporation treasury stock to corporation's fiscal agent in Oregon for resale by him in California held evidence of conspirators' willfulness to sell stock without a permit and to show their effort to conceal ille-

gal acts in having sold stock beyond amount permitted by permit by supplying stock through such plan.

6. Criminal law $\S$ 400(8)—Summary of books of corporation and fiscal agent held admissible to show sales of corporate stock in excess of permits (Code Civ. Proc. $\S$ 1855, subd. 5; Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), by selling treasury stock of corporation without permit, where books of the corporation and its fiscal agent were voluminous, summary of books prepared to show amount of stock sales in excess of permits was admissible in evidence under Code Civ. Proc. $\S$ 1855, subd. 5.

7. Criminal law $\S$ 402(1)—Where summary of books is admissible in evidence, it is sufficient if opposite party has opportunity to inspect, cross-examine, and make similar summary (Code Civ. Proc. $\S$ 1855, subd. 5).

Where summary of books is admissible in evidence under Code Civ. Proc. $\S$ 1855, subd. 5, it is not necessary that the books be offered in evidence; it being sufficient if opposite party is afforded opportunity to inspect, cross-examine, and make similar summary.

8. Criminal law $\S$ 402(1)—Foundation held sufficient for admission of summary of books of corporation and its fiscal agent in evidence (Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), preliminary proof by bookkeepers held sufficient to authorize admission of summary of books of corporation and its fiscal agent prepared to show amount of stock sales in excess of permits.

9. Criminal law $\S$ 425—Books of fiscal agent held admissible as declarations of coconspirator as an agent (Corporate Securities Act).

In prosecution for violation of the Corporate Securities Act (St. 1917, p. 673), to sell corporation treasury stock without permit, books of corporation's fiscal agent were admissible as his declarations as a coconspirator in so far as concerns conspiracy and as declarations of an agent as to counts for actual violation of the act.

10. Criminal law $\S$ 444—Testimony that entries were made in books from reports regularly made to bookkeepers held to make books admissible under account book rule.

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), by selling corporation treasury stock without permit, testimony of corporation's secretary and its bookkeepers and auditors that entries in corporation's books were made from knowledge obtained from reports regularly made by another person whose duty it was to make reports in regular course of business held to make books admissible under account book rule.

11. Criminal law $\S$ 425—Books of corporation held admissible as acts and declarations within scope of agency of corporation's agents in furtherance of conspiracy (Code Civ. Proc. $\S$ 1870, subd. 2; Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), by

selling corporation's treasury stock without permit, books of corporation which showed amount of stock sales in excess of permits were admissible, in view of Code Civ. Proc. § 1870, subd. 2, as acts and declarations of corporation's agents acting within scope of their employment in making sales and keeping record of sales.

12. Conspiracy ⚡28—One cannot direct agents to sell stock illegally and claim irresponsibility because he did not know agents had carried out orders (Corporate Securities Act).

One is not permitted to set his agents about selling corporation's stock in violation of the Corporate Securities Act (St. 1917, p. 673), and then claim irresponsibility by claiming not to know that the agents have done what they were directed to do.

13. Criminal law ⚡424(5)—Declarations of agents and employees of a coconspirator forming part of the *res gestæ* are admissible against all (Corporate Securities Act).

In prosecution for violation of the Corporate Securities Act (St. 1917, p. 673), by selling stock in excess of permits, declarations of agents and employees of a coconspirator forming part of the *res gestæ* are admissible against all.

14. Criminal law ⚡417(16)—Corporation's books held admissible as declarations of its agents and to show knowledge of conspirator of volume of illegal stock sales (Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), by selling corporation treasury stock in excess of permits, corporation's books were admissible in evidence, not only as declarations of agents, but as evidence to show in connection with other testimony knowledge of conspirator of volume of sales taking place.

15. Conspiracy ⚡47—Evidence independent of summary of books of corporation and its fiscal agent held to show excessive issue or sale of stock (Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), by selling corporation treasury stock in excess of permits, evidence independent of summary of books of corporation and its fiscal agent held sufficient to show excessive issue or sale of stock.

16. Witnesses ⚡298—Where witness under subpoena duces tecum disclosed that defendant's counsel had corporate records sought, requiring counsel to produce records did not compel defendant to give evidence in violation of constitutional rights (Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), by selling corporation treasury stock in excess of permit, where corporation's treasurer and other witnesses in possession of corporation's books were subpoenaed to bring them into court and where all proceedings in connection with demand for their introduction in evidence except demand made for books while officer of the corporation was being examined was without presence of the jury, defendant was not compelled

to give evidence against himself in violation of his constitutional rights.

17. Witnesses ⚡16—Subpoenaed books carried to defendant's counsel or placed in garage subject to witness' order are not beyond order of court.

Books subpoenaed into court are not beyond reach of court order because witness so subpoenaed carries them to defendant's counsel or places them in garage subject to his order instead of bringing them into court.

18. Conspiracy ⚡47—Evidence, aside from testimony of coconspirators or accomplices, held to sustain conviction of violating Corporate Securities Act (Pen. Code, § 1111).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), by selling corporation treasury stock in excess of permit, testimony, aside from that of coconspirators or accomplices, held sufficient, in view of Pen. Code, § 1111, to sustain conviction.

19. Criminal law ⚡428—Testimony of conspirator is regarded as sworn testimony and not as admission or declaration.

The testimony of a conspirator is to be regarded as sworn testimony, not as an admission or declaration.

20. Criminal law ⚡428—Testimony of a coconspirator is "testimony of an accomplice," and must be corroborated (Pen. Code, § 1111).

Testimony of a coconspirator given in court, while not classified as an admission or an act or declaration out of court, is nevertheless testimony of an accomplice, and under Pen. Code, § 1111, must be corroborated.

21. Conspiracy ⚡45—Affecting intent, evidence of submitting scheme to deputy corporation commissioner was inadmissible in prosecution for conspiracy to violate Corporate Securities Act.

No specific intent is necessary to constitute the crime of violating the Corporate Securities Act (St. 1917, p. 673), except intent to do the acts denounced thereby, and hence in prosecution for conspiracy to violate the act sustaining objection to evidence to prove that plan adopted by defendants was submitted to attorneys and deputy corporation commissioner on issue of defendants' intent was proper.

22. Criminal law ⚡428—If evidence of acts and declarations of coconspirators is properly admitted, it may be considered by jury for all purposes (Code Civ. Proc. § 1870, subd. 6).

If evidence of acts and declarations of coconspirators is properly admitted under Code Civ. Proc. § 1870, subd. 6, it may be considered by jury for all purposes, and consideration need not be postponed until conspiracy is found to exist from independent facts.

23. Conspiracy ⚡28—Instruction that willful plan to sell stock beyond permit would constitute conspiracy to violate Corporate Securities Act held not error (Pen. Code, § 20; Corporate Securities Act, § 14).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), § 14, by selling corporation treasury stock without permit, instruction, in view of the Pen.

Code, § 20, that lack of knowledge that stock was issued in excess of permit would constitute acts done under mistake of fact and be defense, but selling stock beyond or without permit amounting to violation of the Securities Act would constitute guilt even though defendants believed that acts done in certain way would not be illegal, *held* without error.

24. Criminal law ⚡32—Requested instruction that ignorance of law would excuse violation or conspiracy to violate Corporate Securities Act was properly refused.

In prosecution for conspiracy to violate Corporate Securities Act (St. 1917, p. 673), by selling stock in excess of permits, defendant's requested instruction that ignorance of law would be an excuse was properly refused.

25. Criminal law ⚡772(6)—Requested instruction on misconception or ignorance of facts disjunctively coupled with mistake of law was properly refused (Corporate Securities Act).

In prosecution for violation of the Corporate Securities Act (St. 1917, p. 673), by selling corporation treasury stock in excess of permit, defendant's requested instruction on misconception or ignorance of facts, disjunctively coupled with principle of mistake of law, was properly refused.

26. Criminal law ⚡823(1)—Failure to instruct that plea of guilty of codefendants was no evidence of guilt held not prejudicial, in view of instruction given (Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), where coconspirators who had pleaded guilty testified at trial, failure to instruct that plea of guilty of codefendants was no evidence of guilt *held* without prejudice to defendant, in view of instruction that if jury affirmatively found conspiracy was formed then they should determine whether defendants or any of them actively participated therein.

27. Criminal law ⚡809—Refusal of instruction, misleading in form, held not error (Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), defendant's requested instructions, misleading in form, were properly refused.

28. Licenses ⚡42(5)—Refusal of instruction that officer of corporation could not be criminally liable for acts of corporation's agents held proper (Corporate Securities Act).

In prosecution for violation of the Corporate Securities Act (St. 1917, p. 673), by selling corporation treasury stock in excess of permit, refusal of defendant's instruction that an officer of a corporation could not be criminally liable for acts of corporation's agents and that codefendants must be defendant's agents in order to convict *held* proper.

29. Criminal law ⚡393(1)—Grand jury's use of records voluntarily submitted to corporation commissioner held not coercing defendants, indicted for conspiracy, to furnish incriminating evidence (Corporate Securities Act, § 17).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), in

selling stock in excess of permits, where books were voluntarily turned over to the corporation commissioner and thereafter grand jury's subpoena was served on commissioner's deputy and corporation officers were never subpoenaed, defendants were not compelled to furnish evidence, within section 17 providing that no one shall be prosecuted for matters concerning which he was compelled to produce documentary evidence.

30. Conspiracy ⚡43(6)—Indictment for conspiracy to violate the Corporate Securities Act held sufficient (Corporate Securities Act, §§ 3, 14).

Indictment for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), which followed language of section 14 and further specified how defendant's participation in subscriptions and sales of stock violated section 3, *held* sufficient to show facts constituting a crime.

31. Indictment and Information ⚡125(19)—Counts in indictment for conspiracy to violate the Corporate Securities Act held to charge one crime only (Corporate Securities Act, §§ 3, 14).

Where individuals cannot be directly charged under terms of Corporate Securities Act (St. 1917, p. 673), § 3, which defines a crime by a corporation, but can be charged under section 14 with selling or assisting in sale of stock in manner causing the corporation to violate section 3, counts in indictment against individuals charging offer for sale, negotiation for sale, and taking subscriptions for stock and authorizing aid in sale of stock charged one crime only.

32. Grand jury ⚡38—Grand jury must appoint stenographic reporter only in cases where district attorney so demands (Pen. Code, § 925).

Under Pen. Code, § 925, grand jury is required to appoint a stenographic reporter to take testimony of witnesses only in cases where district attorney so demands.

33. Conspiracy ⚡45—Sustaining objections to questions to show disposition of money derived from illegal sale of stock held proper in conspiracy prosecution (Corporate Securities Act).

In prosecution for conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), court properly sustained objections to questions to show disposition of money derived from sale of stock and stock subscriptions which were not in issue.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Abner Doble was convicted of conspiracy to violate, and actual violation of, the Corporate Securities Act, and he appeals. Affirmed.

Carey Van Fleet, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Wm. F. Cleary and Emery J. Mitchell, Deputy Attys. Gen., for the People.

KOFORD, P. J. This is an appeal from a judgment of conviction upon an amendment which accused defendants in the first count of criminal conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), and in six other counts of directly violating the said act by making certain sales of capital stock of the Doble Steam Motors Corporation. The appellant, Abner Doble, was the president of said corporation. Defendant F. G. Cox was the fiscal agent in charge of the sale of stock, and defendant W. E. Barnard was his stock sales manager. The other defendants were officers of the corporation. All the defendants except W. A. Doble and this appellant pleaded guilty. W. A. Doble was acquitted. The conspiracy count charged that the defendants on or about the 1st day of July, 1923, conspired to violate the Corporate Securities Act in the following manner: To offer for sale, negotiate for sale of, take subscriptions for, authorize, direct, and aid in the sale of, cause and assist in causing to be sold, and to sell shares of capital stock of Doble Steam Motors Corporation, then and there the securities of said corporation and of its own issue, without a permit so to do from the commissioner of corporations. The indictment, in conformity with Pen. Code, §§ 184 and 1104, alleged certain overt acts performed by defendants in effectuating the said conspiracy: First, that they furnished and delivered to defendants Cox and Barnard chassis and vehicles known as Doble steam automobiles; second, in the months of July and August, 1923, conducted and maintained on Mission street and Powell street establishments for the purpose of displaying the said car and chassis; third, during the months of July and August, 1923, and thereafter for a period of time the exact duration of which is to the grand jury unknown, employed and directed certain named individuals as salesmen, agents, and servants to take subscriptions for, negotiate for the sale of, to offer for sale, and sell said shares of capital stock. The fourth, fifth, sixth, seventh, eighth, and ninth overt acts alleged were sales of such securities to certain named individuals, specifying the number of shares and date of each sale. The dates specified were July 11, 21, August 1, 2 and 3, 1923. The remaining six counts of the indictment charged independently of the conspiracy certain specified sales of stock without a permit. These sales are the same as those sales mentioned and described as overt acts in the conspiracy charge. Upon all these counts the appellant was convicted with the exception of counts 3 and 7.

The facts proven were, as briefly as we are able to state them, as follows: Two permits were obtained from the California commissioner of corporations permitting the sale of the aggregate of 100,000 shares of stock of the corporation. A spirited sales campaign was conducted in the state of California by

the corporation under the direction of F. G. Cox as its fiscal agent. Under these permits the stock was sold rapidly, and by June 19, 1923, the 100,000 shares permitted to be sold had been sold. At first most of the sales were made in Los Angeles, but the sales campaign in San Francisco was conducted from June 4 to August 4, 1923. An application was made to the corporation commissioner on June 23, 1923, for permission to sell 100,000 additional shares. This application did not meet with favor and remained pending until the 9th of August, 1923, at which time it was withdrawn. In the meantime (which embraces the dates of the various sales alleged in the indictment), sales of stock continued to be actively made in San Francisco and vicinity until August 4. In general, the conspiracy proven consisted of the agreement among the defendants that, notwithstanding the permit had been exhausted, sales of stock should continue. The officers, including this appellant, knowing that the permit had been exhausted, urged the fiscal agent to continue making sales; the appellant rejected the suggestion that further subscriptions should be filled by buying up stock from the public; it was the mutual understanding that sales of stock should continue, in the hope that perhaps a permit would be subsequently secured either from the then corporation commissioner or his successor, there being a rumor that the commissioner might resign. In the third application, made on June 23, it was stated that 96,132 shares of stock had been sold up to and including June 16, 1923, as shown by an audit made by certain public accountants. This application was signed and verified by the oath of appellant and others. The witness Penberthy testified that he was an auditor, accountant, and bookkeeper employed by Cox from March 23, 1923, and continued in his employment for one year. He checked, issued, and signed checks and vouchers showing weekly sales of stock by Cox and his salesmen. By these checks and vouchers attached, Mr. Cox made weekly remittances to the Doble corporation showing total amount of sales for each week. The check for the week ending June 16 showed sales of 11,736 shares. These shares, we may assume, were taken account of by the public accountants (referred to in the application above mentioned), in stating that 96,132 shares had been sold up to June 16. The other weekly checks showed the following sales of shares: For the week ending June 23, 8248 shares; week ending June 30, 8474 shares; July 7, 6898 shares; July 14, 8480 shares; July 21, 9350 shares; July 28, 8195 shares; and August 4, 13,109 shares. The evidence thus showed that, although appellant stated in his application on June 23 that 96,132 shares had been sold by June 16, on June 23 the amount sold had exceeded the 100,000 shares allowed by the permits obtained, and by August 4, had exceeded it by over 70,000 shares.

We now take up an additional and further statement of facts which relate to occurrences after August 4, 1923. It became apparent that the application to the corporation commissioner for the permit to sell further shares would not be granted, and it was withdrawn on August 9, 1923. Thereupon and not before, the defendants agreed upon a further plan to enable themselves to continue selling and issuing shares of stock in the absence of a permit from the corporation commissioner. Very briefly, this plan was that the corporation would *pretend* to sell to Cox in Portland, Or., a quantity of shares of capital stock, and that he, Cox, would then resell the said shares to the public in the state of California either as new sales or in fulfillment of subscriptions that had theretofore been taken by him in excess of the amount allowed by the original permits granted. Some of the main documents looking to the effectuation of the plan were prepared in California at San Francisco, but were signed and delivered in Portland, Or. The appellant signed some of the documents in San Francisco. It may be stated in passing here that two of these documents were antedated, the dates used following by a few days the dates of the two permits originally granted by the corporation commissioner. The instruments were actually prepared on or about August 11-13, 1923. Immediately thereafter some of the defendants went to Portland, Or., and the plan was carried out through means of an escrow with the Portland Title & Trust Company. Certain stock certificates calling for large blocks of stock made out to Cox were left with the title company, and, upon the indorsement and order of Cox, the title company issued the stock from time to time to various purchasers and subscribers in the state of California. These shares were delivered in California by Cox and his salesmen.

[1] In referring to the Portland sale plan above, we have used the expression, the *pretended* sale to Cox. The evidence shows the sale was only a wash sale. While the conspirators observed the outward forms of a real sale to Cox and then a resale by Cox as a shareholder of his own shares to various members of the public, the whole transaction was conducted in such a manner that Cox never assumed responsibility as a purchaser, never put up his own money or credit, but, by borrowing from the California subsidiary corporation money which he had previously paid in on account of the excess sales and by using other funds of the corporation in his possession, he went through the form of buying, but nevertheless the whole scheme when completed constituted a sale by the corporation through the conspirators of the corporation treasury stock to the public in California. The stock made out to Cox and placed in escrow there and from time to time by his order reissued to California purchas-

ers in the manner the record discloses was not a bona fide sale, and constituted a violation of the Corporate Securities Act of California, as was pointed out in *People v. Eisman* (Cal. App.) 248 P. 716.

[2] The conspiracy consisted, then, of the agreement to sell without a permit made during the latter part of June or the 1st of July. The evidence lends itself to the following summary: At first it was the hope of the defendants that a permit would afterwards be obtained from the corporation commissioner, and when that hope failed on or about August 8 or 9, they found themselves in the position that they would likely be exposed for having oversold; not being able or willing to pay back the money to the subscribers and having been previously unwilling to fill the excess subscriptions by purchasing stock in the open market from previous purchasers, they now were confronted with the necessity of further action; thereupon the Portland plan was adopted.

Appellant contends that the sale to Cox in Portland was not a violation of the Corporate Securities Act of California, because it was done outside of this state, and that the subsequent sales by Cox as a shareholder of his own stock to the public were not forbidden by the act; that, the two acts being legal, there could be no criminal conspiracy to do legal acts. Error is assigned in the giving and refusing of instructions based upon the theory of the validity of the Portland plan. The court rejected certain requested instructions prepared upon the subject of whether the Portland escrow stock issues constituted violations of the statute. In giving the definition of "sale" found in the Corporate Securities Act, the instructions omitted the proviso to the effect that the delivery of one certificate in exchange for another theretofore legally issued shall not be construed to be a sale. Inasmuch as the defendants had already illegally sold and issued shares in excess of the permits before the Portland plan was made and the charge and conviction did not rest on the stock sales that passed through the Portland escrow, we do not consider appellant has been prejudiced by this omission, or by the rulings on these instructions.

[3] While we have stated that the evidence shows that the Portland plan constituted a violation of the Corporate Securities Act, nevertheless if we should concede it to have been a lawful transaction it would not affect the validity of the judgment appealed from in this case for two reasons: First, the indictment charged certain acts at certain dates as crimes and as overt acts of the conspiracy which the evidence shows occurred before the Portland plan was either executed or planned; second, these acts were not performed in contemplation of the Portland plan, and from their nature could not become valid by reason of the Portland plan, even

if done in contemplation of it. The indictment, in alleging the dates of the sales specified as specific offenses in counts 2 to 7, inclusive, and in alleging the dates of the sales specified as overt acts of the conspiracy, does not go beyond August 4. In alleging the other overt acts or those which are not the specific sales of stock but are the exhibition of automobiles, maintenance of showrooms or salesrooms, and directing of salesmen, the dates alleged are not specific, but the evidence shows that these overt acts also occurred prior to August 4. On that date the campaign in San Francisco ceased and the last of the showrooms was closed. The evidence shows that the Portland plan was not agreed upon or jointly contemplated until August 10 or 13, immediately after the application for the third permit was withdrawn on August 9.

All the alleged overt acts and crimes, therefore, were either alleged or proven to have occurred before the Portland scheme was planned or executed. For this reason we conclude that there are no overt acts specified in the indictment referable to the Portland part of the conspiracy, and also that the Portland plan could not affect the specific stock sales alleged as public offenses committed and fully performed before that plan was devised.

[4, 5] No argument is suggested and we can think of none showing that sales of stock made without a permit would not be a violation of the Corporate Securities Act, even if done in the hope or expectation that a permit would afterwards be obtained. The statute requires a permit to be *first* obtained. *Moore v. Moffatt*, 188 Cal. 1, 204 P. 220, by no means holds that such a subscription is not a violation of the act.

Although a very great number of subscriptions obtained prior to August 4 were filled through the Portland escrow, it is not contended that these oversubscriptions and sales amounting by August 4 to more than 70 per cent. over the permits for 100,000 shares were accomplished in contemplation of filling them through the Portland escrow. Not only was that done before the Portland plan was agreed upon and much of the stock actually delivered, but it was treasury stock and not reissued stock. None of the purchasers specified in the indictment received their stock through the Portland escrow with the possible exception of Henry Amacher, and as to him the sale was alleged and proven as occurring July 11. His subscription and first payment were obtained on that date upon a fiscal agent's blank, a form of contract which represented a sale by the corporation of its own stock to the subscriber. Cox continued to take subscriptions upon fiscal agent's blanks until October, 1923. The sales campaign reached its height in July, 1923, started to drop off in August, and September cancellations exceeded subscriptions. Neither can it be ar-

gued under the evidence that these sales were sales of canceled subscriptions, as these sales occurred also before cancellations exceeded subscriptions.

Therefore, even if the Portland escrow was not a violation of the statute, the acts previously performed up to August 4, consisting of actually issuing treasury stock and taking subscriptions on behalf of the company (not brokers' agreements for reissued stock), constituted a violation of the act as charged in the indictment. The Portland plan would not undo the statutory violations and conspiracy for that purpose which had occurred before that plan was either agreed upon or carried out. The value of the evidence of the Portland plan was in showing a continuation of the same determination with knowledge and willfulness to sell without a permit and in showing an effort on the part of the conspirators to conceal their illegal acts in having over-sold by supplying stock in this way.

[6, 7] Error is assigned in the admission into evidence of a summary of the books of F. G. Cox, F. G. Cox Company, and of certain of the books and records of the Doble corporation. This summary of the books was prepared to show the amount of stock sales in excess of the permits. It was made by the witness, Mr. Cummings, a certified public accountant. This summary was admissible under subdivision 5 of section 1855, Code of Civil Procedure. The books were proven to be voluminous, the record of sales going into the number of thousands. *Wigmore on Evidence*, § 1230; *McPherson v. Milling Co.*, 44 Cal. App. 491, at page 495, 186 P. 803; *People v. Dole*, 122 Cal. 486, at page 496, 55 P. 581, 68 Am. St. Rep. 50; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, at page 86, 53 P. 410. It is not necessary that the books themselves be offered in evidence, but it is sufficient if they are available or produced in order to afford the opposite party an opportunity to inspect, cross-examine, or make a similar summary. 16 *Corpus Juris*, 615, § 1211. We do not understand the case of *Shields v. Rancho Buena Ventura*, 187 Cal. 569, 203 P. 114, to hold contrariwise, although there the books were actually put in evidence.

[8, 9] It is claimed that the books themselves were not admissible, sufficient foundation not having been laid, and hence that the summary was also inadmissible. As to the Cox books, the preliminary proof by bookkeepers was as follows: The witness Smith testified that while he was in Cox's office for a time that would embrace July and August, 1923, he did not have complete charge of the books until a much later date. Mr. Penberthy testified that he was a bookkeeper and auditor for Mr. Cox and the Cox corporation; that he acted in conjunction with a Mr. Moorehouse from March until June 23, at which time he became office manager. He verified, approved, and signed the weekly

checks and vouchers accounting for the sales by Cox which we have referred to above. Mr. Cox himself testified that his sales organization and bookkeepers operated under his direction and control; that they rendered reports to him upon which he acted as correct. The Cox books were admissible as a declaration of Cox, a coconspirator, so far as concerns the conspiracy count, and as a declaration of an agent so far as concerns the other counts.

[10] As to the Doble books, there was the testimony of the secretary of the corporation, and the following bookkeepers and auditors, Mr. Pinski, Mrs. Lamb, Mr. Jensen, and Miss Capps—substantially the whole bookkeeping force mentioned in the evidence, with the exception of Miss Marshall, who acted directly under the secretary, and who was in West Virginia at the time of the trial. These witnesses showed as full a knowledge of the truth of the entries in the books as was reasonably possible, having regard for the fact that the knowledge of the amount of stock sales came to the Doble corporation from its fiscal agent, Cox. These bookkeepers received reports from Cox's force, showing amount of stock sold and money receipts, verified them from time to time, and made the appropriate entries in the Doble books. This was in the regular course of business. All corporations act through their agents. These entries were made, then, from knowledge obtained from reports regularly made to the bookkeepers by another person employed in the business (Cox), whose duty it was to make the same in the regular course of business. This made the books admissible under the account book rule as restated in *Chan Kiu Sing v. Gordon*, 171 Cal. 31, 151 P. 657.

[11] But the introduction of the books of the corporation here should be compared to a case where they are offered against the corporation as the acts and declarations of its agents rather than to a case where they are offered by the corporation to prove an account against a debtor. *Wigmore, Evidence* (2d Ed.) § 1557. While the salesmen, bookkeepers and auditors were in one sense agents of the corporation, in a true sense they were the agents of the officers of the corporation as well. Here all of the officers of the Doble corporation were defendants. It was through these officers that the sales campaign was started and carried out by the corporation. These officers employed and directed the salesmen through the corporation's fiscal agent, Cox, and the bookkeepers and auditors were employed and directed by these same officers, the defendants. The agents acted within the scope of their employment in making the sales and in keeping a record of the sales. The corporation itself was a party to the conspiracy and statutory violations, though not charged in the indictment.

[12] One is not permitted to set his agents

about selling stock in violation of the law and then claim irresponsibility by claiming not to know that these agents have done what they were directed to do. *Wigmore on Evidence* (2d Ed.) vol. II, § 1078, says:

"He who sets another person to do an act in his stead as agent is chargeable by such acts as are done under that authority and so, too, properly enough, is affected by admissions made by the agent in the course of exercising that authority."

Code of Civil Procedure, § 1870, subd. 2, provides that evidence may be given of the act or declaration of the agent of a party within the scope of his agency and during its existence after proof of the agency. *Wharton, Criminal Evidence* (10th Ed.) § 700; 3 *Wharton on Evidence*, 1170, 1171, 1173, 1177, 1192, 1198; *Mechem on Agency* (2d Ed.) § 2007.

[13] The declarations of the agents and employees of a coconspirator forming a part of the *res gestae* have been held to be admissible against all under this principle. 16 *Cor. Jur.* § 1301; *State v. Grant*, 86 Iowa, 216, 53 N. W. 120; *Patch Mfg. Co. v. Protection Lodge, etc.*, 77 Vt. 294, 60 A. 74, 107 Am. St. Rep. 765; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

The admissibility of the declarations of a conspirator against his coconspirators and the admissibility of the declarations of an agent against his principal are both based upon the same theory—the law of agency. We need draw no distinction, therefore, under the facts in this case, between the conspiracy count and the other counts in the indictment.

[14] The books were admissible, not only as declarations of agents, but at the very least as evidence tending to show, in connection with other testimony, the knowledge on the part of appellant of the volume of sales taking place. *People v. Rowland*, 12 Cal. App. 6, 106 P. 428; *People v. Leonard*, 106 Cal. 302, 39 P. 617. While the evidence does not show that the appellant made personal examinations of the books, it does show that he received reports of their contents from the bookkeepers, and there was considerable other evidence warranting the inference that he had knowledge of their contents in this respect quite apart from any presumption arising from his duty to know as the president of the corporation.

[15] If the summary of the books admitted be regarded as admissible merely as tending to show notice and knowledge, and not competent to show oversubscription as a fact, there is, independently of the summary, sufficient other evidence to show the excessive issue or sale of stock. The testimony of Mr. Penberthy, bookkeeper, auditor, and office manager for Cox, showing the weekly checks and sales accounts covering the period from

June 16 to August 4, taken in connection with appellant's verified statement of the sales made to June 16, show the sales to have been over 70,000 more than permitted by the permits.

The case of *People v. Blackman*, 127 Cal. 248, 59 P. 573, is strongly relied on by appellant. There books were held not admissible. Inasmuch as one purpose of the offer there was to show the defendant did not keep correct books, but were falsified to enable the defendant to perpetrate and conceal the crime of embezzlement, the books were held not admissible as regular entries made in the course of business. On the other hand, the defendant's knowledge and complicity in falsifying the books was not first shown and so the books were not admissible on either theory. But it was there said:

"If there was evidence that the entries were made by the defendant or under his direction, or with his knowledge, they would most undoubtedly be competent and important evidence against him." Page 253 (59 P. 574).

[16] It is next argued that the defendant was compelled by the court to produce certain corporation records and thus give incriminating evidence against himself in violation of his constitutional right. Witness Jensen, who had been superintendent of the Doble factory and also treasurer and secretary of the corporation for a time, together with other witnesses who had had possession or access to the Doble books, were subpoenaed to bring the books to court. While the district attorney was examining the witness Jensen in an endeavor to explain the nature of the books, to ascertain why they had not been produced in court and where the books were last seen, the counsel for defendant interrupted and stated as follows:

"Mr. Van Fleet: As far as these witnesses are concerned, I can relieve the situation very easily and tell you all about it. The books are in my office, brought over there by Mr. Abner Doble, or most of the books. There was a whole truckload of books brought over this morning. What are they, stock certificates? A. Stock stubs and stock ledger cards.

"Mr. Van Fleet: Brought over this morning by Mr. Jensen and these other witnesses that you subpoenaed.

"Mr. Fitzgerald: Then I call upon you to produce those, under the subpoena. They were brought over and delivered to you instead of the court.

"Mr. Van Fleet: They weren't delivered to me.

"Mr. Fitzgerald: Where are they?

"The Witness: They are in my automobile in the Palace garage.

"Q. Why didn't you bring them here? A. There are too many of them for me to carry, and I thought the best thing to do was to park my automobile until the court told me what to do with them.

"Mr. Van Fleet: We can have them here in

10 minutes. Of course, I want to make my objection.

* * * * *

"Mr. Van Fleet: I want to apologize to the court for this delay. It was partly due to my own fault, your honor please; I told them to put the books in the garage until —"

A recess of 10 minutes was then taken and the witness excused, after which he returned, stating that he had brought the only books that he could find, that being the stock stub books and ledger cards. The witness also stated that Miss Capps could better identify the books and possibly tell where others were, and thereupon she was called. The examination continued concerning the location of the books of the company. She identified the records then in court as being the stock certificate stubs, the original binders and stubs of all stock certificates that had been issued. Later Mrs. Lamb, another bookkeeper, testified that she was in charge of the books and that the ledger and journal were mostly in her handwriting. It appeared from her testimony that some of the books had not yet been produced in court, but were in the office of counsel for defendant. The district attorney then called upon defendant's attorney to produce the books without the formality of a subpoena. Defendant's counsel replied, that inasmuch as he was attorney for the defendant they were not in his custody but in theirs, and the books were confidential communications and that he could not be compelled to produce evidence against the defendants. The court then excused the jury, stating that he would take up the legal objections in the absence of the jury. After the jury was excused, the district attorney asked for an order directing defendant's counsel to produce the books, stating that his demand was made solely for the purpose of laying the foundation for the introduction of copies if the originals were not produced. Defendant's counsel replied, "As to the demand, to keep the record clear, I say that they are not under my control." After further argument the court stated, "Now, I will stand corrected if this is not the fact. The record discloses here that you are now in physical custody of the books." Defendant's counsel stated, "I will say they are in my office for the purposes of the record." The court instructed defendant's counsel to produce the books in court at the next session. At the next session Mrs. Lamb was again called to the stand and was examined concerning the books, which apparently had been produced in court at that time by some one.

At one point in the examination after the books were produced and when an objection was made upon the ground that the demand for the books was made in the presence of the jury, the court admonished the jury to draw no unfavorable inference from anything that

might have been said or done in relation to the books in evidence, and to disregard any statements made in relation to the production of the books.

Appellant relies upon the following authorities: *McKnight v. United States* (C. C. A.) 115 F. 981; *Foster v. United States* (C. C. A.) 178 F. 174; *State v. Hollingsworth*, 191 N. C. 595, 132 S. E. 667, 669; *People v. Dufur*, 34 Cal. App. 644, 168 P. 590; *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383.

[17] This record does not show that defendant was compelled to give evidence against himself in violation of his constitutional rights. Subpoenas duces tecum were apparently served on the bookkeepers having possession of the books, but instead of bringing the books to court in obedience to the subpoena, they were left either in the office of defendant's counsel, according to his statement, "for purposes of the record," or in an automobile, according to the testimony of the witness Jensen. The proceedings were without the presence of the jury except the demand made while the witness Jensen was being examined. These books were produced by him. The order for the remaining books was made out of the presence of the jury and for the purpose of laying the foundation for the introduction of secondary evidence. These books found their way into the control of defendant's counsel after subpoena duces tecum was served. We do not understand that if a witness so subpoenaed carries the books to defendant's counsel or places them in a garage subject to his order instead of bringing them to court that they are beyond the reach of an order of the court. If the order of the court made under these circumstances was irregular the irregularity was technical and not substantial. In view of the cautionary instruction given, the irregularity was less serious than that passed in *People v. Dufur*, 34 Cal. App. 644, 168 P. 590, and in view of the fact that the order was made out of the presence of the jury, the proceedings compare favorably with those passed in *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383.

[18-20] The appellant attacks the sufficiency of the evidence, not upon the ground that it does not prove the offenses charged, but in these two respects: First, that there was insufficient evidence outside of the acts and declarations of the coconspirators. Second, that there was not sufficient testimony outside of that of accomplices tending to connect the appellant with the commission of the crimes charged. Some of the testimony received in evidence constituted declarations and admissions of coconspirators and was admitted on that ground; the testimony, however, of which appellant complains is not to be classed as acts or declarations of conspirators. Some of the conspirators were witness-

es in the case and testified at length concerning the conferences and transactions constituting the formation and execution of the conspiracy. A distinction must be drawn between the case where acts and declarations of a conspirator are offered against him and his coconspirators by the testimony of a third person (in which case the value of the testimony consists in its character as an admission) and where sworn testimony is given in court by members of the conspiracy. The testimony of a conspirator is to be regarded as sworn testimony and not as an admission or declaration. It has been directly so held in *People v. Zimmerman*, 3 Cal. App. 84, 84 P. 446. However, the testimony of a coconspirator given in court, while not classed as an admission or an act or declaration out of court, is nevertheless testimony of an accomplice. Eliminating all of the testimony given by the coconspirators or accomplices, there is sufficient other evidence in the record to comply with the requirements of section 1111 of the Penal Code, which requires the testimony of an accomplice to be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.

The effect of adding the checks and vouchers accounting for weekly sales as testified to by Mr. Penberthy and the total sales reported over appellant's verification to the corporation commission has already been mentioned as sufficient evidence of overselling the permit. Appellant testified that weekly reports were placed on his desk by his employees stating the amount of sales made by Mr. Cox and his agents. The books of the Doble corporation were proven in connection with the testimony of several of the bookkeepers of the Doble company who were not members of the conspiracy. The appellant as a witness also admitted signing in San Francisco contract options authorizing Mr. Cox to buy and sell a large quantity of stock and admitted authorizing two other contracts calling for large minimum weekly sales and remittances. The minutes of a meeting of the corporation directors, at which appellant was present and voted, were received in evidence, and these minutes showed the ratification of the said options and other like agreements. Appellant testified that he did not know the reason for antedating the contract options. He explained the difference in sale prices of stock in the two Portland contracts as being for the purpose of allowing people who first bought to receive stock at a smaller price than those who purchased afterwards. The agreements, however, called for concurrent payments and therefore simultaneous sale of the stock mentioned in each agreement. He acknowledged receiving a letter dated May 4, in which Mr. Cox stated that, "If we are going to sell stock in Oakland and San Francisco it will be nec-

essary to have a permit to sell additional stock." He testified that he visited the Powell street salesroom almost every night in July; that he looked at the volume of sales made at the salesroom. He also testified having been present at various conferences in which the Portland plan was agreed upon. He also testified that he paid particular attention to all questions of money received and paid out by the Doble corporation, which would embrace the large amount of money paid in excess of what would be realized from the sale of 100,000 shares and would also embrace the payment of \$80,000 to Cox O. K.'d by appellant, and used to draw down stock held in the Portland escrow.

[21] The trial court sustained objections when defendant offered to prove that the Portland plan had been submitted to attorneys and to a deputy corporation commissioner. Appellant claims that this testimony should have been admitted on the issue of the intent of the accused. He relies on *People v. Flanagan*, 65 Cal. App. 268, 223 P. 1014, and *People v. McCalla*, 63 Cal. App. 783, 220 P. 436. These cases, however, distinguish between a mistake of fact and a mistake of law and point out that while an act done unintentionally may not constitute a crime, an act done intentionally is nevertheless a crime, even though the party committing the act was under a mistaken belief as to the legality of the act. No specific intent is necessary to constitute the crime of violating the Corporate Securities Act except the intent to do the acts denounced by the statute. In the *McCalla* Case above cited the court quotes with approval *State v. Foster*, 21 R. I. 251, 43 A. 66. What is there said disposes of this contention of appellant. *People v. Simonsen*, 64 Cal. App. 97, 220 P. 442.

[22] The court did not instruct the jury that they could not consider the acts and declarations of the coconspirators unless and until they were convinced by evidence independently of these acts and declarations that a conspiracy had been formed. Code of Civil Procedure, § 1870, subd. 6, states that evidence may be given at the trial of acts and declarations of one conspirator against the others after proof of the conspiracy. This rule undertakes to state under what condition such evidence may be given at the trial and is a question for the court in ruling on evidence. If the evidence is properly admitted it may then be considered by the jury for all purposes, and there was no necessity in the court's separating the evidence into two classes for the jury's consideration.

[23] The court instructed the jury that the mere association of individuals with an innocent purpose or with honest intent is not a conspiracy as defined by law; that while a conspiracy cannot exist without a guilty intent in the minds of the conspirators, yet this

does not mean that the parties must know that they are violating the statute; that the question was whether the defendants conspired to do the things which were in violation of the law, not whether they had any knowledge that they were violating the law; that the word "intent," as used in Penal Code, § 20, means an intent to do the acts charged and does not mean that to render the act criminal there must be an intent to violate the law; that section 14 of the Corporate Securities Act makes punishable one who knowingly authorizes, directs, or aids in the sale of securities contrary to the provisions of the act; that one who knowingly performs the acts forbidden is guilty even though he had no specific intent to violate its provisions; that the word "knowingly" imports only a knowledge that the facts exist which bring the act within the provisions of the statute; and, in another place, that the jury should consider all the facts and circumstances disclosed by the evidence in considering the intent of the defendants.

[24, 25] A lack of knowledge that stock had been or was to be issued in excess of the permit would constitute acts done under a mistake of fact and be a defense; but acts purposely planned and done, such as to sell beyond or without a permit, which in law amounts to a violation of the statute, would constitute guilt, even though the defendants entertained the belief that those acts being done in a certain way would not amount to a violation of the law. The instructions complained of in this regard we think fairly stated the law applicable to the case and are in consonance rather than out of harmony with *People v. Eiseman* (Cal. App.) 248 P. 716, and *People v. Flanagan*, 65 Cal. App. 268, 273, 274, 223 P. 1014. Defendant's requested instructions 5, 6 and 7 were refused because they had the effect of stating that ignorance of the law would excuse. Instruction No. 6 contained the element of misconception or ignorance of the facts, but it was disjunctively coupled with the principle of mistake of law. The defense of mistake of fact was adequately covered by other instructions given.

[26] Neither do we think the defendant was prejudiced by the court's failure to instruct that the plea of guilty of certain codefendants was no evidence of guilt. The court included in its instructions the following:

"If on the other hand you answer that question in the affirmative (i. e., was there in fact a conspiracy formed as charged), you should then determine the question whether these defendants or either of them actively participated and entered into such conspiracy or scheme."

The defendants who pleaded guilty testified at the trial, and it would be far-fetched to say that their plea did what their testimony could not do. Defendant W. A. Doble

was tried jointly with this defendant and was acquitted.

[27, 28] Defendant's requested instructions No. 61 and No. 62 were properly refused, they being misleading in form, the one assuming that in no case can an officer of a corporation be criminally liable for the acts of the corporation's agents, the other assuming facts which were for the jury's determination that both Cox and Barnard must be the agents of both defendants in order to convict either defendant.

[29] Appellant claims immunity under section 17 of the Corporate Securities Act, which provides that no person shall be prosecuted for anything concerning which he shall have been compelled to testify under oath or to produce documentary evidence. On May 21, 1924, the corporation commissioner wrote a letter to Doble Steam Motors Corporation stating:

"In order to facilitate the examination of the books of your company, it is suggested that the following books and papers be brought over to this office temporarily. (Follows a list of items.) In the event that this suggestion meets with your approval I will appreciate receiving the books and papers above described as soon as convenient to you."

The affidavit used on the motion to set aside the indictment on this ground stated that the defendants and each of them did as officers of said corporation deliver and cause to be delivered to said corporation commission the said books and papers described in the letter; that on the 31st of May the defendants were informed that the books were about to be turned over to the grand jury pursuant to a subpoena. Thereupon the corporation served written demands for the books and papers upon the commissioner and claiming immunity on behalf of the Doble corporations and its officers. Later similar demands were made upon the grand jury. The evidence shows that the corporation commissioner's letter was written in connection with the matter of filing an application for a further permit; that a grand jury subpoena was served on the corporation commissioner's deputy May 26; that the officers of the Doble corporation were never subpoenaed by the commissioner either to testify or bring the books. We think the record does not show the defendants were compelled to produce the books within the meaning of the immunity section of the act. The books went into the possession of the commissioner voluntarily pursuant to his letter of request. The demand for the return of the books, after the grand jury subpoena had been served on the deputy corporation commissioner having possession, did not bring the transaction within the meaning of the section which is confined to cases where the accused is compelled to give oral evidence or documentary evidence. The books having been

voluntarily parted with in the beginning, the service of the subpoena should be regarded the same as though served upon any other custodian not a defendant. A different rule would have the result that admissions and incriminating statements though voluntarily given immunity was not subpoenaed, but the the continuous consent of the accused. In *People v. Schwarz* (Cal. App.) 248 P. 990, relied on by appellant, the defendants who were given immunity had been compelled to attend under subpoena and give oral incriminating evidence against themselves. In *United States v. Armour & Co.* (D. C.) 142 F. 808, also relied on by appellant, the defendant given immunity was not subpoenaed, but the circumstances under which he was required to give documentary evidence are outlined on page 811 of the decision. From these facts and from the form of the resolution under which the investigating officer was acting, the court finds that the accused did not voluntarily give the evidence. The immunity statutes there considered were also broader in that the giving of evidence as well as being compelled to give evidence was embraced within the immunity clause.

[30] It is urged that defendant's demurrer to the indictment should have been sustained upon the grounds that the facts alleged do not constitute a crime. Section 3 of the Corporate Securities Act forbids any *company* to sell, offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first secured a permit. Section 14 provides that:

"Every officer, agent, or employee of any company, and every other person, who knowingly authorizes, directs, or aids in the issue or sale of * * * any security, * * * contrary to the provisions of this act, * * * or willfully violates or fails to comply with any of the provisions of this * * * act, is guilty of a public offense," etc.

The counts of the indictment carefully follow the language of section 14, under which the defendants were charged, and instead of stopping with the language of this section which denounces subscriptions, sales, etc., contrary to the provisions of the act, go further and specify the respect in which the defendant's participation in the subscriptions, sales, etc., were in violation of the act, and, in doing so, follow in turn the language of section 3. Fairly and plainly considered, the counts charge more than acts which would amount to a legal sale by a stockholder of his privately owned shares. The allegation is equivalent to an allegation of ownership by the corporation of the securities sold.

[31] It is contended that the several counts of the indictment each charge more than one offense, to wit, "offer for sale, negotiate for the sale of, and take subscriptions for stock," as denounced in section 3, and the other "authorize, direct and aid in the sale of, cause

and assist in causing stock to be sold," as denounced by section 14. Section 3 defines a crime by a *company*, section 14 a crime by an *officer* of a company and by other individuals. The defendants, being individuals, cannot be directly charged under the terms of section 3, but can be charged under section 14 with selling or assisting in the sale of stock in a way that causes the company to violate section 3. The counts each charge only one crime in this way and are not open to the objection urged by appellant. *People v. Barnard*, 63 Cal. App. 562, 219 P. 756, and *People v. Plath*, 166 Cal. 229, 135 P. 954, are very much dissimilar.

[32] It appears that no stenographic reporter reported the testimony of the witnesses appearing before the grand jury at the hearings resulting in this indictment. The district attorney did not demand it for these hearings, although a stenographic reporter had been sworn generally for this grand jury and reported other cases. It is contended that if a reporter is used on any hearing before a grand jury that then, under the provisions of Penal Code, § 925, he must attend and report all hearings, and that the defendant has a right to a transcript of testimony in case he is indicted by such grand jury. The part of the section of which an interpretation is asked reads:

"The grand jury, on demand of the district attorney, whenever criminal cases are being investigated before them, must appoint a competent stenographic reporter to be sworn and to report the testimony that may be given in such causes in shorthand, and to transcribe the same in all cases where an indictment is returned. If an indictment has been found against a defendant, a copy of the testimony given in his case before the grand jury shall be served upon him," etc.

The section requires the grand jury to appoint when two conditions coexist, first the demand of the district attorney, and second "whenever criminal causes are being investigated." This latter language if given any effect at all must mean that such demand and appointment may occur at one time when criminal causes are being investigated and that at another time when other criminal causes are being investigated such demand and appointment may not occur. We understand that such has been the interpretation of the practice. At a time when this section read much the same the Supreme Court referred to it as being optional with the district attorney whether the proceedings should be reported or not. In *re Kennedy*, 144 Cal. 636, 78 P. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840. *People v. Delhantie*, 163 Cal. 463, 125 P. 1066; *People v. Arnold*, 17 Cal. App. 68, 118 P. 729, is not contrary. That case holds that it is not necessary to reswear the reporter for each and every case in which he acts, but that the

one general oath administered by the foreman of the grand jury for all cases coming before that body is sufficient.

[33] The court properly sustained objections to questions put for the purpose of showing the disposition of the money derived from the sale of stock and stock subscriptions. This was not an issue in the case, and the court so instructed the jury.

We have reviewed the entire case and are convinced the appellant had a fair trial. The errors assigned are technical and not substantial. The evidence shows plainly that the appellant knowingly participated in the persistent endeavors of his fellow officers and agents to continue selling stock of the corporation to the public in California after he well knew the permits had been exhausted and that new permits were not obtainable.

The judgment and order denying a new trial are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

83 Cal. App. 370

PEOPLE v. MARKS et al. (Cr. 1477.)

District Court of Appeal, Second District, Division 2, California. May 25, 1927.

1. Indictment and information $\S$ 125(5/2)—Information charging conspiracy in two counts held to charge but one offense (Pen. Code, § 518).

Information charging conspiracy to commit crime of extortion, defined in Pen. Code, § 518, in one count, and conspiracy to falsely move and maintain suit, action, and proceeding in second count, held to involve single transaction and to charge commission of but one offense.

2. Criminal law $\S$ 982—On conviction under information charging only single offense of conspiracy, though in two counts, court could not grant probation and at same time sentence defendant to imprisonment.

On conviction under information containing only single charge of conspiracy in two counts, trial court had no authority to grant probation to defendant on one count and at same time to sentence her on other count to term of imprisonment in county jail.

3. Criminal law $\S$ 982—Where court, after conviction under two counts charging only single offense, granted probation, and at same time sentenced defendant, result was as though no judgment had been rendered.

Where court, after conviction under two counts containing only single charge of conspiracy, granted probation to defendant, and at same time sentenced her to term of imprisonment in state prison, result was as though no judgment had been rendered.

4. Habeas corpus $\S$ 30(3)—Where court granted probation and at same time sentenced defendant to imprisonment for single offense, defendant was not entitled to release.

Where court, on conviction of what was single charge of conspiracy in two counts

granted probation to defendant and at same time sentenced her to term of imprisonment in state prison, defendant was not entitled to be released because of error.

5. Conspiracy ⚡47—Conviction of defendant for conspiring to commit extortion and to falsely maintain an action held justified by evidence.

In prosecution for conspiring to commit extortion and to falsely maintain action, finding that defendant was an active participant in crime and conviction of defendant held justified by evidence.

6. Criminal law ⚡742(1)—Credibility of witnesses is solely for jury.

Jury is sole judge of credibility of witnesses.

7. Criminal law ⚡1037(2)—Without assignment of questions by district attorney as misconduct and requested instruction to disregard, misconduct will not be reviewed by Court of Appeals.

Where defendant failed to assign asking of questions by district attorney as misconduct, and did not request instruction to disregard or to admonish district attorney to refrain from such further practices, and did not show questions were asked in bad faith, misconduct by district attorney will not generally be reviewed by Court of Appeals.

8. Criminal law ⚡706—District attorney's redirect examination as to whether person brought into record by defendant was under arrest and thief, excluded by court, held not to show misconduct.

In prosecution for conspiracy to commit extortion and to falsely maintain action, redirect examination by district attorney of state's witness as to whether person brought into record by defendant's cross-examination was under arrest and a thief, excluded by court, and not shown to have been made in bad faith, held not to disclose misconduct by district attorney.

9. Criminal law ⚡706—District attorney's cross-examination of defendant, prosecuted for conspiring to commit extortion, as to whether she lived in apartment under her name, held not misconduct.

In prosecution for conspiracy to commit extortion and to falsely maintain action, cross-examination by district attorney of defendant as to whether she lived in apartment under her name, excluded by court on objection that it was irrelevant, incompetent, and immaterial, held not to disclose misconduct by district attorney as raising inference that defendant lived there under different name.

10. Criminal law ⚡706—District attorney's cross-examination of defendant to prove flight, excluded by court and instructed to be disregarded, held not to show misconduct.

In prosecution for conspiracy to commit extortion and to falsely maintain action, cross-examination of defendant by district attorney as to whether she hid in dressing room when officers came, to prove flight, held not to show misconduct by district attorney, where defendant made no suggestion that examination was unfair and improper at time, and court sus-

tained objections to all offers of such proof and admonished jury not to consider same.

11. Criminal law ⚡1037(1)—Misconduct by district attorney, to be complained of on appeal, must be objected to.

Objections must be made to prejudicial misconduct of district attorney as basis for complaint in appellate court.

12. Criminal law ⚡780(3)—Instruction leaving question whether one is accomplice to jury requiring corroboration held not misleading, though unnecessary, in view of instruction that particular witness was accomplice.

In prosecution for conspiracy to commit extortion and to falsely maintain action, instruction that whether one is an accomplice is for jury to determine from all the testimony, and that conviction cannot be had on accomplice's testimony unless corroborated by other evidence connecting defendant with commission of offense, held correct, and not misleading, though instruction could have been omitted in view of succeeding instructions that particular witness was accomplice.

13. Criminal law ⚡823(12)—Instruction that state's witness was accomplice and testimony must be corroborated by testimony connecting defendant with crime held not error, viewing other instructions.

In prosecution for conspiracy to commit extortion and to falsely maintain action, instruction that state's witness was to be considered as an accomplice and that her testimony must be corroborated by other testimony connecting defendant with crime to authorize conviction, held not error, in view of other instructions.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

On an information charging Carl H. Marks and others with conspiring to commit the crime of extortion and of falsely maintaining an action, Gladys Nichols was convicted, and she appeals. Judgment set aside, with directions that trial court arraign defendant for judgment and sentence as required by law.

A. D. Orme, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

MURPHEY, Justice pro tem. The information filed by the district attorney of the county of Los Angeles in this case contained two counts, count 1 charging the defendants with conspiring to commit the crime of extortion, and count 2 charging the defendants with conspiring to falsely maintain an action or suit. After a trial had on the information, the jury returned a verdict finding the defendant Nichols guilty under each count of the information and thereafter the court pronounced judgment granting her probation for five years on count 1, and sentencing her to the county jail of Los Angeles county for the term of two years on count

2. From said judgment and order of the trial court denying her motion for a new trial, the defendant Gladys Nichols prosecutes this appeal.

It is the contention of the defendant: First, that the information, although containing two counts, charges but one offense; second, that the evidence introduced by the prosecution is insufficient as a matter of law to sustain the conviction of this defendant upon either count of the information; and, third, that the instructions given by the trial court are so inconsistent and confusing that it is impossible to determine which of the instructions was followed by the jury and applied to the evidence in the case.

[1-4] In so far as the first point is concerned, involving the law of the case, the matter was before the first division of this court in *Re Nichols* (Cal. App.) 255 P. 244. In that matter it was "the contention of petitioner that the order made by the trial court on the so-called first count of the information in granting probation to petitioner the court exhausted its jurisdiction" (inadvertently stated by the court as "exceeded" its jurisdiction) "and that the sentence imposed on petitioner under the second count of the information was in excess of the jurisdiction of said court and consequently was a nullity." In an exhaustive opinion written by Mr. Justice Houser, the court determined these issues, and we are entirely satisfied with the reasoning and conclusion of the court in that opinion, and adopt the same as the law of this case on the matters therein adjudicated. The opinion states:

"In the first count of the information, as hereinbefore set forth, petitioner was charged with the crime of conspiracy to commit the crime of extortion, in that she and two other persons named therein 'did willfully, unlawfully, and feloniously, wickedly, and fraudulently conspire, combine, confederate, and agree with Carl H. Marks and Hilda E. Daws, and each with the other, to commit a felony, to wit, the crime of extortion, in the county of Los Angeles, state of California; that thereafter, and in furtherance of the conspiracy aforesaid, the said defendant Gladys Nichols, together with Carl H. Marks and Hilda E. Daws, did call up the said R. J. Johnson on the telephone and make an appointment for a demonstration of an automobile, and did go out with said R. J. Johnson for demonstration, and did rent a room in the Crawford Apartments at No. 941 South Georgia street, in which the said R. J. Johnson was to be trapped with Hilda E. Daws, and did make an appointment with the said R. J. Johnson to go to said room with Hilda E. Daws, and did watch the said Hilda E. Daws and R. J. Johnson go up to said apartment, and did thereafter enter the said room and surprise the said R. J. Johnson therein in company with the said Hilda E. Daws, and did demand money from the said R. J. Johnson, and did threaten to sue the said R. J. Johnson for alienation of affections, and did hire and employ an attorney for the purpose of suing the said R. J. Johnson, and

for the purpose of thereby and therein, as aforesaid, of extorting and obtaining money from the said R. J. Johnson, contrary to the form, force, and effect of the statute,' etc. "Without setting forth the language of the second count of the information, it may suffice to state that thereby petitioner was charged with the commission of the crime of conspiracy to falsely move and maintain a suit, action, and proceeding by doing and performing substantially the same acts as were set forth in the first count, together with the additional allegation that petitioner and her confederates 'did falsely pretend and represent that Carl H. Marks was married to Hilda E. Daws, and did thereby and therein conspire to falsely maintain a suit for alienation of the affections aforesaid.' The act alleged to have been committed by the defendant in the first count of the criminal action by which a conspiracy to commit one criminal act was charged was therefore substantially restated in the second count by which the defendant was charged with having committed a different offense. The only difference between the allegations in the two counts was that in the second count the falsity of the pretension of the conspirators that Hilda E. Daws was the wife of Carl H. Marks was alleged, which allegation was omitted from the first count."

After quoting from section 518 of the Penal Code, defining extortion and from *People v. Schmitz*, 7 Cal. App. 330, 94 P. 407, 419, 15 L. R. A. (N. S.) 717, *People v. Sanders*, 188 Cal. 744, 207 P. 380, and *People v. Johnson*, 22 Cal. App. 362, 134 P. 339, the court concludes:

"With reference to the two counts in the information in the case here being considered, it is clear that the basis thereof was a single transaction and involved but one conspiracy. In the case of *United States v. Weiss* (D. C.) 293 F. 992, in which one of the questions before the court was that of the right of the prosecution to charge several different criminal offenses where they arose out of one conspiracy, the following language appears: 'At the threshold it must be noted that the government cannot split up one conspiracy into different indictments, and prosecute all of them, but that prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. *Murphy v. U. S.* (C. C. A.) 285 F. 804 at page 816; *In re Snow*, 120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658; 16 *Corpus Juris*, 270, and cases there cited.'"

The court further fortifies its conclusion by citations from the cases of *People v. Frank*, 28 Cal. 507, *People v. Powell*, 50 Cal. App. 436, 195 P. 456, *People v. Jailles*, 146 Cal. 301, 79 P. 965, and *People v. Eagan*, 116 Cal. 287, 48 P. 120, and concludes that:

"Assuming that the authorities hereinbefore cited satisfactorily establish the conclusion that but a single transaction was involved in the aggregate of the allegations contained in both the first and the second counts of the information, and that the defendant therein was legally charged with the commission of but one offense, the question of the effect of the action of the trial court in granting the defendant proba-

tion as to the 'first count' and sentencing her to state prison on the 'second count' remains for consideration."

It is to be noted that the statement that the defendant was sentenced to state's prison was inadvertently made as the judgment of the trial court was that the defendant should be imprisoned in the county jail of Los Angeles county.

On the second phase of the case the first division of this court quotes from the case entitled *In the Matter of the Application of Cyril J. O'Connor* (Cal. App.) 252 P. 730, the case entitled *In re Fink* (Cal. App.) 250 P. 714, and *People v. Mendosa*, 178 Cal. 509, 173 P. 998, from which latter case the court quotes as follows:

"In the *Mendosa Case* (178 Cal. 509, 173 P. 998), the judgment of the trial court was that the defendant be imprisoned in the state prison; that the sentence be suspended and the defendant remanded to the custody of the sheriff and confined in the county jail until the further order of the court; and, while it was held therein that such a judgment was illegal in that there was no authority in law for the action of the court in suspending the execution of the sentence and at the same time remanding the defendant to the custody of the sheriff to be confined in the county jail, and consequently that such judgment should be reversed, it was also ruled that the defendant was not entitled to a new trial by reason of such error, but that the trial court should again arraign defendant for judgment and thereupon proceed to pronounce a proper judgment on the conviction legally obtained. The error, therefore, was not fatal in the sense that it was prejudicial to the substantial rights of the defendant. It did not have the effect of exhausting the jurisdiction of the trial court so as to prevent it from pronouncing a new or different judgment. And so, in the case under consideration, it is manifest that on a conviction on what we have held was a single charge of conspiracy the trial court had no authority to grant probation to the defendant and at the same time to sentence her to a term of imprisonment in the state prison. The court might have done either the one thing or the other, but clearly not both of them. Like the judgment in the *Mendosa Case*, the defendant could not be under a sentence to the state prison and at the same time be either released on probation or remanded to the custody of the sheriff to be confined in the county jail. The two respective conditions of the judgment are so opposed one to the other that neither is capable of enforcement without doing extreme violence to, if not destroying, the other. The result is as though no judgment had been rendered. However, reasoning from the decision in the *Mendosa Case*, we are constrained to hold that the error committed by the trial court should not avail to the end that the release of the petitioner should be ordered. As is said in the *Matter of Smith*, 152 Cal. 566, 567, 93 P. 191, 192: 'It does not by any means follow that the prisoner must be discharged if the judgment and commitment are void. * * * The contention on the part of the prisoner that the sentence pronounced * * * is utterly void

for the purpose of committing him to the state prison, but is nevertheless valid for the purpose of vacating the bench warrant, and ending the felony case, is illogical in the last degree, and finds no support in the decisions which he cites.' The intention of the trial court in the premises is perfectly clear, and petitioner has suffered nothing so far as her substantial rights are concerned by reason of the error on which the petition is predicated * * * it is ordered that the writ be discharged, and that the petitioner be and she is remanded to the custody of the sheriff of the county of Los Angeles, with directions to the superior court to arraign petitioner for judgment and thereupon to proceed in the manner required by law."

Adopting the foregoing as the judgment of this court on the questions of law involved in the discussion we come to the remaining issues raised by the appellant on this appeal: First, the insufficiency of the evidence as a matter of law to sustain the conviction of the defendant on either count; second, errors of law occurring at the trial; third, confusing and inconsistent instructions; and, fourth, misconduct of the district attorney.

[5] We are satisfied from a careful examination of the record that the evidence amply justified the verdict. Indeed, if the testimony of Hilda Daws, an accomplice, is sufficiently corroborated, the evidence as to the guilt of the defendant is overwhelming. We think that the court fully and correctly instructed the jury upon all matters of law involved in the case, and that there is no merit in appellant's contention that the conviction was not good either in law or in fact. If the jury believed the witnesses for the prosecution, and evidently they did, there was ample evidence to support a verdict of guilty as against the appellant. There is no doubt but that the conspiracy was formed and that the perpetrators intended to hold up the complaining witness Johnson for a large sum of money. The people called Hilda Daws, one of the alleged conspirators, as a witness for the prosecution, and it is on this phase of the case that the major contention of the appellant is predicated; it being her contention that Hilda Daws was an accomplice, with which we fully agree, and that her testimony was not sufficiently or at all corroborated. We have carefully examined the testimony in the case and are satisfied that the facts and circumstances are such that a finding that the appellant was an active participant at every stage in the proceedings might fairly be augmented by the statement that she was the brains of the enterprise.

There is ample evidence in the record to show these facts: That the appellant had known the complaining witness Johnson for several years prior to the birth of this attempted holdup; that she had been a witness in a divorce action between Johnson and his wife; that he had several business transac-

tions with her in the way of money loans; that neither of the other conspirators had ever known Johnson personally, and, such information as they acquired came from the appellant; that some one telephoned to Johnson to meet Hilda Daws for the purpose of demonstrating an automobile (and, as the appellant was the only one who personally knew Johnson, it would seem that it would be a fair inference that she did the telephoning); that Johnson, in response to this telephone message, did meet Hilda Daws and demonstrated an automobile with the view of selling the same to her; that the appellant and Hilda Daws lived together and were intimate friends and associates for six weeks prior to the time of the attempted holdup; that they lived three weeks at the McKenzie Hotel, two weeks at an apartment house on Coronado street, and from there went to the apartment house at 1213 Shatto street, at which place they were residing at the time of the commission of the offense set out in the information; that the codefendant and coconspirator Marks had been on terms of friendly intercourse with the appellant and Hilda Daws for many weeks prior to the 13th day of September, the date upon which Johnson was taken by Hilda Daws to the Crawford Apartments; that he visited with the two women daily, and several times each day; that the appellant had resided at the Crawford Apartments, where Johnson and Hilda Daws were trapped by Marks, during the months of April and May of the same year; that she was the only one of the conspirators who had ever lived at or known of the Crawford Apartments; that Hess, who was employed by Marks to prosecute the suits contemplated by the conspirators, was the attorney for the appellant, and had attended to business for her long prior to and up to the date of the trapping; that he had never served either Marks or Hilda Daws, and that Marks had never known of his existence. There is evidence that Mrs. Daws had visited Hess' office with the appellant on some prior occasion. The evidence shows that the day after the trapping of Johnson Marks went to Hess' office and was followed by the appellant and Hilda Daws. Marks denies that he was at the office when the women were there, but this is disputed by Hess. At this meeting with Hess, the appellant and Hilda Daws were in his private office while Marks sat in the anteroom; Marks denied that he saw the women and the appellant states that she has no recollection of seeing Marks there. While the appellant and Mrs. Daws were in the inner office, Hilda Daws was questioned by Hess as to her relationship with Marks and as to the facts occurring at the Crawford Apartments; the appellant testified that she paid no attention to the conversation, but was writing a letter. Attorney Hess says she

was present during the whole time, and that he did not observe that she was writing any letter, and was within hearing of the conversation. The appellant had admittedly been informed of the meeting between Johnson and Hilda Daws at the Crawford Apartments on the night before; admittedly she knew that Hilda Daws was not the wife of Marks. In the interview with Hess, Hilda Daws had informed him in the presence of the appellant that she was the wife of Marks, and gave the time and place of her marriage to him. At the conclusion of this interview in Hess' office, Hilda Daws departed and left the appellant and Hess alone, at which time they discussed their business affairs. At this interview between the appellant and Hess in his private office, the appellant did not give him any information as to the criminal designs of Marks and Hilda Daws, although at the time she knew that the statements of Hilda Daws were untrue as to her marriage with Marks, and she knew that there had been an attempted hold-up of Johnson at the Crawford Apartments. Parenthetically it may be said that this of itself is sufficient grounds for a reasonable inference that she was a party to the unholy alliance. The testimony shows that she had degrees from two universities, was an educated woman, and it would seem incredible that, unless she was thoroughly saturated with the criminal instinct, she should have silently sat by and tolerated the prosecution of this nefarious scheme against Johnson.

There is this further testimony and circumstance in connection with this matter: After the arrest of the appellant and Hilda Daws, a conversation was heard in the county jail between these women by another inmate of this institution, Hazel Leininger. The three women were in attendance on a Sunday evening party in the county jail. The witness Hazel Leininger said:

"Mrs. Nichols asked Mrs. Daws if she had signed any confession and Mrs. Daws says, 'No; why?' Mrs. Nichols said: 'Don't sign any confession or let them know I know anything about this, and I can get out, and then I can get you out in about ten days.'"

[6] No good purpose would be served in quoting verbatim the testimony set out in the above recital. Suffice it to say that there is testimony to support every recital of fact from witnesses other than Hilda Daws. Some of this testimony was contradicted, an immaterial circumstance, as the jury was the sole judge of the credibility of the witnesses. In view of this recital, and it is not exhaustive of all of the facts that might be gleaned from the record, and in view of the well-settled state of the law as to the quantum of evidence required to corroborate an accomplice, we feel that there is no merit in the contention of the defendant as to the alleged insufficiency of the evidence. In the

case of *People v. Kelly*, 69 Cal. App. 558, 231 P. 767, the court says:

"It is conceded by the respondent that Talbott was an accomplice of defendant Kelly—the only question in regard to appellant's contention being as to the sufficiency of the corroborating evidence. Talbott testified fully regarding the commission of the offense by himself, aided and abetted by defendant Kelly, and two witnesses gave evidence of Kelly's admission after his arrest, in substance, that he received a part of the money which was embezzled, and that, if permitted to do so, he would phone to some of his friends and would be able to procure the money to clear up the shortage. An early case (*People v. Ames*, 39 Cal. 403) lays down certain illuminating principles with reference to the construction which should be placed upon the statute in question. Among other things, it is there pointed out that even if such evidence raised, 'a suspicion of the guilt of the accused' the demands of the statute would be met. But that doctrine has since been repudiated, and it may now be regarded as settled law that the corroborating evidence will not be sufficient if it be of no greater strength than to justify a mere suspicion of defendant's guilt. *People v. Thompson*, 50 Cal. 480; *People v. McLean*, 84 Cal. 482, 24 P. 32; *People v. Sternberg*, 111 Cal. 3, 43 P. 198; *People v. Barker*, 114 Cal. 620, 46 P. 601; *People v. Bunkers*, 2 Cal. App. 205, 84 P. 364, 370. On the other hand, it is not necessary that such incriminating evidence be corroborative of each and every fact testified to by the accomplice; but all that is required is that, standing alone, it tends to connect the defendant with the commission of the offense. It may be slight (*People v. Melvane*, 39 Cal. 616), and of itself entitled to but little consideration (*People v. McLean*, 84 Cal. 482, 24 P. 32). 'It is not required that it be absolutely convincing; nor need it extend to every fact and detail covered by the statements of the accomplices.' *People v. Bunkers*, 2 Cal. App. 205, 84 P. 364, 370. 'It need not be strong; it is sufficient if it tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to but little weight (citing case). Nor need it extend to every fact and detail covered by the statements of the accomplice. *People v. Kunz*, 73 Cal. 313, 14 P. 836; *People v. Cloonan*, 50 Cal. 449.' *People v. Barker*, 114 Cal. 620, 46 P. 601. Neither need it 'be evidence tending to establish the precise facts testified to by the accomplice.' *People v. Cloonan*, 50 Cal. 449. To the same effect, see *People v. Garwood*, 11 Cal. App. 665, 106 P. 113; *People v. Leavens*, 12 Cal. App. 178, 106 P. 1103; *People v. Martin*, 19 Cal. App. 295, 125 P. 919. Clearly a confession by the defendant on trial would be a sufficient corroboration. *People v. Tobin*, 39 Cal. App. 76, 179 P. 443; *People v. Richardson*, 161 Cal. 552, 120 P. 20; *People v. Josselyn*, 39 Cal. 393, 400. It is held in the case of *People v. Armstrong*, 114 Cal. 574, 46 P. 611, that an admission by the defendant which showed his criminal connection with the commission of the offense was all the corroboration that was required. To the same point is the language in *People v. Richardson*, 161 Cal. 552, 563, 120 P. 20, where it is said: 'Her evidence was sufficient proof of the corpus delicti to warrant the introduction of evidence of admissions or confessions on the part of defendant for purposes of the necessary corroboration.' In the *Armstrong Case* the ad-

missions made by the defendant were far from amounting to a confession of guilt; indeed, in many respects they were susceptible of an interpretation which would show his innocence of guilty intent. Notwithstanding such fact, the court held it to be a sufficient corroboration of the testimony of the accomplice. The defendant in the instant case did not make a full confession. What he did say was in effect that he had received a part of the stolen funds, and that if given an opportunity he would 'clear up the shortage.' Bearing in mind that an admission is sufficient; that it need not be strong, but, to the contrary, that it may be slight; that if standing alone it might be entitled to but little weight; and that it need not extend to every fact testified to by the accomplice—we are constrained to hold that the requirements of the statute were fulfilled in that the admission of the defendant tended to connect him with the commission of the offense."

[7] The appellant's next contention is based upon the acts of alleged misconduct on the part of the district attorney during the progress of the trial. Several instances are cited wherein it is contended improper and prejudicial questions were asked by the district attorney. In no instance did appellant assign the asking of any question as misconduct, nor did she request the trial court to instruct the jury to disregard the questions or admonish the district attorney to refrain from such further practices. Furthermore it is not shown by the appellant, nor does the appellant indicate, that the questions were asked in bad faith. In view of the well-settled law in this state that, in the absence of such assignment and request, the appellate courts will not go into the matter of misconduct of prosecuting officers, we might properly leave the matter at this point. In deference to the exhaustive discussion of this matter and the patient industry exhibited by counsel in presenting it to the court, we shall consider some of the assignments of misconduct presented by him.

[8] During the cross-examination of Hilda Daws, the appellant endeavored to establish as a fact that she (the appellant) had placed in the hands of one Brody, a friend, associate, and acquaintance of the alleged conspirators, her diamonds, in order that he might procure a loan on them. On redirect examination, the district attorney asked the witness if this was the—

"same Brody now under arrest for shooting up the Haney girls, and isn't he a thief and an associate of thieves?"

"Mr. Eddy, Counsel for Appellant: The only reason I want to object to that is I am afraid on account of its immateriality, I won't have a chance to cross-examine, so I will have to object, but, if the court will let me cross-examine, I won't object at all.

"The Court: I am more inclined to sustain the objection and admonish the jury that Brody is not on trial here.

"Mr. McIsaac, Deputy District Attorney: I withdraw the question."

The appellant brought Brody into the record and it does not appear that the redirect examination was or could be construed to be in bad faith or with any improper motive, assuming that the question was objectionable.

[9] Another assignment arose out of the fact that the district attorney, out of the presence of the jury, stated that he intended to call a witness who would testify that the appellant lived at the Crawford Apartments under the name of Williams. The court stated that he would permit the former but not the latter part. Subsequently the district attorney asked the appellant on cross-examination if she had lived in the Crawford Apartments under the name of Nichols, to which an objection was made by counsel for the defendant and was sustained. The most that can be said of this is that it was subject to the inference that she may have lived there under a different name. The only objection to this by the attorney for the defendant was that it was irrelevant, incompetent, and immaterial, which objection was sustained. Clearly there was no misconduct in that respect.

[10] The next and only other assignment of misconduct justifying special consideration, if any of them do, is suggested by the following proceedings:

"Question by the District Attorney (appellant on the stand): When the officers came you hid, didn't you? A. No, sir; I was back—I was in the dressing room. Q. You didn't ask the officers what the trouble was? A. No one asked for me either. Don't forget that. Q. You are sure of that? A. Absolutely. No one searched the apartment or no one asked for me. Q. Why did you keep hid in the closet—

"Mr. Eddie: Just a minute. Object to the question as incompetent, irrelevant, and immaterial.

"The Court: You were both talking at once. I didn't get the question.

"Mr. McIsaac: This is along the line of flight. This witness concealed herself when the officers arrived.

"The Court: Read the question.

"Mr. Eddie: Nothing testified to on direct examination about being hid in a closet.

"Mr. McIsaac: There has been a wide range of direct examination, and I have a right to cover the field on cross. If this witness made an effort to conceal herself from the officers it is material. * * *

"Mr. Eddie: They can prove flight by other witnesses. There is no evidence here of flight at all. They are undertaking to make this witness a witness against herself.

"Mr. McIsaac: Withdraw the question."

There is nothing in that statement to justify any accusation as to the district attorney's fairness or to impute to him any improper motive in asking the question, and, in view of the fact that no suggestion by the attorney for appellant that it was unfair or improper was made at the time, it probably

did not occur to him or to the jury that there was any such element involved in the question. The court sustained objections to all offers of proof made by the district attorney that have been made the basis for an assignment of misconduct, and generally admonished the jury that they were not to consider the same. The instructions by the court on this phase of the case are such that, even if proper and necessary assignments of misconduct had been taken by counsel for the appellant, we would be constrained to hold that no substantial right of the appellant was infringed by reason of any conduct of the district attorney in the prosecution of the trial. With reference to this matter, the court instructed the jury as follows:

"* * * If any evidence has been admitted and afterwards stricken out, you must disregard the matter so stricken out entirely, and if any counsel has intimated by questions which the court has not permitted to be answered, that certain things are, or are not, true, you must disregard such questions and refrain from any inferences based upon them. If counsel, upon either side, have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are. * * *

[11] In conclusion, upon this aspect of the case, we may well say that objections must be made to prejudicial misconduct of the district attorney as a basis for a complaint in the appellate court. As was well stated in the case of *People v. Peete*, 54 Cal. App. 333, at page 369. 202 P. 51, 67:

"It frequently happens that in the heat of a trial counsel ask improper questions. But judgments cannot be reversed for an inadvertence of this character, unless, from an examination of the record, we may be of the opinion that it has caused a miscarriage of justice. In view of the court's prompt rulings and instructions to disregard the questions which it will be presumed were heeded by the jury, it cannot be said that defendant's cause suffered by reason of anything contained in these questions, however improper they may have been."

In quoting the last phrase above we do not wish to be understood as implying that questions propounded by the district attorney in the instant case are subject to such a criticism.

[12] The remaining question to which particular attention is called by the appellant as a reason for reversing the judgment is based upon an attack upon an instruction by the trial court. It is appellant's contention in this behalf that the instructions are so entirely inconsistent and confusing that it is impossible to determine which of the instructions were applied by the jury to the evidence in the case. As an illustration of this contention, appellant calls attention to the following instructions:

"(1) Whether or not one is an accomplice as defined in these instructions, is for the jury to determine from all the testimony and circumstances in proof in the case.

"(2) A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

"(3) You are instructed that Mrs. Daws, who has testified in this case is to be considered by you as an accomplice.

"(4) You are instructed that, unless you find the testimony of the witness Mrs. Daws corroborated by other evidence which has been introduced in this case which tends to connect the defendant with the commission of the offense charged, you must find the defendant not guilty."

[13] The first instruction was a correct statement of the general principles of law as to the corroboration of accomplices, and, in view of the succeeding instructions, all of which were given at the instance of the appellant, it might well have been omitted, but to say that these are uncertain or misleading is to do violence to the English language and convict jurors of supreme stupidity. The jury is told specifically in two separate instructions that Mrs. Daws was an accomplice, and in one that as such her testimony must be corroborated or the defendant acquitted. As intelligent men and women, upon reading or hearing those instructions read, the jury could have arrived at no other conclusion than that the defendant could not be convicted unless there was corroboration of Mrs. Daws' testimony, as outlined by the other instructions given by the court. Furthermore we are of the opinion that, if the first instruction above quoted alone had been given, no sane juror, after a consideration of all the facts and circumstances adduced in the case, could have had any doubt whatever that Mrs. Daws was an accomplice. She was the instrumentality through which the proposed badger game was to be accomplished. She was the most active person involved in the transaction, and no juror could have been so dense as to have had any doubt as to the fact of her being one of the conspirators. As a whole, the instructions by the court were full, fair, and comprehensive, and our attention has not been called to a single instruction that does not correctly state the law.

It results from the foregoing opinion that the judgment of the court, admitting the appellant to probation on count 1 of the information should be set aside; the judgment of the court sentencing appellant to the county jail for a term of years upon the second count be set aside; and that the court be, and it is hereby, directed to arraign the defendant for judgment and sentence and pro-

ceed therewith in the manner required by law.

We concur: WORKS, P. J.; THOMPSON, J.

83 Cal. App. 424

CLIFF v. CALIFORNIA SPRAY-CHEMICAL CO. (Civ. 3258.)

District Court of Appeal, Third District, California. May 26, 1927.

1. Pleading $\S$ 20—Complaint, alleging that seller of chemical solution causing plaintiff's injuries acted either as defendant's agent or as retailer, held bad on demurrer.

Complaint, alleging that one, from whom plaintiff purchased chemical solution causing injuries complained of, acted either as defendant manufacturer's agent or as retailer, held bad on demurrer.

2. Appeal and error $\S$ 1040(10)—Defendant recovering judgment was not prejudiced by overruling of demurrer to complaint.

Defendant recovering judgment was not prejudiced by erroneous overruling of demurrer for alternative allegation in complaint.

3. Poisons $\S$ 6—Evidence against manufacturer for injuries by chemical solution, purchased from dealer, held insufficient for jury.

In action for injury to plaintiff's eye by chemical solution, purchased from one to whom defendant manufacturer sold it, spurring from container when opened by plaintiff, evidence held insufficient to take case to jury.

4. Appeal and error $\S$ 1061(4)—Defendant, for which jury returned verdict, was not prejudiced by denial of directed verdict.

Denial of directed verdict was not prejudicial to defendant, where jury returned verdict in its favor.

5. Poisons $\S$ 6—One injured by chemical solution, purchased from one to whom manufacturer sold it, can recover from latter only in tort.

There being no contractual relations between manufacturer of chemical solution and purchaser thereof from another, to whom manufacturer sold it, recovery for purchaser's injuries caused thereby can be had only in tort.

6. Poisons $\S$ 6—Purchaser cannot recover for injuries caused by substance purchased, unless danger was imminent, inherent, and concealed by seller.

One injured by compound or substance purchased by him can recover only if it was imminently and inherently dangerous and such danger was concealed by seller.

7. Poisons $\S$ 6—Seller must have knowledge that compound was imminently and inherently dangerous, to be liable for injuries to subsequent purchaser.

Seller must have had knowledge, or circumstances connected with preparation and marketing of compound or substance sold must

have been such as to charge him with knowledge, that it was imminently and inherently dangerous, to render him liable for injuries to subsequent purchaser.

8. Poisons ⚡6—**Instruction on manufacturer's liability for negligence in preparing chemical solution causing injury, held not error.**

In action for injuries by chemical substance, purchased by plaintiff from one to whom defendant manufacturer sold it, instruction that defendant could not be held liable for negligence in manufacturing and preparing solution, unless it knew or should have known, and concealed its knowledge, of dangerous defect when it shipped solution, or solution was imminently and inherently dangerous without plaintiff's knowledge, *held not error.*

9. Appeal and error ⚡1052(8)—**Errors cannot be held prejudicial, where judgment was only one possible under admitted facts and law applicable.**

Where judgment, under admitted facts and law applicable, was only one that could be entered, alleged errors, as in admitting testimony, cannot be *held prejudicial.*

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by A. J. Cliff against the California Spray-Chemical Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Schottky & Soliss and Ostrander & Ostrand-er, all of Merced, for appellant.

Wyckoff & Gardner, of Watsonville, for respondent.

PLUMMER, J. The defendant had judgment in an action begun and prosecuted by the plaintiff to recover damages for an injury resulting to one of his eyes from the alleged negligence of the defendant. From this judgment the plaintiff appeals.

The complaint alleges that during all of the times mentioned therein the defendant was engaged in the manufacture and sale of a certain chemical solution, known as and called "Ortho Lime Sulphur Solution," for use in orchards and vineyards in spraying trees and vines; that said solution, for the purpose of marketing, was placed in drums or containers of about 50 gallons' capacity; that on or about the 12th day of January, 1923, plaintiff purchased at Atwater, in the county of Merced, state of California, several barrels of said solution manufactured by the defendant from one C. J. Pregno, "who was at said time acting either as an agent for said defendant or as a dealer in said Ortho Lime Sulphur Solution"; that thereafter and on or about the 27th day of February, 1923, plaintiff, intending to use said solution for spraying purposes and without any knowledge of any danger therefrom or warning by the defendant of any danger, attempted to remove the plug from one of the containers, which was the method provided by defendant for

opening the same and removing the solution therefrom, and, while so doing, by reason of the negligence of defendant, the plug was suddenly thrown out of its hole by explosive force within the barrel or container, and said solution contained therein was suddenly and with great force expelled and thrown out of the container, striking plaintiff in and about the face and body, a portion thereof striking his left eye and so severely injuring the same that the sight thereof was entirely destroyed; that thereafter, on the 1st day of November, 1923, said eye was removed by one Brett Davis, a duly licensed physician and surgeon, etc.

[1, 2] The complaint further alleges that the injury was occasioned solely by the negligence of the defendant, by reason of its carelessness and negligence in the manufacture and preparation of said solution for marketing and use, and its failure to warn plaintiff of any injury in connection therewith. To this complaint the defendant interposed a general and special demurrer. One of the special grounds of demurrer was directed against the alternative pleading, relative to C. J. Pregno acting either as an agent of the defendant or as a retailer in said Ortho Lime Sulphur Solution. The demurrer upon this ground was well taken. See *Jamison v. King*, 50 Cal. 132; 21 Cal. Jur. p. 42, § 22. However, as the defendant had judgment, no prejudice has resulted from such ruling.

[3] The record shows that the defendant, a manufacturer of spray materials, sold the material in question to one C. J. Pregno, a retailer at Atwater, in Merced county; that Pregno sold it to the Atwater Fruit Exchange, a co-operative association, of which the plaintiff was a member, which, in turn, sold the same to the plaintiff; that there were no contractual relations existing between the plaintiff and the defendant. The material in question was a compound containing 10 per cent. lime, 20 per cent. sulphur, and 70 per cent. water, practically uniform in character and quality with other brands of spray material in use among orchardists. The record also shows that the material in the drum or container was correctly labeled; that it was neither explosive nor poisonous, and only slightly caustic; that it would irritate the flesh, but not violently. This is in accordance with the testimony of the chemist called by the plaintiff. This witness also testified that the compound has no more volatility than water, and that it had no more tendency to expand or generate pressure, when confined, than water. The plaintiff himself had used Ortho Lime Sulphur Solution spray for some four years preceding the accident; he was accustomed to protect his hands from irritation caused by the spray by wearing a pair of gloves, usually rubber gloves, and that he wore no protection over his eyes. Before the accident occurred, the container had

been lying in an orchard, where it was intended to use the same, for a period of some two days; that the plaintiff bent over the drum and unscrewed the plug or cap with a wrench; that, as he was doing so, the cap blew out and the spray spouted into his face and into his left eye; that he bathed his eye in a barrel of water standing in the orchard, rubbing it with his hands; that evening he applied potato poultice; afterwards it was treated by Dr. Davis of Merced, who testified that by May 1st the injury had all healed and that there was no necessity for further treatment. Plaintiff afterwards went to San Francisco to another doctor, who gave him a thermostatic treatment to remove the scar over the center of the eyeball; this treatment is by means of heat, with electricity applied directly to the center of the eye. Following this treatment there was a sloughing off of the outer surface of the cornea; water came out of the inside of the eye, and the eye was lost. The testimony of Dr. Davis was to the effect that the loss of the eye was traceable "in some way to his condition and this treatment."

While the complaint alleges that there was an explosion within the drum or container at the time the plaintiff was attempting to remove a plug therefrom, as hereinbefore stated, it is evident from the testimony that there was no explosion, and that a portion of the contents of the container was caused to spout therefrom, by reason of air pressure exerted within the container. While the testimony is to the effect that the container was being opened while in a practically level position, the circumstances of the liquid spouting from the opening would strongly lead to the conclusion that the container was on a sufficient angle to cause the liquid to fall toward that particular portion of the container and to press against the plug, and that the air pressure in the opposite portion of the upper end of the drum was sufficient to cause the liquid to spout from the container. The testimony of the chemist is direct to the point that there were no explosive substances in the drum. His testimony is that the ingredients in combination were neither explosive nor poisonous; that it would irritate some, but it was not a violent irritant; that an exposure of the drum to the sun would cause a slight expansion of the ingredients, just as the sun would cause water to expand; that a rise in temperature of 15 degrees would cause an expansion of about one-tenth of a gallon in the 50-gallon drum.

The testimony shows that the drums delivered to the plaintiff had a capacity of 54 gallons. It may be here said that three drums of that capacity were purchased by the plaintiff, two of which contained 50 gallons each and one 51 gallons. This testimony would justify the conclusion that there was sufficient air space left in the drums, and that the spouting of the liquid therefrom must

have been caused by a slight tilting of the container.

The record shows that the labels which were placed upon the drums gave specifically and in detail the quantity, quality, and ingredients contained in each. The accuracy of the labels is unquestioned. There was also testimony to the effect that the substance had been handled for many years without any one experiencing any injurious results. There was no testimony to support the allegation that C. J. Pregno was acting as an agent of the defendant, nor was there any testimony introduced from which the jury could conclude that the chemical contents of the drums were not correctly stated on the labels, nor was there any testimony from which the jury could conclude that the contents of the drum in question was imminently or inherently dangerous, or contained anything from which the jury could conclude that a user thereof, in the ordinary course of handling, or in applying it to the uses and purposes for which it was intended, would be exposed to any hazards, or to anything that might result injuriously to either life or limb.

[4] Upon the conclusion of the case, the testimony showing, as we have said, that there were no contractual relations between the plaintiff and the defendant, that the spray had been purchased from the co-operative association, which in turn had purchased the same from Pregno, and the testimony showing that there was nothing imminently or inherently dangerous in the contents of the drum, that the chemical contents of the drums were correctly stated upon the labels pasted thereon, that the spray had been used for a number of years without any injurious consequences by the plaintiff as well as others, that the contents of the drum were neither poisonous nor explosive, that it had no more expansive quality than water when exposed to the sun, there being no testimony that the defendant knew or had any cause to know of any dangers in the handling of the compound, or knew or had reason to know of any negligence connected with the preparation or marketing thereof, or in any manner concealed, or attempted to conceal, anything whatever that might render the use of the spray material injurious, or that there were any risks incident in the use of the spray for the purposes for which it was intended, the defendant interposed a request for a directed verdict in its favor. This was denied. We think this ruling erroneous. While the ruling of the court in this particular may not be said to be prejudicial to the defendant, by reason of the fact that the jury returned a verdict in its favor, nevertheless it does obviate a setting forth and consideration of the alleged errors of the court in its instructions to the jury.

[5-7] There being no contractual relations between the plaintiff and the defendant in this case, the plaintiff having bought from

others to whom the defendant sold the article in question, recovery can only be had in tort, and then only when the compound or substance sold is imminently and inherently dangerous and such danger concealed by the seller. The seller must have had knowledge, or the circumstances connected with the preparation and marketing of the article in question must have been such as to charge him with knowledge.

While it is argued upon this appeal that this is a question of first impression, we find upon investigation that such is not the case. In *Lewis v. Terry*, 111 Cal. 39, 43 P. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146, the court states the rule in this language:

"If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made"—citing *Coughtry v. Globe Woolen Co.*, 56 N. Y. 127, 15 Am. St. Rep. 387; *Heizer v. Kingsland Mfg. Co.*, 110 Mo. 605, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 482; *Winterbottom v. Wright*, 10 Mees. & W. 109; and *Shearman and Redfield on Negligence*, 60 et seq.

To the same effect is the case of *Catlin v. Union Oil Co.*, 31 Cal. App. 597, 161 P. 29.

In 19 Cal. Jur. pp. 611, 612, we find the law thus stated:

"Ordinarily, a manufacturer is not liable for injuries sustained by reason of defects in articles sold through others unless there is a contractual relationship between him and the one injured. * * * However, even though there is no privity of contract, recovery may be had where an accident happens through the character of a substance sold as being imminently dangerous to human life, and the one injured had no knowledge of its dangerous character. Thus recovery may be had where poisons, inflammable oils, explosives, and like dangerous substances are sold in a mislabeled condition, even though the misbranded substance has passed through the hands of a number of intermediate vendors.

"If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract, nor one for whose benefit the contract was made. But liability attaches where one delivers an article, which he knows to be dangerous, to another person, who has no notice of its nature and qualities, and injury results to such other person through no negligence of his own."

In the note to *Windram Mfg. Co. v. Boston Blacking Co.*, 17 A. L. R. 674, following that case, wherein the Massachusetts Supreme Court holds the manufacturer not liable, the annotator words the rule as follows:

"It is well settled that as a general rule a manufacturer or seller of a defective article is

not liable for injuries to the person or property of an ultimate consumer who has purchased from a middleman, unless the article was inherently dangerous to life or property, the theory being that, in the absence of contractual relations between the parties, no liability can be predicated upon the manufacturer's or seller's negligence; at least, where the wrongful act or acts are not known at the time, and the article is not immediately dangerous to third persons."

Or, as stated in *Catlin v. Union Oil Co.*, 31 Cal. App. 597, 161 P. 29, supra:

"When there is no privity of contract between the first wrongdoer and the person suffering damage, and the negligent act falls within the class concerning things which carry no menace or threat of probable damage to third persons, the liability of the first party will extend no further than to his immediate co-contractor."

The cases cited on page 674 of volume 17, A. L. R., are so numerous in support of the foregoing statement of the law that it is unnecessary to more than refer to the citation. An exception to this rule is stated in *Hsbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157, 23 L. R. A. (N. S.) 876, 21 American Negligence Reps. 530, and, also, on page 681 of volume 17 A. L. R., to wit:

"The manufacturer or dealer who puts out, sells, and delivers, without notice to others of its dangerous qualities, an article which invites a certain use, and which article is not inherently dangerous, but which, by reason of negligent construction, he knows to be imminently dangerous to life or limb, or is manifestly and apparently dangerous when used as it is intended to be used, is liable to any person who suffers an injury therefrom, which injury might have been reasonably anticipated."

Other cases to the same effect are cited in the note to A. L. R., to which we have referred, showing cases where the liability attaches and where liability is held not to attach. In all the cases cited, where the article is not imminently, inherently, or essentially dangerous, liability is rejected. Some exceptions are mentioned, which are really extensions of the rule of liability; such are cases involving the question of the known use to which the article is to be put, and which known use will ordinarily involve the safety of person or property. This extension of the rule of liability was applied in the case of *MacPherson v. Buick Motor Co.*, 217 N. Y. 386, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440. In that case an automobile was equipped with a defective wheel, and it was held that, while an automobile may not be said to be imminently and inherently dangerous, yet its known use is such that the equipping of an automobile with a dangerous part, such as a defective wheel, will render it imminently and inherently dangerous to the user thereof, whoever he may be. The same rule is applied to drugs, medicines, and foods. As said in the language to which we have re-

ferred in 17 A. L. R. on page 688, the decided weight of authority is to the effect that an ultimate consumer may bring an action directed against the negligent manufacturer or packer of industrial articles of food, or of inherently dangerous beverages, with whom no contractual relations exist.

In the case at bar, there is nothing in the record by reason of which the extension of the rule to articles inherently dangerous, or dangerous by reason of their intended use, holding a manufacturer liable, could be held to apply, nor is there anything in the record on which the defendant could be held liable, under the rule upholding recovery, where there has been concealed a defect or negligent construction or preparation. The language to which we have referred in 17 A. L. R., as beginning on page 672, covers 38 pages, and includes every phase of the subject, and, when applied to the circumstances presented by the record here, establishes conclusively that no liability has been shown on the part of the defendant. It would serve no useful purpose to recite the law found in the notes to which we have referred, and we therefore refrain from so doing.

[8] We may, however, state that the contention of the appellant that the court erred in instructing the jury that the defendant could not be held liable for its carelessness and negligence in the manufacture and preparation of the spray material, unless the defendant had knowledge, or should have had knowledge, of a dangerous defect when it shipped the solution, and that it concealed said knowledge from its consignee; or, second, that the spray material was a substance imminently and inherently dangerous, and that the plaintiff did not have knowledge of such dangerous character and that the defendant knew, or should have known it, and concealed it from the plaintiff, is not well taken.

The rule as to concealment is clearly stated in the case of *Krahn v. J. L. Owens Co.*, 125 Minn. 33, 145 N. W. 626, 51 L. R. A. (N. S.) 650, where a defective board was installed over a cylinder in a threshing machine, and an injury resulted to one who stepped thereon. The rule applied was that the board was so defective as to be dangerous to life and limb; that the defendant knew of the defect when it sold the machine, or at least ought to have known it; that the defect was proximately the cause of the injury; that the defect was concealed to such an extent that observation on the part of the plaintiff would not disclose it; that the part was intended for the purposes for which it was being used; and that plaintiff was one of the class of persons of whom it was contemplated the article would be used.

[9] However, as hereinbefore stated, there is no evidence in the record of any concealment. The evidence is direct and uncontra-

dicted that the labels on the drums correctly stated the ingredients contained within, and also the percentage of each; that the contents of the drum was neither explosive, poisonous, nor imminently nor inherently dangerous. This being the case, no contractual relations being shown, no liability exists. Whether the court erred or did not err in admitting testimony that no claims for personal injuries in the use of the spray had ever been made against the company is wholly immaterial, as, under the admitted facts and the law applicable, the judgment in favor of the defendant is the only one that could be entered, and therefore none of the alleged errors of the court can be held to be prejudicial.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

83 Cal. App. 578

**MEYER v. HELLMAN COMMERCIAL
TRUST & SAVINGS BANK.**
(Civ. 4668.)

District Court of Appeal, Second District, Division 2, California. June 3, 1927.

1. Trial ⇨91—Counsel familiar with deposition, desiring to object to particular series of questions, should object to questions as read instead of moving to strike out after reading of entire series.

Counsel, desiring to object to particular series of questions and answers in deposition with which they were familiar, should have objected to each question as read instead of waiting for reading of entire series and then moving to strike out portion of deposition on ground that the irrelevancy of the answers could not have been anticipated.

2. Banks and banking ⇨154(7)—In action against bank, statement in deposition of person who committed forgery that bank officer had advised him to make good held irrelevant.

In action against bank to recover money paid out on checks bearing plaintiff's forged signature, where deposition of person who committed forgery was read, *held* statement therein that at time of attempted adjustment officer of bank knew that signatures had been forged and advised settlement was irrelevant, and should have been excluded.

3. Appeal and error ⇨1047(3)—Denial of motion to strike out irrelevant portion of deposition held not prejudicial.

In action against bank to recover money paid out on checks bearing plaintiff's forged signature, denial of motion to strike out portion of deposition of person who committed forgery stating that bank officer, after forgery, had advised deponent to make good, *held* not prejudicial.

Appeal from Superior Court, Los Angeles County; G. R. Freeman, Judge.

Action by Elsie Meyer against the Hellman Commercial Trust & Savings Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Page & Hurt, of Los Angeles, for appellant.

JOHNSON, Justice pro tem. This is an action for money had and received, brought by plaintiff as one of defendant's depositors with two accounts, one a commercial account opened in December, 1920, and the other a savings account opened in March, 1921. Judgment was rendered for plaintiff for \$3,702.36, and from that judgment defendant appeals.

Respondent neither having filed a brief nor presented oral argument, the appeal must be determined upon the trial record with the aid of appellant's brief alone.

The controversy arose out of withdrawals of money upon certain checks bearing plaintiff's name as drawer, but, as she claims, with the signatures forged by a man named Berthold, now in the penitentiary under sentence for forgery of plaintiff's name in a wholly independent transaction, which occurred in December, 1921, and in no way affected this defendant. The testimony on behalf of plaintiff was her own, her daughter's, and Berthold's, who, in a deposition taken in San Quentin prison on behalf of plaintiff, swore that by forging plaintiff's name to checks, some of which, paid and canceled, were introduced in evidence, he had drawn about \$4,000 from plaintiff's account with defendant, and had lost the money in gambling. The chief witness called by defendant was a handwriting expert, I. N. Inskeep, who pronounced the disputed signatures to the checks in evidence to be genuine signatures of plaintiff. The court might equally well have decided upon the evidence for defendant rather than plaintiff, but nevertheless it did resolve the conflict in favor of plaintiff. Defendant frankly concedes that, having been unsuccessful in convincing the trial court of the genuineness of the signatures in question, it cannot hope for a reversal upon the evidence as a whole. The theory of defendant was that plaintiff had either shared in the moneys drawn (though this was denied both by plaintiff and Berthold), or that plaintiff had put into Berthold's hands checks signed in blank by herself, and that Berthold had then filled in the amounts to suit his own purposes, the body of the disputed checks being in his undisguised and admitted handwriting.

Defendant's reliance is placed, therefore, upon the alleged error in admitting at the trial a certain portion of Berthold's deposition in reference to a conversation between him and Mr. Bell, vice president of the defendant bank. Plaintiff testified that, when she learned in August, 1921, that there was something wrong with her account, she at once sought out Berthold, and that he con-

fessed to her that he had drawn her money, adding that he had only borrowed it, and would pay her back. It appears that within the next few days Berthold did deposit in plaintiff's account, on August 5, 1921, a check for \$4,000, which, however, was dishonored by the bank on which it was drawn. In his deposition Berthold declared that shortly before he deposited this check of \$4,000 he called at the bank and had a conversation with Mr. Bell, in the presence of a representative of the American Bankers' Association, and that in that conversation he told Mr. Bell that he had forged Mrs. Meyer's name to upward of 20 checks, aggregating in amount \$4,000. After Berthold had given this testimony in his deposition, the following questions were asked and answered:

"Q. What else did you tell him? A. Well, he had told me I had better try to make it up; to pay the money back, and I told him that I would; that I thought I could get my folks to make it up, so I sent a couple of telegrams to my folks but I didn't get any answer back from them. Q. Where were your folks? A. In the East. Q. What else was said to Mr. Bell? A. Well, he told me the best thing I could do was to make the thing right in some way."

The record indicates that at the taking of the deposition an objection was made by defendant's attorney at this point, and also a motion to strike out the portion relating to the conversation between Berthold and Bell; and, when the reading of the deposition at the trial had reached this stage, Mr. Williams, representing the defendant, renewed his objection and his motion to strike, upon the ground that the portion of the deposition relating to the conversation had between the witness and Mr. Bell did not prove, or tend to prove, any issue in the case, and was incompetent, irrelevant, and immaterial. Mr. Williams insisted further that the relevancy of the conversation could not be determined in advance of the answer; that the conversation recited contained no admission by Mr. Bell that could be binding upon the bank; and that it had no tendency to prove or disprove any issue in the case. In opposition to the motion plaintiff's attorney argued:

"It is a conversation with the defendant, in which the defendant and this witness talked about this particular matter that is in issue. The witness told the defendant certain things, and the defendant told the witness certain things, and it is very material in the light of the entire case, if your honor please, that it should be brought to the bank, approximately at the time of the deposit of the \$4,000, that there was an admitted forgery, and that Mr. Bell, representing the bank, told this witness he ought to make it good. I think it is very material."

The court allowed the testimony to stand. Defendant now asserts that the court construed this testimony as evidence of an

admission on the part of defendant that the disputed signatures were in fact forgeries.

[1, 2] It is true that plaintiff's attorney said in his argument that it was material that it should be brought home to the bank that "there was an admitted forgery." The only admission, of course, was the admission of Berthold himself that he had committed forgery; and there is nothing in the deposition indicating any admission on the part of the bank, or forming a basis for the inference of any such admission. The mere rejoinder of Mr. Bell to the effect that, if Berthold had cashed checks on signatures forged by him, the best thing for Berthold to do was "to make the thing good," was no more than a recommendation to him that, if he had secured money by fraudulent means, he should make reparation. At the trial the questions and answers were being read from Berthold's deposition, with which defendant's attorney was already familiar; and the better course would have been to make any desired objection as a question was read rather than to wait for the reading of a series of questions and answers, and then move to strike out that portion of the deposition upon the ground that the irrelevancy of the answers could not have been anticipated. The statement in question not being an admission, it had no relevancy to the issue, and upon timely objection or motion should have been excluded. However, even if the motion had been granted, there would have been left in the record similar testimony, previously given by the same witness in the deposition, and already admitted at the trial without objection. One of the questions asked Berthold was how he came to make the deposit of \$4,000 on August 5, 1921. In the deposition he answered:

"Well, there is a whole lot to be said in order to answer that question. Mr. Bell, the vice president of the Hellman Bank, was really the cause for it being put in; he knew about it, and told me that I better make it good."

When this answer was read at the trial, the attorney for the defendant made a motion to strike out "that part relative to what Mr. Bell knew," on the ground that it was a conclusion; and after discussion, in which the court and both counsel took part, defendant's attorney, referring to the sentence, "he told me I better make it good," said:

"I do not move to strike out that part. The only part I move to strike out is that part relative to what Mr. Bell knew, * * * on the ground that it states a conclusion of the witness."

The court granted this motion, whereupon plaintiff's attorney said:

"Well, it is just merely those four words, 'he knew about it'; to which defendant's attorney responded, 'Yes.'"

[3] Under these circumstances it cannot be said that defendant was prejudiced by denial of the motion to strike out testimony substantially the same, when read a few moments later from the succeeding page of the deposition.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

83 Cal. App. 481

LINTON v. MILLER & LUX, Inc. (Civ. 4592.)

District Court of Appeal, Second District,
Division 2, California. May 31, 1927.

1. Waters and water courses ⇨156(2)—Contract granting easement to procure water through canal held not to require owner of servient tenement to maintain weir for grantee's benefit.

Contract granting easement to procure water through canal and ditches on servient tenement, providing that the grantee should "pay one-fifth of cost of constructing and maintaining weirs or improvements necessary for maintaining and using" the canal, held not to impose duty on grantor's successor to repair or replace weir, whose only purpose was to divert water to the dominant tenement.

2. Waters and water courses ⇨154(1)—Law does not require owner of servient estate to maintain irrigation canal for benefit of dominant estate.

The law does not place on owner of a servient estate any obligation to repair or maintain an irrigation canal for the benefit of the dominant estate.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by David Linton against Miller & Lux, Inc., for damages resulting from failure to maintain a weir in an irrigation canal system. Judgment for defendant after sustaining a demurrer to the complaint without leave to amend, and plaintiff appeals. Affirmed.

Walter Osborn and Kaye & Siemon, all of Bakersfield, for appellant.

T. P. Wittschen, of Oakland (Kenneth C. Gillis, of Oakland, and Joseph C. Sharp, of San Francisco, of counsel), for respondent.

CRAIG, Acting P. J. The plaintiff and appellant instituted this action against the defendant and respondent for damages alleged to have been sustained through the refusal and failure of the respondent to maintain a weir in its irrigation canal system, in Kern county, which the appellant contends it was obligated to maintain and keep in good condition and repair.

It appears that on or about March 5, 1895, one Henry Miller entered into an agreement

with one Horatio Stebbins, wherein it was recited that both of the parties were interested in the canal and works of the Kern Valley Water Company, from which water might be acquired for irrigation purposes; that, whereas Miller had constructed a canal running from the main canal of the water company, through the lands of Miller & Lux to the easterly boundary of lands owned by Stebbins, and from which the latter could, by the construction of canals and ditches therein-after described, irrigate his property, he, being desirous of securing the use of the canal running from the main canal, paid to Miller \$1,500 for a license and privilege of such use for the purpose of conveying such waters as he might be entitled to receive from canals and reservoirs provided for in a contract between Miller and one Haggin. Stebbins was further granted the license and privilege of constructing ditches 20 feet wide through the lands of Miller & Lux, and it was further agreed that the proposed ditches, when completed, might be used by Stebbins for the purpose of taking such waters as he might be entitled to receive at points where said ditches should tap the Miller tributary of the water company's main canal; that Stebbins should construct such 20-foot ditches and gates as might be necessary, at his own expense, and bear one-fifth of the expense of maintaining the Miller canal, and one-fifth of the cost of constructing and maintaining such gates, weirs, and other improvements and appurtenances as should be necessary for the maintenance and use of said Miller canal.

Appellant alleged in his complaint the principal recitals of the contract as heretofore stated, and attached a copy of the same thereto as Exhibit A. It was further alleged that the plaintiff had by mesne conveyances acquired an interest in the lands formerly owned by Stebbins, and that the defendant had succeeded to the interests and obligations of Miller in said contract and in the lands and canals therein described; that, under and by virtue of the terms and covenants of the original contract and "grant," Miller contracted to maintain and keep in good condition and repair the canal tapping the water company's main canal, and all gates, weirs, or other improvements or appurtenances; that, after the execution of said contract, there was constructed a weir in the Miller canal for the purpose of diverting water for irrigation, but that neither Miller nor the defendant had kept it in good condition or repair; and that for a period of two and one-half years next preceding the commencement of the action it had been allowed to rot, and that it was washed away; that the plaintiff had demanded that the defendant reconstruct said weir, but that it had failed and refused to do so, and that the plaintiff was compelled to, and did, build a dam in the canal at a cost to him of \$300; that such dam

was unsatisfactory, and was finally destroyed; that, because of the plaintiff's inability to obtain sufficient water for irrigation, he had been damaged in the sum of \$2,500. In a second count it was recited that one James Anderson had under the same circumstances been damaged in a like amount, and had assigned his cause of action to the plaintiff, wherefore judgment was prayed for \$5,600.

The defendant demurred generally and specially to the complaint, and the demurrer was sustained without leave to amend, and judgment entered thereon, from which the plaintiff appeals.

[1, 2] It is apparent that the copy of the contract attached to the complaint does not support the allegations that Miller agreed to maintain and keep the weir in good condition and repair for the purpose of irrigating the plaintiff's lands. The only provision of the contract bearing upon that matter is to the effect that the plaintiff's predecessor in interest "will pay one-fifth of the cost of constructing and maintaining such gates, weirs, or other improvements and appurtenances as may be hereafter necessary for maintaining and using said canal"—referring to the Miller canal. However, the weir which is alleged to have rotted and been washed away was not "necessary for maintaining and using" the Miller canal. Its only purpose was to divert water to the 20-foot ditch constructed by Stebbins, the plaintiff's predecessor in interest. We are satisfied that no stipulation of the contract places upon the defendant the burden of repairing or replacing this particular weir; on the other hand, there is no obligation placed by law upon the owner of a servient estate to repair or maintain a right of way or canal for the benefit of the dominant estate.

In *Bean v. Stoneman*, 104 Cal. 49, 55, 37 P. 777, 779, the claimant of an easement consisting of a water course brought suit against his grantor for an alleged failure of the latter to furnish sufficient irrigation water, due to defective ditches. It was held that, while the owner of the servient estate can do no voluntary act to destroy or impair the easement, yet the fact that the grantor had used the ditch "could not of itself impose upon him the obligation to always continue its use, and the grant contained no express covenant that he would do so, or that he would keep the ditch in repair." And the rule in such cases was announced in the following language:

"The grantee, or owner of the easement, is bound to keep it in repair, and this applies as well to water ditches as to private ways. *Quinlan v. Noble*, 75 Cal. 250 [17 P. 69]; *Durfee v. Garvey*, 78 Cal. 546 [21 P. 302]. In *Prescott v. Williams*, 5 Metc. [Mass.] 429, 39 Am. Dec. 688, a case cited in *Durfee v. Garvey*, 78 Cal. 546 [21 P. 302] it was said: 'The duty of making repairs, and the labor necessary for keeping the water course in a state fit for use, rests

wholly upon him who claims an easement on his neighbor's land; and, as a general rule, easements impose no obligation upon those whose lands are thus placed in servitude to do anything.' See, also, Goddard on Easements, 285, 443."

It follows that, since it nowhere appears that the defendant was required to do more than refrain from a voluntary interference with the grantee's right to acquire his share of the water for irrigation, and the weir in question was requisite only to the diversion of appellant's share of the water, he was not entitled to damages from respondent because of its refusal to maintain it, and the complaint therefore failed to state a cause of action.

The judgment is affirmed.

We concur: THOMPSON, J.; JOHNSON, Justice pro tem.

INDEPENDENCE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 5531.)★

District Court of Appeal, Second District, Division 2, California. May 31, 1927.

Hearing Granted by Supreme Court July 28, 1927.

1. Insurance §144(1)—Insurance carrier's liability is not enlarged by unknown contract of insured employer to indemnify another employer against injury to employee.

Insurance contracts being governed by the rules applying to contracts generally, liability of an employer's insurance carrier is not increased by contract of the employer, unknown to the insurer, to indemnify another employer against injury to or death of an employee.

2. Master and servant §375(2)—Injury to employee riding from work in conveyance not under employer's control is not compensable.

Where injury to employee occurs while riding from work in conveyance not furnished by, or under control of, the employer, it does not arise out of and in the course of the employment, so as to be compensable.

Certiorari to review an order of Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Concepcion Loya and another against the Southern Pacific Company and others. The Industrial Accident Commission made an award of compensation in favor of one of the claimants against the Independence Indemnity Company, and such company petitions for certiorari to review the order. Award annulled.

Floyd T. Schneidell, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CRAIG, Acting P. J. On December 28, 29, and 30, 1925, and January 3, 1926, the Southern Pacific Company employed, among others, one Leo Loya, as a laborer in one of its crews of trackmen upon its lines of railroad in the vicinity of Los Angeles. On the morning of the last-named date the crew of laborers, including Loya, proceeded from their home base at Saugus, which lies between Los Angeles and Castaic, under orders of the railroad company, to Camulos, beyond Castaic, where they worked during the forenoon, clearing a wreck, returning to Castaic at about 1:30 p. m. of the same day. The Wm. Fox Vaudeville Company, a corporation engaged in the moving picture enterprise at Los Angeles, was then making pictures at Castaic, which is approximately midway between Los Angeles and Santa Paula, toward the north and west of the former city. Prior to the dates above mentioned, the Wm. Fox Vaudeville Company (for convenience designated herein as the Fox Company) requisitioned an engine and five cars for the purpose of photographing a train scene, and a gasoline motor car upon which to place the camera. It appears that the train was in charge of a railroad foreman, and both were used for the purposes of the Fox Company, whose director gave orders to the conductor and foreman, until about 4:30 o'clock p. m., when they were released, and started back toward Saugus. It is conceded that Loya and other workmen were on the motor car, riding toward home, during his return trip, and that Loya fell from the car, receiving injuries from which he died almost immediately, and that at the time of the accident the petitioner herein was the insurance carrier of the Fox Company.

The respondent Concepcion Loya, father of the deceased, and respondent David Loya, a minor son, by his guardian ad litem, filed with the Industrial Accident Commission an application for compensation, naming therein as defendants both the Southern Pacific Company and the Fox Company. Upon a hearing petitioner was joined as a party defendant, and, evidence having been introduced and the case submitted, the commission awarded compensation in favor of the minor, denying relief to the father, and finding that "Leo Loya was employed as a laborer on January 3, 1926, at Saugus, Cal., by defendants Southern Pacific Company, a corporation, who was his general employer, and Wm. Fox Vaudeville Company, a corporation, who at said time was his special employer; * * * that at the time of the injury and death of said Leo Loya, and for several hours prior thereto, he was performing special service for the Wm. Fox Vaudeville Company, a corporation, and under its exclusive supervision and control; * * * that the Southern Pacific Company, as general employer, should not be held liable

for any part or portion of said death benefit and burial expense by reason of that certain indemnification agreement entered into by it and the said Wm. Fox Vaudeville Company on January 3, 1926; and that the Southern Pacific Company should be relieved of all liability and discharged therefrom. * * * Award is therefore made in favor of David Loya against Independence Indemnity Company, a corporation, defendant, of a death benefit and burial expense in the total sum of \$1,599.94, payable," etc.

It is contended by the petitioner, in the main, that: (1) The crew of laborers, including the deceased, was not ordered by the Fox Company, and did not work for it; (2) that the purported indemnification agreement mentioned in the findings was executed by an assistant to the moving picture director, without the authority of the Fox Company, and whose only duties were to order men and equipment upon such occasions; and (3) that, while returning homeward, Loya was riding upon a conveyance of the Southern Pacific Company, under the sole supervision and control of its agents, at a time and place where no supervision or control was or could have been exercised by the Fox Company.

Counsel for the defendant Southern Pacific Company introduced in evidence before the commissioner an instrument entitled "Indemnification—Moving Picture Special Train," reciting, in part, as follows:

"To release and discharge, and it does hereby release and discharge, the Southern Pacific Company from all liability for loss of or damage to any of its property which may be sustained by reason of any cause whatsoever, whether occurring through negligence of Southern Pacific Company, or its employees, or otherwise, while in transit over or upon the lines or in the custody of the Southern Pacific Company; and to indemnify and save harmless the Southern Pacific Company from any damage or injury to the person or property or loss of life of any of its officers, agents, actors, performers, servants, or employees, or the public, or the employees of the Southern Pacific Company, which may occur through negligence of Southern Pacific Company or its employees or otherwise;

"(3) To indemnify and save harmless the said Southern Pacific Company from all claims, suits, judgments, costs, charges and counsel fees paid, sustained or incurred by said Southern Pacific Company for or on account of any injury or damage herein above referred to, whether occurring through negligence of Southern Pacific Company or its employees or otherwise; and

"(4) To pay for any injury or damage that may occur to the property of the Southern Pacific Company or its employees through the use of its property by the undersigned which may be sustained by reason of any cause whatsoever, reasonable wear and tear excepted.

"Dated at Saugus, Cal., this 3d day of January, 1926. Wm. Fox Vaudeville Co.,

["Corporate Seal] By M. Miggin.

"Witness: H. E. Pierson.

"(When executed by a corporation, a duly authorized officer must sign the corporation's name and his own and his official title thus: 'Jewel Film Co., by John Jewel, President,' and also affix corporate seal.)"

The introduction of the contract of which the foregoing is an excerpt was strenuously opposed by counsel for the Independence Indemnity Company, upon various grounds, among them being that Miggin had no authority to execute it on behalf of his principal, and that, in any event, if valid, it constituted an independent transaction between the Fox Company and the Southern Pacific Company, and was irrelevant to the question of liability under the indemnity company's insurance policy.

[1] It affirmatively appears from the testimony of all the witnesses who claimed to have knowledge upon the subject that neither Miggin nor any other person had authority to execute the instrument in question. Miggin swore that he had no such authority; that his only duties were to assist in ordering equipment and men, under the instructions of the director in charge of the picture; that he ordered the train and crew, and the motor car and one man, by written requisition; and that, when they arrived, a paper which he believed to be a receipt for the property was produced by a representative of the railroad company, who said, "Sign here," which he did; but that, had he known the character of the instrument, he would not have signed it. It appears without contradiction that Miggin was merely a clerk, with limited authority to bind the Fox Company, under instructions of his director, only for the usual expenses of hired equipment and its accompanying personnel. That he had no power, with or without the sanction of his principal, to enlarge or otherwise vary the terms of the insurance policy by an independent agreement with a third party, of which the insurer had no knowledge, is obvious. Policies of insurance are governed by the same rules which apply to contracts generally. *Main St., etc., Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 P. 937; *Bassi v. Springfield Fire & Marine Ins. Co.*, 57 Cal. App. 707, 208 P. 154. One may not modify the terms of a contract to the detriment of his cocontractor without the express consent of the latter. *Ehrman v. Rosenthal*, 117 Cal. 491, 496, 49 P. 460. Hence, in so far as the act of Miggin was concerned, the insurer did not become obligated to indemnify the Southern Pacific Company against injury to, or the death of, an employee.

[2] As already seen, the Fox Company contracted with the Southern Pacific Company to furnish a train and crew and a motor car for the purpose of making a picture at Castaic canyon. The performance of such service necessitated the presence of equipment and men at the scene of action, commonly

expressed by the artists as "location." It appears that agents of the film company used the equipment and certain men at Castaic, and in so doing directed the conductor and foreman as to their movements, but that the actual operation of the cars was under the exclusive management and control of employees of the Southern Pacific Company is manifest. It is admitted that at least one man was ordered by the Fox Company, and delegated by the railroad company to, and did, operate the motor car. This car was not operated by Miggin or any member of the picture company during the day. Miggin testified, "At about 4 I dismissed the car personally," and it is not denied that six men (of whom Leo Loya was one) and the foreman then boarded the car and started toward home at Saugus.

The question of liability under such circumstances has been frequently discussed by the Supreme Court of California. In *Ocean Accident Co. v. Industrial Acc. Com.*, 173 Cal. 313, 321, 159 P. 1041, 1044 (L. R. A. 1917B, 336) the authorities in both England and America were reviewed, and the court concluded:

"With these authorities before us we think the governing principles of all the decisions are not difficult of discernment. The first of these is that there are excluded from the benefits of the act all those accidental injuries which occur while the employee is going to or returning from his work, and it matters not in this respect whether his journey takes him over public roads or private ways. * * *

"In the very broadest sense, of course, it is true that an injury which happens to a man who is on his way to his place of employment is an injury 'growing out of and incidental to his employment,' since a necessary part of the employment is that the employee shall go to and return from his place of labor. But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore, an employee going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks."

The same rule was announced in *London G. & A. Co. v. Industrial Acc. Com.*, 190 Cal. 587, 589, 213 P. 977; *Clapp's Parking Station v. Industrial Acc. Com.*, 51 Cal. App. 624, 626, 197 P. 369; *Fidelity & Casualty Co. v. Industrial Acc. Com.*, 48 Cal. App. 572, 574, 192 P. 166; *California Highway Commission v. Industrial Acc. Com.*, 61 Cal. App. 284, 285, 214 P. 658, and *Dominguez v. Pendola*, 46 Cal. App. 220, 188 P. 1025.

In the case last cited it was said:

"Where transportation is furnished by an employer, as an incident of the employment, to convey an employee to and from the place of employment, an injury suffered by the employee going or coming in the vehicle so furnished by the employer, and under the control of the employer, arises out of and is in the course of, the employment within the meaning of the Compensation Act"—citing *Judson Mfg. Co. v. Industrial Acc. Com.*, 181 Cal. 300, 184 P. 1, and *Starr Piano Co. v. Industrial Acc. Com.*, 181 Cal. 433, 184 P. 860.

In all of the authorities which have come to our attention it was held that, where the employee avails himself of conveyances other than those of his employer and under its control, the journey to or from home does not constitute a service growing out of and incidental to the employment, within the provisions of the Compensation Act (St. 1917, p. 831, as amended).

It is also contended that there is no evidence in the record to support the finding that at the time of his injury the deceased was an employee of the Fox Company as a special employer. While there is much affirmative evidence tending to show that he was not an employee of, and did not perform any service for, the Fox Company, and the evidence, if any, tending to support the award in this respect is exceedingly weak and meager, we think from what has been said that an extended discussion of the evidence is unnecessary.

The award is annulled.

We concur: JOHNSON, Justice pro tem.; THOMPSON, J.

83 Cal. App. 358

GIORGETTI v. WOLLASTON et al. (two cases). (Civ. Nos. 5447, 5448; S. F. 10890, 10891.)★

District Court of Appeal, First District, Division 1, California. May 25, 1927.

Hearing Denied by Supreme Court July 22, 1927.

1. Highways ⇐184(2)—Evidence warranted finding that automobile driver's failure to observe truck standing at edge of pavement was want of due care.

Where plaintiffs stopped their truck on right-hand side and off paved portion of highway, with left wheels resting 6 or 7 inches from the edge, and where the night was clear and lights of approaching automobile were in good condition, failure of defendant automobile driver to observe the truck at a greater distance than 40 feet held to authorize finding of want of due care in exercise of duty to proceed carefully and be on alert to avoid colliding with others.

2. Husband and wife ⇐260—Wife's right of action for personal injuries is community property.

A right of action for personal injuries to wife is community property.

3. Negligence $\S$ 89(2) — If husband's negligence proximately contributed to wife's injuries, right of either or both to recover is barred (Code Civ. Proc. $\S$ 370).

Though, under Code Civ. Proc. $\S$ 370, wife may sue alone, yet, if husband's negligence proximately contributed to her injuries, right of either or both to recover is barred.

4. Negligence $\S$ 82—Failure to perform duty imposed raises presumption of negligence, which, if proximately contributing to injury, precludes recovery.

Failure of any person to perform duty imposed on him by law raises presumption of negligence, and, if negligence proximately contributes to his injury, he cannot recover.

5. Negligence $\S$ 122(1)—Presumption of negligence from failure to perform duty may be overcome by showing failure excusable and not inconsistent with due care.

Presumption of negligence from failure to perform duty imposed by law is not conclusive, but may be overcome by evidence that failure was excusable or justifiable under circumstances, and not inconsistent with exercise of due care.

6. Highways $\S$ 184(3) — Contributory negligence in failing to remove unlighted motor-truck entirely from pavement held for jury (Motor Vehicle Act, $\S\S$ 13, 20[w], as amended by St. 1919, pp. 206, 219).

Where plaintiffs stopped their automobile truck on right-hand side and off paved portion of highway, with left wheels resting 6 or 7 inches from edge, to adjust lights, and were there struck by defendant's automobile, whether failure to remove vehicle as required by Motor Vehicle Act, $\S\S$ 13, 20(w), as amended by St. 1919, pp. 206, 219, entirely from the pavement was excusable under circumstances, or, if not, whether failure or omission to maintain light proximately contributed to injury, held, under evidence, for jury.

7. Highways $\S$ 184(3)—Whether automobile driver had last clear chance to avoid collision with plaintiff's standing truck held for jury.

In action for personal injuries from collision after dark of defendants' automobile with plaintiff's truck which was standing near edge of pavement, evidence of width of pavement, defendant's failure to apply emergency brake or swerve to left, and of defendant's speed and distance of plaintiffs' truck from center of highway held sufficient to raise issue as to whether defendant had last clear chance to avoid injury and was negligent in failing to do so.

8. Highways $\S$ 179—Where defendant was negligent in failing to avoid collision with standing truck, that he failed to see occupant was immaterial (Civ. Code, $\S$ 3333).

In action for personal injuries from collision after dark between defendant's automobile and plaintiffs' truck which was standing near edge of pavement, where defendant saw truck in which plaintiff was seated and was negligent in failing to avoid collision, it was immaterial, in view of Civ. Code, $\S$ 3333, that he failed to see occupant thereof.

On Hearing in Supreme Court.

9. Negligence $\S$ 83—Last clear chance doctrine applies from time defendant actually observes plaintiff's peril, not from time he ought to have observed it

The last clear chance doctrine applies only from time defendant actually observes plaintiff's perilous position, and not from a time when it might be said that he ought to have observed it.

Appeals from Superior Court, Alameda County; Mortimer Smith, Judge.

Separate actions by Carlo Giorgetti and Clarinda Giorgetti against F. H. Wollaston and another. Actions tried together. From separate judgments for plaintiffs, defendants appeal. Affirmed.

Louis V. Crowley, of San Francisco, for appellants.

Earle Warren and Ralph E. Hoyt, both of Oakland (Henry G. Tardy, of Oakland, of counsel), for respondents.

CASHIN, J. Appeals from the judgments entered in two separate actions for the recovery of damages for personal injuries suffered by respondents in the same accident, and which are alleged to have been caused by appellants' negligent operation of an automobile. By stipulation the actions were tried together and the appeals presented on the same transcript.

Respondents are husband and wife, and appellant Wollaston, at the time of the accident, was the employee of and operating an automobile owned by appellant corporation. The accident occurred at about 9 o'clock p. m. on January 20, 1922, at a point on the public highway between Irvington and Centerville in Alameda county. The highway, which there runs north and south, is paved with concrete, the width of the pavement being 18 feet. Respondents shortly before the accident had been riding in a Ford truck, operated by the husband, and were proceeding north along the highway. The truck was equipped with lamps in front, but carried no light in the rear. The lamps having through some defect commenced to grow dim, the truck was stopped, according to the testimony of respondents, on the right-hand side and off the paved portion of the highway, with the exception that the left wheels rested thereon 6 or 7 inches from the edge. The husband alighted from the truck, his wife remaining seated therein, adjusted the lamps, the time consumed in so doing being from 7 to 10 minutes, and then passed around the vehicle on the side resting on the pavement to the rear. He was there struck by the automobile operated by appellants, which approached from the south. The automobile also collided with the truck, and as the result of the collision both of the respondents suffered physical injuries. Photographs taken at the scene of the accident in June, 1923, show that it would then have been

possible to remove a truck completely off the pavement before stopping, but the testimony is conflicting as to whether this would have been practicable on the night of the accident owing to the condition of the unpaved portion of the highway at that season, it being also testified by one of the respondents that a ditch then existed to the east and near the pavement. The witnesses agree that the night, though dark, was clear, and that the highway followed a straight course in each direction from the place of the accident. It was testified by appellant Wollaston that he approached at a speed of 25 miles per hour; that his lights were in good condition; that he first observed the respondent husband and the truck when between 35 and 40 feet away; and that his car was traveling on the east side and from 12 to 18 inches from the edge of the pavement; that a third automobile was approaching from the north, the lights of which had been visible for a quarter of a mile, and which at the time the truck was first seen by the witness was coming to a standstill on the west side of the highway at a point about 60 feet north of the truck; that after the truck was first seen the lights from the third car interfered with the view of the witness, but that immediately upon seeing the obstruction he applied his foot brake, but not the emergency brake, the course of the automobile so far as appears not being changed.

It is contended by appellants that the court erred in giving certain instructions to the jury; that the only conclusion reasonably to be drawn from the evidence was that respondents alone were negligent, and that the evidence was insufficient to justify the submission to the jury of the issue as to whether appellants had the last clear chance to avoid, and were wanting in ordinary care in failing to avoid, injuring respondents.

[1] It was the duty of appellant Wollaston to proceed carefully and to be on the alert to avoid colliding with others (*Lampton v. Standard Bread Co.*, 48 Cal. App. 116, 191 P. 710); and, while his testimony that he did not see the truck was uncontradicted, yet in view of the fact that the night was clear and his lights in good condition, the jury might reasonably have believed that his failure to observe the obstruction at a greater distance was a want of due care, and this conclusion would not be rendered unreasonable by their acceptance of his testimony that his view was temporarily cut off by the lights of the third car, as it fairly appears therefrom that this occurred after he had observed the truck and one of the respondents near it.

The acts of respondent husband in operating and permitting the truck to remain on the highway at the hour shown, unequipped with a rear light of the kind prescribed by subdivision a of section 13 of the Motor Vehicle Act (St. 1915, p. 405, as amended by St. 1919, p. 206), was a violation of law; and by subdivision (w) of section 20 of the same act,

It is also made unlawful to leave or permit to be left standing on the main traveled portion of any public highway a vehicle undergoing repairs or which has been stopped for the purpose of having repairs made thereon, unless such vehicle shall have been disabled on the main traveled portion of the highway in such manner and to such an extent that it shall be impossible to avoid stopping thereon and impracticable to remove the same therefrom until repairs shall have been made.

[2, 3] A right of action for personal injuries to the wife is community property (*Lamb v. Harbaugh*, 105 Cal. 680, 39 P. 56; *McKune v. Santa Clara, etc., Co.*, 110 Cal. 480, 42 P. 980; *Moody v. Southern Pacific Co.*, 167 Cal. 786, 141 P. 388); and though as provided by statute she may sue alone (section 370, Code Civ. Proc.), yet if the negligence of her husband proximately contributed to her injuries, the right of either or both to recover is barred. (*Basler v. Sacramento, etc., Co.* 158 Cal. 514, 111 P. 530, Ann. Cas. 1912A, 642; *Dunbar v. San Francisco & Oakland T. Railways*, 54 Cal. App. 15, 201 P. 330.

[4, 5] The defect in the headlights of the truck, which led respondents to stop, was, as fairly appears from their testimony, due to a condition which developed a few minutes before the car was stopped and was not caused by a lack of due care on their part; but the absence of lights either in front or in the rear rendered the operation of the truck at the hour mentioned unlawful, and it was the duty of respondents to remove the same from the main traveled portion of the highway. Motor Vehicle Act, §§ 13 and 20(w). The failure of any person to perform a duty imposed upon him by law raises a presumption of negligence, and if such negligence proximately contributes to his injury, he cannot recover. (*McKune v. Santa Clara, etc., Co.*, supra, p. 486 (42 P. 980); *Berkovitz v. American River Gravel Co.*, 191 Cal. 195, 215 P. 675; *Shimoda v. Bundy*, 24 Cal. App. 675, 142 P. 109. This presumption, however, is not conclusive, but may be overcome by evidence that the failure was excusable or justifiable under the circumstances and not inconsistent with the exercise of due care. *Berkovitz v. Am. River Gravel Co.*, supra; *Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, 667, 98 P. 1063, 16 Ann. Cas. 1061; *Harris v. Johnson*, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; *Dewhirst v. Leopold*, 194 Cal. 424, 229 P. 30; *Western Indemnity Co. v. Wasco Land & Stock Co.*, 51 Cal. App. 672, 197 P. 390; *Graybiel v. Auger*, 64 Cal. App. 679, 222 P. 635; *Mitsuda v. Isbell*, 71 Cal. App. 221, 234 P. 928.

[6] In the instant case it does not appear that the time consumed in adjusting the lamps was unreasonable, and, as stated, there was testimony which, if believed by the jury, tended to show that the condition of the highway east of the pavement was such at the time of the accident as to render it impracti-

cable to remove the truck farther in that direction. No reason, however, was shown for the failure to maintain a light on the rear of the truck, and either violation of the statute unexcused, if proximately contributing to the injuries, would bar a recovery, unless appellants, having knowledge of respondents' peril, had the last clear chance to avoid, and by the exercise of ordinary care could have avoided, the injuries. Whether the failure to remove the vehicle entirely from the pavement was excusable under the circumstances, or, if not, whether such failure or the omission to maintain a tail light proximately contributed to the injuries, were questions which in view of the evidence were properly submitted to the jury (*Graybiel v. Auger*, supra; *Western Indemnity Co. v. Wasco Land & Stock Co.*, supra; *Mitsuda v. Isbell*, supra), and were so submitted by instructions which fully and correctly stated the law, and we cannot say that the evidence was insufficient to support a conclusion favorable to plaintiffs on any of the issues presented.

[7] It is contended that in view of the evidence the last clear chance doctrine had no application, and that the court erred in submitting the issue to the jury. As stated above, the width of the pavement was 18 feet, and the third car mentioned was 60 feet north of the truck, where, according to the testimony of Wollaston, it had practically come to a stop, this witness further testifying that upon discovering the position of the truck he failed to apply his emergency brake or swerve to the left. This evidence with that as to the speed of the latter's car and the distance of the truck from the center of the highway sufficiently raised the issue as to whether appellants had the last clear chance to avoid the injuries and were negligent in failing to do so. No error is shown in the instructions presenting this issue, and a finding thereon adverse to appellants would be fairly sustained.

[8] It is further claimed that respondents by the exercise of ordinary care could have extricated themselves from their dangerous position, and that the evidence was insufficient to show that appellant Wollaston knew of the danger to either. It is clear that Mrs. Giorgetti was wholly unaware of the danger from appellants' car; and as to her husband the jury might reasonably have inferred that after becoming aware of his peril he was unable by the exercise of due care to escape it. Furthermore, appellant Wollaston saw the latter and the truck in which Mrs. Giorgetti was seated, and was thereafter, as impliedly found by the jury, negligent in failing to avoid the collision. That he failed to see Mrs. Giorgetti is immaterial, as he was, in consequence of his negligence, responsible for all the damage proximately caused thereby whether it could be anticipated or not. Civ. Code, § 3333.

Appellant further criticizes certain instructions (one of which contains an obvious ver-

bal inaccuracy) in which, it is urged, the law was incorrectly stated. None, however, can fairly be said to have been misleading or, if erroneous, prejudicial.

It appearing that the verdicts were fairly sustained by the evidence, and no error being shown which can reasonably be said to have resulted in a miscarriage of justice in either case, the judgments appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

Opinion in Supreme Court in Bank, Denying Hearing.

PER CURIAM. [9] The petitions for hearing in this court are denied. However, in the discussion of the application of the doctrine of last clear chance, the District Court of Appeal seems to hold that the jury under the evidence might conclude that the defendant Wollaston, by the exercise of due care, might have observed the plaintiffs' car at a greater distance, notwithstanding the positive and uncontradicted evidence of when he first saw that car. If that portion of the opinion be so construed, it is not approved. The doctrine applies only from the time the defendant actually observes the plaintiff's perilous position, and not from a time when it might be said that he ought to have observed it. *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748, 754, 134 P. 709; *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36. Notwithstanding our disapproval of that portion of the opinion, we are satisfied from an examination of the record that the proper application of the doctrine of last clear chance could be and was made by the trial court and jury.

83 Cal. App. 441

HOVLEY v. FRANK MELINE CO. et al.*
(Civ. 4856.)

District Court of Appeal, Second District, Division 1, California. May 27, 1927.

Hearing Denied by Supreme Court, July 26, 1927.

1. Principal and agent §99—Principal cannot clothe agent with ostensible authority and deny or affirm agency at convenience (Civ. Code, §§ 2315, 2317, 2330).

One cannot hold another out before the public as his agent having authority of a general character and take the benefit of his acts when he considers them favorable to him and repudiate his acts when he considers them unfavorable, under Civ. Code, §§ 2315, 2317, 2330, relating to authority of agents and mutual obligations of principals and third persons.

2. Trial §396(3)—Findings held sufficient to support judgment, though court fixed defendant's liability on different theory than that set forth in pleadings.

Finding that defendant "guaranteed" the payment of \$3,000 under contract binding defendant as principal and not as guarantor held not insufficient as not supporting judgment for plaintiff for specific performance of contract, in that it fixed liability of defendant on different

theory than that set forth in pleadings which nowhere used the term "guaranteed," since the only way defendant could be guarantor of performance of his contract was to perform it as principal and one "guaranteeing" the payment of his own indebtedness promising to pay it, however awkwardly expressed.

3. Trial $\S$ 404(1)—Findings will be construed together to reconcile conflict due to apparent misplacing of words.

All findings will be construed together for purpose of reconciling conflicts due to apparent misplacing of words "by" and "to."

4. Specific performance $\S$ 12—Agent's offer of performance will not prevent judgment for specific performance against principal with whom party deals directly.

Offer by an agent to perform a contract will not prevent judgment for specific performance against the principal, where the other party to the contract deals with the principal directly, since he cannot be required to deal with the agent.

5. Specific performance $\S$ 12—Offer to compromise contract will not prevent judgment for specific performance.

Offer to compromise is not such an offer of performance as will prevent judgment for specific performance of a contract.

Appeal from Superior Court, Los Angeles County; M. L. Short, Judge.

Action for specific performance by Elizabeth Hovley against the Frank Meline Company and others. Judgment for plaintiff, and the defendants appeal. Affirmed.

L. M. Chapman and Ward Chapman, both of Los Angeles, for appellant Meline.

W. I. Gilbert and Isidor Morris, both of Los Angeles, for respondent.

YORK, J. The principal point to be decided in the appeal of this case is whether a certain contract signed "Frank Meline Company, by G. H. Seward," and also signed by Peter P. Hovley, plaintiff's assignor, was binding on Frank Meline, who was doing business under the name of Frank Meline Company. Appellant concedes that Seward was at the time he signed the contract in the employ of defendant, but contends that signing the contract was not within the scope of Seward's employment either actual or ostensible. The defendant was at that time engaged in a business of various kinds, among which were construction of buildings, financing, promotion, that of real estate broker, etc. He had four offices in four different localities, and had about 1,000 persons in his employ. He was not, of course, giving personal attention to all of the various branches of his business, but had systematized and organized his business. Seward was operating in what was known as the "Wilshire Office Dept." A letter head had been printed for use in that department on which was printed "The Frank Meline Company, Realtors. Please direct your reply to the Wilshire Office Dept. Attention G. H.

Seward. Promotion, Financing, Loans, Business Properties, Leases, Individually-Owned Apartment, Building Contracts." That letter head was in general use in that department. Mr. Meline learned of this contract executed, in the manner indicated, and did not communicate with Mr. Hovley about it.

[1] After a review of the evidence, we conclude that Mr. Seward was held out to the public by Mr. Meline as having authority to represent him in promoting building contracts and financing and in the manner pursued by Mr. Seward. The contract was a contract of Frank Meline and not of G. H. Seward. A man cannot hold another out before the public as his agent having authority of a general character and take the benefits of his acts when he considers them favorable to him and repudiate his agent's acts when he considers them unfavorable. Civ. Code, §§ 2315, 2317, 2330.

[2] The findings of the court are criticized, and it is true that they are subject to criticism. The use of the term "Frank Meline guaranteed the payment of \$3,000," *standing alone*, supports appellant's contention that the finding is without the issues. The term "guaranteed" nowhere appears in the pleadings or in the evidence, but the meaning of a word is sometimes shown in the context to be different than its technical meaning. The contract was one binding Frank Meline as a principal and not as a guarantor. The only way he could be a guarantor of the performance of his own contract was to perform it as a principal. Where a man "guarantees" the payment of his own indebtedness, he promises to pay it, however awkwardly expressed. And, again, when the trial court finds that he guaranteed "under the terms," etc., the terms of the contract can be considered in ascertaining what "guaranteed" meant, and that it was the obligation specified in the contract. We hold that the judgment should not be reversed on the ground that the court fixed the liability of the defendant on a different theory than that set forth in the pleadings, and we construe the findings as above stated and not on a different theory than that shown in the pleadings. As we construe the findings, the cases of *Chetwood v. California Bank*, 113 Cal. 414, 45 P. 704, *McDougald v. Argonaut Land Co.*, 117 Cal. 87, 48 P. 1021, and other cases cited by appellant in support of his criticism, are not in point.

[3] Again, there is no distinction between the delivering of a certain memorandum to certain materialmen for the benefit of defendant, and a delivery to defendant under the facts of this case, and hence there was no material discrepancy on this point between the allegations of the complaint and the findings. The criticism that it is found that the material was delivered to materialmen instead of *by* them is so apparently a careless misplacing of "to" for "by" and "by" for "to," that the judgment should not be re-

versed for that reason. All findings should be construed together, and, if possible, all conflicts should be reconciled rather than to reverse a judgment because of such conflicts. *Haight v. Haight*, 151 Cal. 90, 90 P. 197.

[4, 5] The contention that the judgment should be reversed because Seward offered to perform cannot be sustained for two reasons: Hovley was dealing with Meline as a principal and could not be required to deal with a man of less responsibility whom he had a right to consider as an agent only. Again, the offer to perform was not made in full accordance with the terms of the Meline Company contract and was at best an offer to compromise.

We find no prejudicial error in the proceedings in the trial, and the judgment is therefore affirmed.

We concur: CONRREY, P. J.; HOUSER, J.

83 Cal. App. 508

METCALF v. ROMANO et al. (Civ. 5796.)★

District Court of Appeal, First District, Division 2, California. June 2, 1927.

Hearing Denied by Supreme Court, Aug. 1, 1927.

1. Highways ⇨184(2)—Evidence held to support recovery for death of boy struck by automobile while he walked along highway.

In action for death of seven year old boy struck by automobile as he walked along highway, evidence held sufficient to support judgment for plaintiff.

2. Witnesses ⇨40(2)—Determination of competency of children under age of ten to testify is within trial court's discretion.

Determination of question of competency of children under ten years of age to testify is matter for trial court to determine in its discretion.

3. Highways ⇨184(4)—Instruction following statutory language as to automobile driver's duty to exercise care held proper (Motor Vehicle Act § 113).

In action for death of seven year old boy killed by automobile as he walked along highway, instruction as to automobile driver's duty to exercise care in driving on public highway which followed wording of Motor Vehicle Act 1923, p. 553, § 113, held proper.

4. Highways ⇨184(4)—Instruction on care required of automobile driver held not erroneous, as omitting circumstance whether child injured suddenly ran in front of car.

In action for death of boy struck by automobile as he walked along highway, instruction dealing with care required of defendant in driving automobile, including element whether deceased's conduct indicated he was aware of approach of defendant's automobile, held not erroneous, as omitting question whether deceased suddenly ran out on pavement in front of car.

5. Trial ⇨194(16)—Instruction, telling jury what to consider in determining whether defendant used due care in driving automobile, held not to direct verdict.

In action for death of boy killed by automobile as he walked along highway, instruction,

telling jury what to consider in determining whether defendant used due care and drove car at reasonable speed, held not to amount to direction of verdict, if certain facts were found from evidence.

6. Trial ⇨234(4)—In action for death of boy killed by automobile, instruction directing verdict, if certain facts were found, held not erroneous.

In action for death of boy killed by automobile as he walked along highway, instruction directing verdict, if certain facts were found, held not erroneous, where such facts, though very much condensed, included lack of due care by defendant, proximate cause, and lack of contributory negligence.

7. Highways ⇨174—School children have right to travel highways without being accompanied by parents to guard against injury by automobiles.

Children going to school have right to travel highways of state; parents not being required to accompany them nor to send them through fields where stock are frequently grazing in order to avert possibility of injury from careless driver of automobile.

8. Highways ⇨174—Child traveling along highway need not indicate intent to run in front of automobile before care is required of driver.

It is not necessary, before care on part of automobile driver is required toward child traveling along highway, that child must first indicate intent to immediately run on highway in front of machine.

9. Death ⇨104(5)—Instruction, limiting parent's recovery for child's death to pecuniary loss considering duty to provide for child during minority, held proper.

In action by parent for death of seven year old boy struck by automobile as he walked along highway, instruction, limiting recovery to financial and pecuniary losses suffered by plaintiff, and allowing jury to consider, in fixing amount of verdict, that plaintiff was bound to provide for, maintain, clothe, and educate child during minority, held proper.

10. New trial ⇨143(1)—Jurors' affidavits cannot impeach verdicts.

Verdicts cannot be impeached by affidavits of jurors.

11. New trial ⇨44(2)—Juror's expression during deliberations held not sufficient reason for new trial, as showing prejudice, in action for death of minor struck by automobile.

Expression of individual juror during deliberations prior to arriving at verdict, in action for death of seven year old boy struck by automobile, held not sufficient reason for setting aside verdict for plaintiff and granting new trial, as showing prejudice against defendant.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Two separate actions by A. B. Metcalf against D. Romano and another were consolidated for trial. Judgment for plaintiff, and defendants appeal. Affirmed.

Theodore M. Stuart, of Fresno, and J. S. Garnett, of Los Angeles, for appellants.

G. L. Aynesworth and L. N. Barber, both of Fresno, for respondent.

BARTLETT, Justice pro tem. Plaintiff brought two separate actions in the superior court of Fresno county, Cal., for the sum of \$10,000 damages for the death of Byron Metcalf, a seven year old son of plaintiff, alleged to have resulted through the boy being struck by an automobile negligently operated by the defendants on the morning of December 4, 1923, while the child was traveling on his way to school along a public highway of Fresno county, Cal., commonly known as the Whites Bridge road. The cases were consolidated for purposes of trial, and one verdict returned and one judgment entered, verdict and judgment being for the sum of \$5,000. A motion for a new trial was made and denied and the appeal is taken from this order and from the judgment on a typewritten manuscript.

[1] The collision which caused the boy's death was at a point on the Whites Bridge road about 15 miles west of the city of Fresno. At the place where the fatal injuries were received, the road, which is a paved one, with dirt shoulders, runs east and west upon a straight line. Plaintiff resided on a small ranch on the north side of the road. On the morning in question Byron Metcalf and two other boys of about his age were on their way to school, traveling on foot, no other person being with them. To reach the schoolhouse the route they were traveling led from plaintiff's ranch to the Whites Bridge road; thence west along this road for about a quarter of a mile; and thence north along another road a half mile to the schoolhouse. The three boys were walking west along the north side of the dirt shoulder of the road just before the collision occurred. Coming towards the boys from the west was a large truck and trailer, which is referred to in the evidence as the "cotton truck." Coming from behind them going west was an oil truck, and behind that, also going west, came the defendants in their automobile. At a point 75 or 100 yards east of the place of collision defendants drove their car around the oil truck and pulled over to the north side of the pavement. The cotton truck was then running along the south side of the pavement. The boys were seemingly watching the cotton truck and giving no attention to the oil truck and defendants' automobile. As he passed the boys the driver of the cotton truck waved his hand at them in an endeavor to call their attention to the other machines. Before passing the cotton truck the right wheels of defendants' machine were off of the north edge of the pavement, but all four wheels seem to have been on the pavement close to its edge when the boy was struck. The evidence is conflicting as to just what occurred at the moment of the collision on the part of either the boys or the defendants.

The fatal injury was a fracture at the base of the skull on the left side. The only bruises on the child were at a point above the left ear near the end of the fracture and on the left side of the right knee. The cotton truck was 38 feet long with its trailer and was being driven at a speed of about 13 miles an hour when it met defendant's machine. Its driver testified that when he passed the children they were in line about 3 feet off the pavement; that as he passed them he saw defendants' car approaching about 60 feet away at a speed which he estimated to be between 30 and 35 miles per hour, and that they passed him at the same rate of speed; that he waved to the children and pointed to the approaching car; that he did not see them move; that all of this time the right wheels of defendants' car were off the pavement; that none of the children looked in the direction of defendants' car; and that he did not hear defendant sound his horn. Defendants testified they were 250 or 300 yards from the boys when they first saw them; that they were then walking off the pavement along the shoulder of the road; that they passed the oil truck and then first saw the boys; that they were then going 30 or 32 miles an hour; that the oil truck when they passed it was going 15 or 20 miles an hour; that they blew their horn when they saw the children first, and again blew it twice when 75 or 100 feet away from them; that when about 6 feet away from them one of the children stepped into the highway; that the car could not be turned to the right, as it would have killed all three children; that the only chance was to twist the car to the left; that this was done and the child saved from the front wheel, but that it was hit by the rear fender as the machine passed; and that at the time of the impact the speed of their machine had been reduced to about 12 miles an hour.

The evidence of the driver of the oil truck is not at all clear or convincing as to the details of what came within his opportunities of observing and his evidence given at the coroner's inquest and on the trial are so conflicting and uncertain that no useful purpose would be subserved by attempting to digest and set it forth in this opinion. Taken altogether, there is sufficient evidence to justify the verdict rendered by the jury and the judgment entered, and the same should not be disturbed, unless the alleged errors of law complained of by defendants warrant a reversal.

These errors are claimed to be, first, the permitting of a boy, Tony Soares, aged eight years, one of the companions of Byron Metcalf, to testify before the jury; second, the giving of certain of the court's instructions; third, the refusing to give some instructions requested by defendants; fourth, in the trial court not setting aside the verdict and granting a new trial on a claim

that one of the trial jurors gave false answers on his voir dire examination, thereby concealing an alleged violent prejudice of the juror against the defendants.

[2] The boy, Tony Soares, was permitted to testify after a careful preliminary examination conducted in the presence of the jury by the trial judge and participated in by the attorneys for both plaintiff and defendant. The determination of the question of competency of children under ten years of age to testify is peculiarly a matter for the trial court to determine in its discretion and there is nothing in the evidence here that would justify an appellate court in declaring that there was an abuse of the sound discretion exercised by the trial court in admitting the evidence of this child.

[3-6] Appellant urges that error was committed in giving the following instructions:

"You are instructed that it is the duty of a person operating an automobile upon a public highway to drive the same with due care and circumspection, and at a careful and prudent speed, not greater than is reasonable and proper, having due regard to the traffic, and he has no right to drive at such speed or in such manner as to endanger the life, limb, or property of any person.

"You are instructed that, in determining whether or not the defendant Romano used due care and circumspection and drove the car at a reasonable and prudent speed, it is your duty to take into consideration all the circumstances which would have influenced the conduct of an ordinarily prudent driver in the same situation, including the relative positions of the children and the truck and trailer, the amount of space which the automobile had in which to pass between them, the apparent age and physical capacity of the children, and whether or not their conduct indicated that they were aware of the approach of the automobile.

"You are instructed that, if you find that the driver of the automobile did not drive with due care and circumspection and at a speed which, under all the circumstances of the case, was reasonable, and that such unreasonable speed or want of due care and circumspection was a proximate cause of the death of plaintiff's child, it will be your duty to find for the plaintiff, unless there was some negligence on the part of the child, or of the plaintiff himself, which contributed to the injury."

Concerning the first paragraph of said instructions, it is urged that it is subject to the same error as was pointed out in *Garrison v. Pearlstein*, 68 Cal. App. at page 339, 229 P. 353. While the instruction there was similar to the instruction here, the statute then was different and the instruction failed to follow the wording of the statute as it existed at that time; whereas, the instruction here under consideration, so far as applicable, followed the wording of the statute as it existed at the time of the accident involved. Section 113, Motor Vehicle Act of 1923 (St. 1923, p. 553). In the *Garrison v. Pearlstein* opinion it is expressly stated:

"If the instruction complained of had used the statutory language there would have been no possible objection."

The next paragraph of the above-quoted instructions is criticised by appellant upon the grounds that it emphasizes certain particular circumstances without mentioning all of the material circumstances disclosed by the evidence. The only one specified as omitted is whether or not the plaintiffs' deceased child suddenly ran out upon the pavement in front of the defendant's car. The instruction included the element of whether or not the children's conduct indicated that they were aware of the approach of the automobile. We think this was sufficient, inasmuch as the instruction purports only to deal with the amount of care required of defendant in driving his automobile. The instruction does not purport to deal with contributory negligence, and the element said to be omitted from the instruction relates more properly to a consideration of contributory negligence than it does to a consideration of the negligence of defendant.

Next, it is also urged concerning the second paragraph of said quoted instructions that it should be held to be erroneous upon the same grounds that certain instructions were held to be erroneous in *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 P. 700; *Keena v. United Railroads of S. F.*, 57 Cal. App. 124, 207 P. 35; *Beyerle v. Clift*, 59 Cal. App. 7, 209 P. 1015. That is to say, appellant contends that the instruction amounts to a direction that the jury find for the plaintiff, if certain facts are found from the evidence. The instruction is not open to this criticism, for it does not purport to direct a verdict; it only purports to assist the jury in the determination of whether or not the defendant driver used due care. The most that could be said for this instruction is that it purports to say what would constitute negligence. It is only in the third paragraph of the above-quoted instructions that a direction for a verdict is found, and there, although the facts are very much condensed, we find all the material elements are incorporated; first, lack of due care on the part of defendant; second, proximate cause; and, third, contributory negligence.

[7, 8] No error was committed by the trial court in the refusal of the instructions requested by the plaintiff that were not given. Children going to school have a right to travel the highways of the state and it is not necessary, before any care on the part of an auto driver is required towards a child, that it must first indicate an intent to immediately run upon the highway in front of the machine, as was requested by the first instruction refused. Neither is it required of parents that they accompany their children trav-

eling a public road on their way to school, nor that they send the children through fields where stock are frequently grazing in order to avert the possibility of injury from the careless driver of an auto on a public road.

[9] The jury was correctly instructed as to the subjects which they could consider in determining the amount of damage occasioned by the death. The instructions given limited a recovery to the financial and pecuniary losses suffered by plaintiff. The court also instructed them that they must take into consideration, in fixing the amount of their verdict, that the plaintiff was legally bound to provide for, maintain, clothe, and educate his child during minority. There is no showing that the verdict is excessive, or that its rendition was influenced through passion or prejudice on the part of the jurors.

[10, 11] The action of the trial court in refusing to grant a new trial on account of the alleged prejudice of one of the trial jurors must be upheld. It does not appear from the transcript or briefs how many of defendants' peremptory challenges were used, the record saying one or more was exercised. Whether or not the jury was polled on the rendering of the verdict does not appear. The motion was heard on the affidavits of two of the jurors and the attorney for defendants. If verdicts could be set aside because of the expressions of individual jurors during their deliberations prior to arriving at a verdict a procedure novel in the administration of justice would be introduced, for by a long line of decisions of the appellate courts of this and of many other states it is held that verdicts cannot be impeached by the affidavits of jurors. The affidavits of the two jurors as to the remarks made during the deliberations of the jury and the testimony given by the juror on his voir dire do not disclose any biased and prejudiced mind against the defendants or their case when he was examined. Regardless of how the juror may have been affected by and regarded the evidence in this case, after it was introduced, it is possible that the evidence in some of the automobile accident cases which have become so frequent all over the state may sometimes have a tendency when heard by jurors to bring about the use of language while deliberating not couched in the choicest English, nor expressive of kindly sentiment towards careless drivers. But such expressions cannot be made a reason for the setting aside of a verdict and granting of a new trial. Methods are provided by law under which jurors, should they violate their oath on their voir dire, or as jurors, can be punished.

The judgment and order are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

83 Cal. App. 445

HEADLEY et al. v. VAN GINKEL et al.*
(Civ. 4844.)

District Court of Appeal, Second District,
Division 1, California. May 27, 1927.

Hearing Denied by Supreme Court, July 26, 1927.

1. Limitation of actions $\S$ 37(3)—Petition to cancel registration under Land Title Law held not barred by limitations, in view of allegation of fraud (Land Title Law, $\S$ 37; Code Civ. Proc. $\S$ 338).

Petition to set aside order rendered in proceeding, instituted under so-called Land Title Law (St. 1915, p. 1932), for registration of land held not barred by limitations of section 37, where more than one year had elapsed after registration, in view of allegation of fraud and Code Civ. Proc. $\S$ 338, providing that action for relief for fraud may be commenced within three years after discovery by aggrieved party; petition being filed within period provided by latter statute.

2. Pleading $\S$ 8(15)—Allegation of fraud must be based on facts.

In an action arising out of fraud, the bare allegation of fraud in the complaint is insufficient without alleging the facts on which the conclusion of fraud may be based.

3. Records $\S$ 9(11)—Findings in suit to set aside registration of land for fraud held not insufficient because court made no direct finding of fraud (Land Title Law).

Findings in suit to set aside registration of land, under Land Title Law (St. 1915, p. 1932), for fraud held not insufficient because court made no direct finding of fraud, where facts established by findings showed that defendant was guilty of fraud.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Suit by Sears Roberts Headley and another against Henry Van Ginkel and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Loenholt & Bell, of Los Angeles, for appellants.

J. E. Ricketts, of Covina, for respondents.

HOUSER, J. This is an appeal from a judgment in a suit brought for the purpose of setting aside an order theretofore rendered in a proceeding instituted under the so-called Land Title Law (Stats. 1914 [1915] p. 1932), for the registration of land, by which order a former order made in the same proceeding was vacated.

Briefly stated, the history of the matter is as follows: By virtue of an appropriate proceeding, a decree was rendered by which certain land apparently belonging to the plaintiff herein was duly registered. Seventeen months thereafter, on the ground of fraud as to him, the defendant herein petitioned in said proceeding for the cancellation of the order formerly made therein and for equitable relief in the premises. Following a

hearing in said matter, the order originally made in said proceeding was vacated and a new order was made affecting the title of the properties of the respective parties. After the lapse of a period of more than 11 months following the date of the order last made, the instant action was commenced for the purpose of canceling the second order made in the Land Title Law proceeding, which action, as hereinbefore indicated, resulted in a judgment by which the cancellation of the said second order was denied. It is from such judgment that the appeal is taken herein.

In effect, appellants contend that the trial court was without jurisdiction to make the said second order, and that it should be set aside for the reason that it is void on its face. The reasons assigned by appellants for the invalidity of the second order, in substance, are that the statute (section 45 of Stats. 1914 [1915] p. 1932) places a limit of one year on the time for the bringing of an ordinary action for the recovery of any interest in land after its "first registration"; that by section 37 of the same act it is provided that, in case of fraud, the same rights are available to the person defrauded as he "would have had if the land were not under the provisions of his act"; and that, although in the complaint of plaintiff fraud was pleaded, no findings of fraud, as such, were made by the trial court.

More than one year having elapsed after the "first registration" before the defendants herein petitioned the court for an order vacating the first order made in the registration proceedings, by the terms of the statute it is plain that, unless fraud was pleaded and proved in the petition which was filed by the defendants herein, the defendants would have had no standing in court. The petition, however, after setting forth the several facts which the petitioners alleged constitute ground for the relief for which they prayed, contained the allegation:

"That the facts hereinbefore alleged constitute a fraud on the court and these petitioners.

"That the decree aforesaid and land certificate No. 16044 were obtained by fraud as alleged, and are null and void as against them."

[1] By such allegation, assuming that the facts stated in the petition were sufficient to constitute an allegation of fraud, the petition was brought squarely within the purview of the provisions of section 37 of the statute (Stats. 1914 [1915] p. 1932), which in such circumstances purports to accord to petitioners the identical rights which they "would have had if the land were not under the provisions of this act." As section 338 of the Code of Civil Procedure provides, in effect, that an action for relief on the ground of fraud may be commenced within three years after discovery by the aggrieved party of the facts constituting the fraud,

and as it appears that the petition was filed within such statutory period, it becomes clear that any point as to the time when the proceeding was commenced by the petitioners for the relief claimed by them is unavailing to appellants.

The remaining point affects the question of the sufficiency of the findings on the question of fraud to support the said second order made by the court. It is not contended by appellants, that the facts alleged in the petition were insufficient to support the conclusion of fraud therein contained and hereinbefore set forth. Indeed, in the brief filed by appellants the following statement may be found:

"The petition of Van Ginkel to set aside the original registration alleges fraud. But the court denied said petition and made no finding of fraud. * * *"

Neither is any complaint made by appellants that the evidence adduced on the hearing was insufficient to support a finding of fraud had the court seen fit to make such direct finding, nor that the facts as found are not the equivalent of such a finding. Consequently it must be taken as admitted that the pleading and the proof were sufficient in all respects; the only thing lacking, according to the intent and purpose of the contention made by appellants, being that the court made no direct finding of fraud committed by the appellants in the premises.

[2] In an action arising out of fraud it is thoroughly established law that the bare allegation in the complaint, that the defendant has been guilty of fraud in the transaction on which the action is founded, is insufficient as a pleading. The facts on which the conclusion of fraud may be based must be alleged. See 12 Cal. Jur. p. 800 et seq. and cases cited.

The case of *Hick v. Thomas*, 90 Cal. 289, 27 P. 208, 376, was an action to set aside a conveyance of property on the ground of fraud and duress. From a judgment in favor of plaintiff, defendant appealed. Among his contentions was one that the findings were insufficient in that they did not specifically state that the representations made by defendant were false. With reference thereto the syllabus states the law as follows:

"A finding of facts inconsistent with and contradictory of the representations made sufficiently shows that the representations were false, without a specific finding thereon."

In the case of *Bates v. United Construction Co.* (Cal. App.) 253 P. 328, a question somewhat similar to that here under consideration was involved in that the appellant there contended that as the action was one "for the recovery of money as return of consideration on an action for rescission," the failure of the judgment in so many words to recite that a rescission was adjudged rendered the judgment of no validity. The fol-

lowing statement of the law affecting the particular point appears in the syllabus (52 Cal. App. Dec. 438):

"In such action it cannot be said that the judgment was invalid for the reason that there was no conclusion of law stating that a rescission had been effected, where it was apparent that the facts found and the judgment rendered thereon meant nothing other than that the contract was extinguished or rescinded."

[3] It therefore is manifest that the facts are what is of paramount importance, and upon which the judgment must ultimately rest. The legal conclusion following from the facts that fraud has been practiced upon the plaintiff either may or may not be tenable, dependent entirely upon what is actually shown by the findings of fact. The facts being established by the findings, if, as a matter of law, they show that the defendant has been guilty of fraud in the premises, it is a matter of no consequence either that they have been misnamed, or that they have received no label whatsoever.

Assuming that which seems to be conceded by appellants, to wit, that aside from the conclusion of fraud the findings made by the court were sufficient to support the said second order, it follows that the judgment should be affirmed. It is so ordered.

I concur: CONREY, P. J.

YORK, J., being disqualified, takes no part in the foregoing decision.

83 Cal. App. 551

PFUNDER v. GOODWIN et al. (Civ. 4703.)

District Court of Appeal, Second District,
Division 1, California. June 3, 1927.

1. Husband and wife ⇨149(1)—Wife's right to exemption of earnings from execution for husband's debts may be waived (Civ. Code, §§ 168, 3268).

Wife can waive the right to the exemption of her earnings from execution for her husband's debts, given by Civ. Code, § 168, under section 3268, providing that benefit of certain statutes, may be waived by any party entitled thereto unless such waiver would be against public policy.

2. Husband and wife ⇨268(2)—Wife waives exemption of her earnings from execution for husband's debts by investing them in community property held in name of husband (Civ. Code, §§ 168, 3268).

Where wife, after first receiving her earnings, which are exempt from execution for husband's debts under Civ. Code, § 168, allows the money to be invested in community property held and possessed in the name of her husband, she waives its further exemption from execution for her husband's debts under section 3268, permitting such a waiver.

3. Fraudulent conveyances ⇨154(1)—That bill of sale alleged fraudulent as against cred-

itor was recorded is of no importance (Civ. Code, § 3440).

In determining whether a bill of sale was void as a fraud on creditors under Civ. Code, § 3440, no importance is to be given to the fact that the bill of sale was recorded.

4. Fraudulent conveyances ⇨146(2)—Sale of tractor by husband to wife held fraud on creditors and void, where tractor remained on same premises as before, though thereafter driven by wife (Civ. Code, § 3440).

Where tractor alleged to have been sold by husband to wife remained at their home and in other places where the husband had been using it, the same as before the sale, though the wife thereafter drove the tractor, sale held fraudulent as against creditors and void, under Civ. Code, § 3440; delivery being insufficient where the transferor continues to have the use and control in the same manner and to the same extent as before.

5. Fraudulent conveyances ⇨135—Statute declaring what conveyances shall be presumed fraudulent and void as to creditors must be construed the same where husband and wife are parties to sale as in other cases (Civ. Code, § 3440).

Construction of Civ. Code, § 3440, providing that certain transfers of personal property shall be presumed fraudulent and void as to creditors if made by person having possession or control, and not accompanied by immediate delivery followed by actual and continued change of possession, must be construed in the same manner when the sale is between husband and wife as in other cases.

York, J., dissenting.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action for conversion of personal property brought by Alice Pfunder against Frank J. Goodwin, administrator of the estate of Wm. H. H. Goodwin, deceased, and another. From a judgment for plaintiff, defendants appeal. Reversed.

C. H. Scharnikow, of Los Angeles, for appellants.

A. S. Maloney and C. O. Thompson, both of San Bernardino, for respondent.

CONREY, P. J. The judgment from which defendants appeal, covers 80 per cent. of the value (\$500) of a tractor, which was sold by the sheriff in execution of a judgment against the respondent's husband.

It is conceded that the tractor as originally purchased by respondent's husband was community property of the husband and wife. It was found by the court that said tractor had been purchased under a sales contract, in the name of the husband, and that 80 per cent. of said purchase price was paid by the plaintiff with her separate earnings. Said earnings were deposited in a joint bank account of the plaintiff and her husband, and that account was checked upon in making the payments for the tractor. The remaining 20

per cent. of the purchase price "was paid out of community funds belonging to plaintiff and her husband." The court found also that, until seized by the sheriff, the tractor had remained "in joint possession" of the plaintiff and her husband.

Section 168 of the Civil Code says: "The earnings of the wife are not liable for the debts of the husband." In this case the wife had earned certain money by her personal industry. That money went into the joint bank account, and was checked out by the husband to pay for the tractor. How far may funds, thus obtained and invested, be pursued and defended by the wife as against creditors of the husband who have given him credit in the purchase by him of community property? Suppose the tractor had been sold by the husband, and suppose the proceeds had been reinvested in other merchandise, or in real property. May the wife, at any time thereafter, hold such property as against creditors of the husband (the seeming owner of the property) by proving that the original investment, years before, was made with funds earned by her?

Reasonable justice would appear to require that there be some limit to the assertion of such claims, if the "community property" laws under which we live are to continue in force.

[1, 2] The wife's right to hold exempt from execution for her husband's debts moneys classed as "earnings of the wife" is within the class of rights which "may be waived by any party entitled thereto, unless such waiver would be against public policy." Civ. Code, § 3268. Section 168, Civil Code, is a declaration of public policy in relation to "the earnings of the wife." But it would seem that such public policy is adequately satisfied when the wife, having first received such earnings, voluntarily waives further right of exemption by allowing the money to be invested in other community property held and possessed in the name of her husband. We think that the terms of said section 168, and the practical effect of such further investment of money with the wife's consent, alike mark the limit of the exemption. "Section 168 does not provide that the earnings of the wife are her separate property, but that they are not liable for the debts of her husband. * * * Likewise without foundation is appellant's contention that, even though the earnings of a wife be incorporated, with the other community property, a sum equal to the amount of these earnings will always remain exempt from the community creditors." *Street v. Bertolone*, 193 Cal. 751, 754, 226 P. 913, 914.

The views herein stated are in harmony with those expressed long ago by Prof. John Norton Pomeroy, who made a careful study of the community property laws. 4 West

Coast Reporter, 305 et seq. See, also, *McKay on Community Property* (2d Ed.) § 298.

[3-5] In addition to respondent's claim that her original interest in the tractor was exempt from levy under the attachment, she further contends that the judgment should be sustained for the reason that, as found by the court, respondent's husband prior to the sheriff's levy upon the tractor had executed to her a bill of sale of said tractor "in consideration of love and affection and \$10," and that on the same day the bill of sale was received in the recorder's office of San Bernardino county, Cal. Appellant, on the other hand, contends that said transfer to the plaintiff was void, under section 3440 of the Civil Code, for want of sufficient delivery and change of possession. On this issue of law we are in agreement with appellant. We do not understand that the recording of the bill of sale is a matter of any importance. Our attention has not been called to any statute providing for the recording of such an instrument, or giving to such recording any legal effect. The judgment creditor of the husband was such creditor while the husband remained in possession of the property, and therefore the transfer by the husband to the wife must be conclusively presumed to be fraudulent as against such creditor, and therefore void, unless the transfer by bill of sale was accompanied by immediate delivery and followed by an actual and continued change of possession of the thing transferred. Civ. Code, § 3440. The evidence shows without conflict that the tractor remained at the home of respondent and her husband, or in other places where the husband was using it, after the execution of the bill of sale, the same as before that event. The only exception to this evidence is found in the testimony of respondent that, although the tractor remained on the place, she herself drove it after that time on said premises. This did not amount to a change of possession. Where the transferor, subsequent to the delivery of a bill of sale of personal property, such as an automobile, continues to have the use and control thereof in the same manner and to a like extent as before, there is no such delivery as the law contemplates as requisite to constitute a valid transfer. *Tenant v. Cline*, 47 Cal. App. 461, 190 P. 1065. The fact that the transferor and transferee were husband and wife furnishes no reason why the provision of the statute should receive a construction different or more liberal than in cases of such transfer between strangers. *Blaney v. Cline*, 53 Cal. App. 686, 200 P. 751.

The judgment is reversed.

I concur: HOUSER, J.

I dissent: YORK, J.

83 Cal. App. 537

GILDE v. SCHUSTER. (Civ. 5648.)

District Court of Appeal, First District, Division 1, California. June 3, 1927.

1. Evidence ⇨397(2)—Extrinsic evidence is inadmissible to vary, modify, or contradict written contract, since all written negotiations are presumed merged therein (Civ. Code, § 1625).

Extrinsic evidence is not admissible to vary, modify, or contradict terms of written instrument by showing intention of parties different from that clearly expressed in the writing, since all previous negotiations and agreements are presumed merged in written contract, in view of Civ. Code, § 1625.

2. Contracts ⇨169—Where written contract is ambiguous, court must consult conditions, situation, and motives of parties to ascertain intention.

It is duty of court, when language of written contract is not clear, positive, and certain, to consult conditions, situation, and motives of respective parties for purpose of ascertaining intention.

3. Evidence ⇨461(1)—Parol evidence of circumstances and situation of parties to ambiguous contract may be considered to ascertain true intention, and fact issue may be presented.

Where there is latent ambiguity in written contract, or language will admit of more than one interpretation, or intention of parties is doubtful, parol evidence of circumstances and situation of parties may be considered to ascertain true intention, and in this matter issue of fact may be presented.

4. Evidence ⇨450(5)—Parol evidence held admissible, affecting intention of parties to written instrument acknowledging receipt of money, agreement to invest, and promise to repay (Civ. Code, § 1647).

Instrument signed by defendant, acknowledging receipt of money from plaintiff, agreement to invest it, and promise to repay in 30 days, is ambiguous, and parol evidence is admissible to ascertain true intention of parties by reference to circumstances under which it was made, in view of Civ. Code, § 1647.

5. Appeal and error ⇨1010(1)—Finding of trial court, supported by evidence, that ambiguous instrument was intended as promissory note cannot be disturbed (Civ. Code, § 1647).

Where evidence was sufficient to show that instrument stating receipt of money, agreement to invest it, and promise to repay was intended by parties to be promissory note, finding of trial court that it was one cannot be disturbed on appeal, in view of Civ. Code, § 1647.

Appeal from Superior Court, Alameda County; James E. Quinn, Judge.

Action by John Gilde against George A. Schuster for money had and received. Judg-

ment for plaintiff, and defendant appeals. Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

Breed, Burpee & Robinson, of Oakland (William M. Thornton, of Oakland, of counsel), for respondent.

TYLER, P. J. Action for money had and received. The complaint is in two counts. Under the first it is alleged that plaintiff, on December 26, 1923, lent to the defendant at his request the sum of \$1,000, which he promised to repay with interest 30 days after date. The second count alleges that defendant received said sum from plaintiff under a promise to repay the same within such time.

Defendant in his answer set up as a special defense to each of the two causes of action that the money was obtained to be loaned by him to the Great Western Auto Finance Company for the benefit of plaintiff, along with the sum of \$1,500 which defendant was lending to the company on his own behalf; that plaintiff's portion thereof had been so loaned to the company by defendant at the request of plaintiff and at his direction. Upon the trial, plaintiff, as part of his case, introduced in evidence a document signed by plaintiff and delivered by him to defendant in words and figures as follows:

"Oakland, Cal., December 26, 1923.

"Received from John Gilde one hundred dollars which I agree to invest at open interest rate for a period of thirty days, at which time \$1,000.00 plus open interest will be paid on demand.
Geo. A. Schuster."

The lower portion of the document contained the additional words and figures:

"I have in hand security of the value of \$5,000.00 on 3 notes, of which John Gilde has an interest of \$2,000.00. Geo. A. Schuster.

"P. S. These notes under date of 12/27/23."

All of the lower portion to the original document was written thereon by defendant two or three days subsequent to the delivery of the writing in its original form, under circumstances hereinafter referred to. It was contended by plaintiff at the trial that the agreement was a promissory note. Defendant, on the other hand, claimed that the document was a mere receipt and agreement to invest, and that defendant had loaned the funds to the Great Western Auto Finance Company in good faith, and that therefore he could not be held liable upon the instrument. The trial court admitted parol testimony for the purpose of interpreting the meaning of the writing. Under this ruling all of the surrounding circumstances of the transaction were brought out. It appears therefrom, in substance, that on or about December 23, 1923, defendant visited a barber shop conducted by plaintiff and in the presence of several em-

ployees stated that he could obtain 10 per cent. per month on automobile loans. Doubts were expressed as to his ability so to do and of the safety of loans of this character. Defendant informed plaintiff that he wanted to invest in a loan of \$2,500 and had only \$1,500, and requested that plaintiff loan him \$1,000 to make up the difference. Defendant assured plaintiff that the investment he intended to make was a perfectly safe one, as the company, in placing the loans limited the value of the automobiles to 50 per cent. of their value. Defendant then informed plaintiff that he would give him his personal note, but would not guarantee to pay him \$100 for the month's interest, but that it would not be less than \$70. After thinking the matter over, plaintiff advanced to defendant \$1,000 and received from him the instrument in question. On the following day defendant delivered to the Great Western Auto Finance Company the sum so obtained from defendant, together with \$1,500 of his own funds, and received from said company three promissory notes secured by three conditional sales contracts. After receiving the same, he met plaintiff and offered to turn over to him the security he had received from the finance company. Plaintiff suggested that he place them in his safe deposit box, which defendant did. At the same time defendant asked for his note and wrote thereon the addenda concerning the security which he held. Shortly thereafter the finance company became insolvent, and it developed that two of the promissory notes and conditional sales contracts were forgeries. In addition to these facts, one of the plaintiff's employees testified that defendant had requested a loan from plaintiff of the amount involved. Under this evidence the trial court found that plaintiff had loaned defendant the amount of the note, and it thereupon gave judgment for plaintiff without the usurious interest. It is conceded that, if parol evidence of the transaction was properly admitted, the case comes within the conflict of evidence rule, and must be affirmed, but it is urgently contended that, aside from the admission of parol evidence to explain the words "open interest," the right of the court to receive such evidence was not authorized, as the instrument in other respects was plain and unambiguous and amounted to nothing more than an agreement to invest.

[1-5] It is, of course, elementary that extrinsic evidence is not admissible to vary, modify or contradict the terms or provisions of a written instrument by showing the in-

tention of the parties to be different from what is clearly expressed in a writing; for, when the parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagement, all previous negotiations and agreements with reference to the subject-matter are presumed to have been merged in the written contract, and the whole engagements of the parties and the extent of their undertaking is presumed to be contained therein. This rule is so well established that it is needless to cite authorities in its support, for it has found expression in our Code, Civ. Code, § 1625. The rule is likewise universal, however, that it is the duty of a court, when the language used is not clear, positive, and certain, to consult the conditions, situation, and motives of the respective parties for the purpose of ascertaining their intention. Though the agreement of the parties be reduced to writing, if there be a latent ambiguity therein, or if the language of the writing will admit of more than one interpretation, or if the intention of the parties is left in doubt from a reading of the document, parol evidence of the circumstances and of the situation of the parties may be considered in order to ascertain their true intention; and in this matter an issue of fact may be presented to the trial court for its determination. *Los Angeles High School Dist. v. Quinn*, 195 Cal. 377, 234 P. 313; *Shelley v. Byers*, 73 Cal. App. 44, 238 P. 177. That the instrument in question is ambiguous to our minds admits of no doubt. This is evidenced by the argument of the very able counsel on both sides of the case. The very first portion thereof indicated that it is a receipt. The next portion states its purpose, and then follows an absolute promise to repay at a stated period with an indefinite rate of interest. It is difficult to imagine how so short an instrument could be more ambiguous. Having some features of a receipt and some of a promissory note, it was not only the right but the duty of the court to receive parol evidence to ascertain the true intention of the parties by reference to the circumstances under which it was made. *Payne v. Neuval*, 155 Cal. 46, 99 P. 476; Civ. Code, § 1647. Such evidence being abundant to prove that the parties intended the instrument to be a promissory note, the finding of the trial court that it was one cannot here be disturbed.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

83 Cal. App. 645

LOS ANGELES GAS & ELECTRIC CORPORATION v. ETIENNE. (Civ. 4560.)★

District Court of Appeal, Second District, Division 2, California. June 7, 1927.

Hearing Denied by Supreme Court Aug. 4, 1927.

1. Eminent domain ⇨200—Property owner has burden of establishing damages in condemnation proceeding.

In action to condemn realty, burden of proof is on property owner to establish damages.

2. Eminent domain ⇨202(1)—Testimony showing special affection for premises held properly excluded in measuring damages in suit to condemn property having market value.

In action to condemn realty shown to have market value, testimony to prove special affection for premises by owner held properly excluded as element in measuring damages.

3. Eminent domain ⇨240—Court's statement that experts whose figure was accepted as damage for land condemned alone testified to familiarity with other sales in vicinity did not show acceptance of other sales as measure of damages.

Where trial court accepted highest figure of plaintiff's experts as measure of damages for property condemned, court's statement that such experts alone testified to familiarity with actual sales in vicinity did not show that trial court based measure of damages solely on sale of other lands, but is to be construed as consideration by court of experts' knowledge of other sales for purpose of testing their knowledge as to reasonable market value of land.

4. Evidence ⇨558(8)—Knowledge by experts in condemnation proceeding of other sales in vicinity held admissible to test knowledge of market value.

In condemnation proceedings, knowledge of experts concerning sales of other lands in vicinity is admissible to test their knowledge and dependability of opinion as to reasonable market value of property in dispute.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Action by the Los Angeles Gas & Electric Corporation against Alexander Etienne. From the judgment, defendant appeals. Affirmed.

Frank C. Prescott, of Los Angeles, for appellant.

S. W. Guthrie, Paul Overton, and Samuel Poorman, Jr., all of Los Angeles, for respondent.

CRAIG, Acting P. J. The respondent was plaintiff in a condemnation proceeding by which it was sought to take a certain lot with two houses thereon belonging to the appellant. A trial was had at which three witnesses testified on behalf of the respondent,

and a like number on behalf of appellant. The court accepted the opinions of the former set of witnesses, and rendered judgment that the property be condemned, and that the price of \$5,670 be paid to the defendant and appellant herein. This appeal is taken from that judgment.

[1] Complaint is made of the rule in this state which places the burden of proof on the defendant to establish damages in an action of this character. However, appellant's counsel recognizes that such is the law, and we concur with him in that view.

[2] It is urged that the court should have received in evidence testimony which was offered, but denied admission, to prove the special affection for the premises which the owner entertained because of past associations and other considerations, such as that it held hallowed souvenirs of his deceased wife. Authorities are cited to the effect that, where property has no market value, the measure of damages is its value to the owner. This rule is inapplicable here, because all of the witnesses testified that the property had a market value. We are cited to no authorities, and are aware of none, holding that the testimony offered would afford a proper element in measuring damages in a condemnation suit.

[3] Finally, it is said that the trial judge excluded every consideration except one in deciding the case, and that the one consideration relied upon by him is not a proper basis for measuring damages in this character of actions. In announcing its decision the trial court stated, in part, as follows:

"The three witnesses for the plaintiff testified that they were familiar with the actual sales made within the past year or two. * * * Defendant's witnesses testified that they were not familiar with any sale at all within that length of time. * * * I don't see any other figure to use. * * * It will be the judgment of the court that the property be condemned at the price of \$5,670, the highest figure fixed by the plaintiff's experts will be allowed for it."

[4] From this it is argued that the court based its decision alone upon the testimony of the plaintiff's witnesses as to sales, and that the value of land being condemned cannot be determined by proof of what other land of similar locality in the district has brought upon a sale. The rule announced in Reclamation District v. Inglin, 31 Cal. App. 495, 160 P. 1098, is that, while the prices at which other sales of land in the same district were made cannot be used to fix the value of land in dispute, it is proper to ask questions on cross-examination concerning such sales and the prices paid "for the purpose of testing the witness' knowledge and impeaching his opinion." The object of testing the witness' knowledge is obviously to ascertain the dependability of his testimony on direct ex-

amination and of his opinion as to the reasonable market value of the property in dispute. In the instant case the court no doubt had in mind at the time of rendering its decision all of the testimony which had been submitted and which was proper for consideration in determining the damages to be assessed for appellant's property. Apparently, exercising its proper prerogative as a trial court in the weighing of testimony, it had resolved the matter down to a balancing and comparison of testimony of the expert witnesses. Under the authority above cited and numerous decisions referred to therein it was entirely within the rule to consider the knowledge displayed by these experts concerning sales of other lands in that vicinity "for the purpose of testing the witnesses' knowledge." We think that, construing, as we must, all intendments in favor of upholding the decision of the trial court, no different construction can be placed upon its quoted statement than this, and that, so construed, no error was committed, nor did any prejudice result to appellant's legal rights.

The judgment is affirmed.

We concur: THOMPSON, J.; MURPHEY, Justice pro tem.

83 Cal. App. 391

JOYCE et al. v. KRUPP et al. (Civ. 5489.)

District Court of Appeal, First District, Division 1, California. May 26, 1927.

1. Covenants ☞79(3)—Restriction may be enforced by lot owner only if it creates servitude burdening defendant's lot in favor of complainant's lot as dominant tenement.

That building restrictions in deed to lot in a tract restricted under a uniform plan of improvement may be enforceable as between lot owners, their insertion in deed must burden defendant's lot as servient tenement in favor of lot of complaining owner as owner of dominant tenement.

2. Covenants ☞103(2)—Under covenant limiting lot owner's right to enforce restrictions to owners in same block, nonobservance of restrictions in other blocks did not affect owner's right to enforce restrictions.

Where covenant in deed to lot in restricted tract gave one lot owner a right of action against others for violation of restrictions occurring on lots facing on same street and in same block only, lot owner's right to enforce restrictions against an owner in the same block who purchased lot with knowledge of restrictions was not affected by nonobservance of restrictions by owners in other blocks.

3. Covenants ☞103(2)—Defendants are entitled to show that lot owners suing to enforce building restrictions have themselves violated restrictions.

In lot owners' action to enforce building restrictions, defendant is entitled to show in

abatement of plaintiffs' action that plaintiffs themselves have violated restrictions.

4. Appeal and error ☞1048(7)—Sustaining objection to cross-examination of plaintiff, suing to enforce building restriction, as to whether he rented building in rear of his lot, not limited to whether building was occupied for residence purposes, held not reversible error.

In action to enjoin violation of uniform building restrictions and for damages, sustaining objection to defendant's question asked of plaintiff on cross-examination as to whether plaintiff did not have a building on the rear of his lot occupied by persons from whom plaintiff received rent, if offered to show that plaintiffs themselves violated restrictions by using such structure for residence purposes, held not reversible error, since question did not limit occupation of such building to residence purposes, and restriction permitted customary outhouses, including private stable or garage, which if not used by plaintiff could have been rented by him without violation of restriction.

5. Deeds ☞144(1), 157, 165—"Condition" is created by mutual agreement of parties binding on both, and breach forfeits estate.

A condition is a qualification annexed to an estate on the happening of which the estate is enlarged or defeated, and it is created by mutual agreement of the parties and is binding on both so that breach of condition works forfeiture of estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condition.]

6. Covenants ☞1—"Covenant" is agreement of covenantor only, and breach is ground for recovery of damages and injunctive relief.

A covenant is an agreement of the covenantor only, breach of which is merely ground for recovery of damages with right to equitable remedies of injunction restraining further violation and to abate structure illegally erected.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Covenant.]

7. Injunction ☞62(3)—Lot owners held entitled to sue for damages for violation of restrictions limiting use of property to private dwellings, and to enjoin such use.

Where deed contained a covenant restricting use of premises to first-class, private, one-family residences and a covenant and restriction providing that restrictions and conditions shall run with land and that breach thereof may be enjoined, abated, or remedied by appropriate proceedings, held that lot owners were entitled to maintain an action for damages for breach of covenant, and, irrespective of provisions to that effect, were entitled to equitable remedies.

8. Injunction ☞13—Proof of actual or substantial injury is not necessary to enjoin violation of uniform building restriction.

Proof of actual or substantial injury is not essential to entitle lot owners to restrain violation of uniform building restriction, but mere proof of violation of restriction is sufficient.

9. Covenants ¶103(2)—**Substantial injury must be shown to justify award of damages for violation of uniform building restriction.**

In action at law for damages for violation of uniform building restriction, substantial injury must be shown to justify award of damages.

10. Covenants ¶119—**Court properly considered nature and appearance of building violating uniform building restriction in determining whether injury occurred and amount thereof.**

In action for damages for violating uniform building restriction, limiting use of premises to first-class one-family private dwelling, court properly considered fact that defendant's building was not of a pleasing and beautifying appearance nor artistically constructed in determining whether plaintiff's property had been injured by the erection thereof and the amount of depreciation resulting.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Roy E. Joyce and another against Lena Krupp and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Erwin P. Werner, of Los Angeles, for appellants.

Ellis & Vickers, Kimpton Ellis, and Joseph W. Vickers, all of Los Angeles, for respondents.

KNIGHT, J. This is an appeal by defendants from a judgment awarding damages in an action based upon the alleged violation of certain building restrictions contained in a deed.

Plaintiffs and defendants, respectively, were the owners of lots numbered 366 and 367 in a tract of land which had been therefore subdivided and platted into a large number of blocks and lots and sold pursuant to a map thereof filed in the county recorder's office. All deeds thereto, including those conveying the lots to plaintiffs and defendants, contained the following uniform building restrictions: That until January 1, 1930, "the said premises shall be used for residence purposes only. That no building or structure whatever other than a first-class private residence, with customary out-buildings, including a private stable or garage, shall be erected, placed, or permitted on said premises, or any part thereof. * * * That only one such residence building shall be permitted on said lot at one time." The evidence shows that said restrictions were inserted in said deeds pursuant to a general plan or scheme for the improvement of said tract, and the court so found.

All of said deeds also contained a condition and covenant reading as follows:

"Provided, that a breach of any of the foregoing conditions shall cause said premises to

revert to the said grantor, its successors or assigns, each of whom, respectively, shall have the right to immediate re-entry upon said premises in the event of any such breach; and, as to the owner of any other lot in said tract fronting upon the same street and in the same block with the said premises, the foregoing restrictions and conditions shall operate as covenants running with the land, and the breach of any such covenant or the continuance of any such breach may be enjoined, abated, or remedied by appropriate proceedings by such grantor, its successors or assigns or by any such owners, their heirs, devisees, executors, administrators, successors or assigns, but by no other person."

Plaintiffs acquired lot No. 366 in June, 1922, and about a month later established their residence thereon. In the interim defendants started to erect the building in controversy on their lot No. 367, which adjoins plaintiffs' lot on the south in the same block and fronts on the same street. It was not until August 14, 1922, however, that the construction of said building had progressed far enough to enable plaintiffs to determine the style and character thereof, at which time they discovered that it was designed to be a duplex or two-family dwelling, and consequently violated said building restrictions. The next day, August 15, 1922, and again on August 16, 1922, plaintiffs notified defendants in writing of such violation, against which plaintiffs protested and demanded that defendants comply with the terms of their deed; but the latter, ignoring said written notices and demands, proceeded to and did complete said structure as originally planned by them, which resulted in plaintiffs instituting this action on September 30, 1922. The complaint sets forth two causes of action, the first being an equitable one under which injunctive relief was sought, both prohibitory and mandatory; the second was one at law for damages. Upon trial the injunctive relief prayed for was denied, but under the second cause of action plaintiffs were awarded damages in the sum of \$1,500, the trial court having found that "said building or structure erected (by defendants) upon said lot 367 is not a first-class private residence, but, on the contrary is, and is intended to be, a duplex or two-story residence which can be conveniently used by two families entirely separate and apart from each other"; and that the same "is an unsightly looking structure or building and * * * is so constructed and designed as to clearly show that it is a two-family dwelling or duplex house and not a first-class private residence"; and therefore violated the building restrictions contained in the deed (Walker v. Haslett, 44 Cal. App. 394, 186 P. 622), for which plaintiffs were entitled to damages in the amount of the depreciation caused thereby to their property.

Defendants make no claim that the above findings are not supported by the evidence, nor do they question the validity of said building restrictions, nor that of the condition and covenant upon which plaintiffs' action is founded; but they seek to defeat plaintiffs' right of recovery upon the ground that said building "restrictions were not being observed and complied with generally by the owners of the lots on the same street and in the same tract"; that plaintiffs purchased their lot in said tract with full knowledge of those conditions, and that consequently none of the remedies provided for in said covenant were available to the latter, citing *Bryant v. Whitney*, 178 Cal. 640, 174 P. 32.

[1, 2] We find no merit in the point. In order that such restrictions have force, not merely as between the original parties, but as between lot owners, it must appear that their insertion in the deed by the original grantor was, in effect, the creation of what amounts to a servitude, to the burden of which the lot of the defaulting owner is subjected as the servient tenement, and to the benefit of which the lot of the complaining owner is entitled as dominant tenement. *Werner v. Graham*, 181 Cal. 174, 183 P. 945; *McBride v. Freeman*, 191 Cal. 152, 215 P. 678. In other words, the right to enforce said restrictions by a lot owner depends upon the existence of a privity of estate or of contract between himself and the defaulting owner. As will be noticed, the covenant under consideration conferring upon one owner a right of action against another for a violation of said building restrictions limits his right of action to a violation occurring on a lot "fronting on the same street and in the same block" with his own, and is therefore unenforceable against those owning property in the same tract but beyond the boundaries mentioned, the reason being that as between himself and the latter owners no privity of estate or of contract exists. The evidence here shows without dispute that neither at the time plaintiffs acquired their lot nor at any later period was there any violation of such building restrictions on property situate within the same block and fronting on the same street as plaintiffs' property, except the violation committed by defendants. Therefore, even though it be conceded that there was a nonobservance of such restrictions by owners of lots situate in a portion of said tract against whom plaintiffs were given no right of action, such fact did not affect plaintiffs' right under the covenant to enforce the building restrictions against defendants and other owners with whom such privity existed. *Werner v. Graham*, supra; *McBride v. Freeman*, supra. The case of *Bryant v. Whitney*, supra, upon which defendants rely, is different from the instant case in many of its material facts, and, besides, it appears that "there was no privity

between the plaintiffs and the defendant.
* * *

[3, 4] Defendants assign as error a ruling of the trial court sustaining plaintiffs' objection to the following question propounded to one of the plaintiffs while under cross-examination: "Is it or is it not a fact that you, in the rear of your house, and on the same lot, you have a building there that is occupied by two people for which you collect rent? * * *" claiming that thereby they were denied the right to prove that plaintiffs themselves were violating said building restrictions. If it be assumed that in the absence of any affirmative allegation in the answer charging plaintiffs with having violated said building restrictions defendants were entitled to urge that defense, we think the court might well have allowed the question to be answered as a preliminary question, for defendants were entitled to show in abatement of plaintiffs' action, if such was the fact, that plaintiffs themselves had violated said building restrictions. *Bryant v. Whitney*, supra. But we are not prepared to say that the error, if any there was, in sustaining the objection to this particular question warrants a reversal of the judgment for the following reasons: At the time the objection was made, and in support thereof, plaintiffs asserted, and correctly so, we think, that if this particular question were answered in the affirmative, the fact would not be established thereby that a violation of the building restrictions had been committed, because, as they argue, under the terms of said deeds plaintiffs were entitled to build "customary outbuildings, including a private stable or garage," and, in the absence of any prohibitive clause to that effect, to rent the same provided such structures were not rented or used for residential purposes in violation of the restrictions in said deed that "only one such residence building shall be permitted on said lot at one time." If, therefore, defendants' intention in asking said question was to prove this latter condition, their purpose could easily have been made clear by reframing the question after objection thereto had been sustained, so as to make it less ambiguous; and failure to pursue the matter further after the grounds of plaintiffs' objection had been amplified by the comment mentioned fairly implies that defendants' only purpose in asking said question was to prove that plaintiffs had collected rent for the use of their garage or stable or other outbuilding as such, and was not to prove that any such structure was being utilized for residential purposes. In that state of the record we are of the opinion that the single ruling complained of, if erroneous, does not justify a reversal of the judgment.

[5, 6] Further contention is made that said deeds, having provided that "the breach of any such covenant or the continuance of

any such breach may be enjoined, abated or remedied by appropriate proceedings by such grantor * * * or by any such owners, * * * restricted plaintiffs to the exercise of the remedies mentioned, and consequently gave them no right of action for damages. We are unable to sustain this contention. In volume 9 of California Jurisprudence, at page 335, it is said:

"The distinction between conditions and covenants is a decided one and the principles applicable quite different. A condition is a qualification annexed to an estate, upon the happening of which the estate is enlarged or defeated, and it differs from a covenant, in that it is created by mutual agreement of the parties, and is binding upon both, whereas a covenant is an agreement of the covenantor only. A breach of a condition on which an estate is granted works a forfeiture of the estate, while the breach of a sole agreement of the covenantor is merely ground for the recovery of damages."

And in volume 7 of the same work, at page 778, it is again stated that

"The ordinary remedy for nonfulfillment of a covenant is that the delinquent party must respond in damages"—citing a large number of cases.

In addition to an action for damages, however, the complaining owner is entitled to invoke equitable remedies to enjoin further violation and to abate the structure illegally erected (*Walker v. Haslett*, supra; *Pomeroy*, *Equitable Remedies*, vol. 1, p. 283; 7 Cal. Jur. p. 779); and where, as here, both equitable relief and damages are sought in separate causes of action the defendant may not complain when the court, as it did in the instant case, denies the former and grants the latter. *Alderson v. Cutting*, 163 Cal. 503, 126 P. 157, Ann. Cas. 1914A, 1.

[7] It will be observed that the deeds under consideration contained both a condition and a covenant, the latter running with the land and inuring to the benefit of said owners. Therefore, under said covenant, plaintiffs were allowed to maintain an action for damages for the breach of said covenant, and, regardless of any provisions to that effect inserted in said deeds, were also entitled to the exercise of equitable remedies. The insertion in said deeds of the provision purporting to confer upon owners the right to exercise equitable remedies was apparently intended to grant additional and not to restrict their remedies, although such provision was obviously unnecessary in view of the fact that in the absence thereof equitable remedies would have been available.

[8, 9] Contrary to the allegations made in defendants' answer, the court found that defendants' building 'is not of a pleasing and beautifying appearance and is not of constructive value and a benefit, and is not a

credit and advantage to the property of plaintiffs and every other property within said immediate vicinity * * * and is not artistically constructed"; and defendants claim that the court erred in considering the facts thus found as an element of damage. Where equitable relief is sought, proof of actual or substantial injury is not essential, the establishment of a violation of a uniform building restriction being all that is necessary to entitle a complaining owner to relief (*Walker v. Haslett*, supra); but in an action at law, substantial injury must be shown to justify an award for damages (*Alderson v. Cutting*, supra).

[10] It would therefore appear that the facts embodied in the foregoing finding were rightly considered by the court in determining whether or not plaintiffs' property had in fact been injured by the erection of defendants' building, and, if so, the amount of depreciated value it had sustained as a result thereof. The asserted waiver to which defendants call attention was entirely foreign to the question of damages, having related to the allegation in plaintiffs' complaint that defendants' building was constructed in violation of an additional building restriction contained in said deeds which provided that no residence shall be constructed within two feet of either side line of the premises.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

MAHONE v. THOMPSON. (Civ. 4670.)

83 Cal. App. 561

District Court of Appeal, Second District, Division 2, California. June 3, 1927.

1. Contracts ⇨322(4)—Evidence held not to support finding that contractor for construction of building failed to properly nail hardwood floors.

In owner's action against contractor for damages for failure to properly construct building in accordance with contract, evidence held insufficient to support finding that defendant failed to nail down hardwood floors properly or in good and workmanlike manner.

2. Contracts ⇨322(4)—Evidence held to support finding that windows leaked because of poor workmanship by contractor constructing them.

In owner's action against contractor for failure to properly construct building in accordance with contract, evidence held to support finding that windows leaked because of poor workmanship.

3. Contracts ⇨322(4)—Evidence held to support finding that outside wall of building was not constructed in workmanlike manner or so as to be weatherproof.

In owner's action against contractor for damages for failure to properly construct build-

ing in accordance with contract, evidence *held* to support finding that outside wall was not constructed in a good and workmanlike manner or so as to be weatherproof.

4. Contracts ⚡322(4)—Evidence held to support award of damages against contractor for cracks in interior plastering of building.

In owner's action against contractor for failure to properly construct building in accordance with contract, evidence *held* to support award of damages for crack in interior plastering, alleged to have resulted because it was not done in good, workmanlike manner.

5. Contracts ⚡322(4)—Evidence held to sustain finding that contractor constructing building delayed construction beyond period named in contract.

In owner's action against contractor for damages for failure to construct building in accordance with contract, evidence *held* to sustain finding of delay in completion beyond period named in contract.

6. Damages ⚡122—Rental value held properly allowed for contractor's failure to complete building within period named.

Allowance of rental value of premises as damages for delay in failing to complete construction within period named in contract *held* proper.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Anna R. Mahone against Joseph Thompson. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Charles H. Adkins and E. C. Bowen, both of Los Angeles, for appellant.

Earl Curtis Peck, of Los Angeles, for respondent.

JOHNSON, Justice pro tem. This is an action growing out of a building contract made March 17, 1920, between plaintiff as owner and defendant as contractor, which plaintiff asserted, and the court found, had not been duly performed by defendant. Judgment was rendered in plaintiff's favor for \$815 as damages, and from that judgment defendant appeals.

Plaintiff's amended complaint alleges the making of the contract for the erection of a residence building, all the work of which, except heating and painting, was to be done by defendant according to plans and specifications of Frank O. Eager, architect, for the sum of \$5,200. The contract provided that the work should be completed within 120 working days. Plaintiff avers also that defendant failed to construct the building according to the plans and specifications in numerous particulars; further, that completion was delayed, and that plaintiff has suffered damages in the sum of \$3,000. In reference to some, but not all, of the defects specified, the court found that defendant had not complied with his contract, and particu-

larly that he failed to nail down the hardwood floors properly, or to construct in workmanlike manner the windows and outside wall, or to plaster the house properly. In each of these matters the court assessed separately the damages sustained by plaintiff, in amounts aggregating \$230. The court further found that there was delay in completion of the building beyond 120 working days, the time allowed by the contract, and that the contract was not in fact completed until April 1, 1921. For the delay, the court fixed the damages at \$585. Judgment having been rendered against him for a total of \$815 and costs, defendant made a motion for a new trial, and, upon denial of the motion, appealed from the judgment.

Defendant contends that the evidence is insufficient to support the court's findings as to either the defects or the delay.

[1] In regard to the hardwood floors, the court found that defendant failed to nail them down properly or in good and workmanlike manner, and assessed the damage at \$60. The defendant contends that the evidence shows that these floors were properly nailed, but that they buckled because the plans prepared by plaintiff's architect did not provide sufficiently for ventilation. Defendant's contention on this point is correct. Plaintiff testified that the buckling occurred in the dining room and in part of the living room at the north side of the house, where there was no ventilation, and that this lack of ventilation was the cause of the buckling. Likewise, Irwin Beatty, a building contractor who was called by plaintiff as a witness, testified that the floors were laid right, but that the buckling was due to lack of ventilation on the north side of the house, and that any floor, no matter how well nailed, would buckle if there were not ventilation beneath. He put the expense of repairing the floor at \$60 to \$65; and the court in its finding evidently adopted his estimate. Defendant testified that he followed the plans and specifications, which did not call for ventilators on the north side, and that the floors were nailed in the usual way at intervals of eight inches. He did not see the floors after they buckled, and the court would not allow him to express an opinion as to the cause of the buckling. The contract and specifications are included in the record on appeal, but not the plans. The testimony of the witnesses mentioned comprises all the evidence in relation to the hardwood floors, and, such being the state of the record, it is apparent that there is no support for the court's finding that defendant failed to nail down the hardwood floors properly or in good and workmanlike manner. The allowance of \$60 for this item is therefore not sustainable.

[2] As to the windows, the court found that they leaked because of poor workmanship. The defendant contends, however, that

the leaks were due to defects in the architect's plans. Plaintiff testified that the leaks occurred where the frames were set into the hollow tile, and that for want of proper filling beneath the frames, openings were left through which water leaked into the interior and damaged the walls and wallpaper. The witness Irwin Beatty corroborated plaintiff's statement, and placed the damage at \$75, as found by the court. There was some conflicting testimony on behalf of the defendant, but the testimony adduced by plaintiff is sufficient to support the court's finding.

[3] Concerning the outside wall, the finding of the court is that the wall was not constructed in a good, workmanlike manner, or so as to be weatherproof, in consequence of which water leaked through, to plaintiff's damage in the sum of \$75. The specifications prescribed the mixture for the outside walls and the finishing coat, the component parts of which were to be combined "in the proper proportions to make weatherproof." Plaintiff testified that the outside wall showed small cracks all over the house, that water came in everywhere, and that the plaster was not weatherproof. Her witness Irwin Beatty testified that there were spots in different places where the water had soaked through the outside walls and had damaged the wallpaper in two rooms; and that this was due to seepage through the tile, stucco, and plaster. He fixed the expense of proper waterproofing at \$75, and this amount was accepted by the court in its finding. The defendant in his testimony did not deny that the walls were not waterproof. He said merely that he used the material specified, and put the mixture on with the usual thickness and in the usual manner. Similar testimony was given by the plasterer who did the work; but he said also that leaks might be caused by shrinkage of green lumber. The testimony on behalf of the defendant does not afford sufficient ground for disturbing the court's finding.

[4] Another defect specified was in the interior plastering, which, the findings state, cracked, owing to the fact that the plastering was not done in good, workmanlike manner. The damage awarded for this item is \$20. Plaintiff testified to cracks throughout the house, and spoke particularly of a crack about one-eighth of an inch wide in some places, which ran the entire length of the house through the ceiling of several rooms, from east to west. She testified also that the plastering had popped in various rooms. Concerning the large crack, the witness Beatty said that the only explanation he could give was that there was faulty construction, either in using damp lumber or in some other way, whereby the wood partition was caused to start away from the tile and the outside wall. He said also that in a house properly built the plastering might check, but

not crack open to the extent of an eighth of an inch. He testified further that he noticed what he called blisters in some of the unpapered rooms, and that such blisters or popping should be fixed in order to make a first-class job. Defendant admitted that there were blisters and cracks, but stated that the plaster was mixed and applied in the usual manner. In this he was corroborated by the plasterer; but neither that witness nor the defendant himself attempted any explanation of the large crack running through the entire length of the house. The court's award on this item finds ample support in the evidence.

[5, 6] The only remaining item is that of the allowance for delay in completion beyond the period of 120 working days named in the contract. By amendment to the complaint made at the trial, plaintiff alleged that defendant did not complete his contract until April 1, 1921; and the finding accords with this averment. Defendant contends that he completed his work by August 28, 1920, but admits that the plumbing and electric wiring, which were included in his contract, still remained to be done at that time, and that thereafter certain finishing work would be required. His testimony as to the actual time of completion is of the vaguest character, his memory being so weak that he was unable to state even the month. There was never any certificate of acceptance; but plaintiff testified that the architect came to her in November, 1920, with bills for materials to be paid, and that she refused to accept the house as completed and made objection to the leaky walls and windows. She testified further that when she examined the house she found that the thresholds were not in, the front door was without hinges, and the garage doors without lock, and other hardware which she had furnished was not in place. It appears that defendant did some further work in December, but still there remained carpenter work to be performed; and, after waiting until March, plaintiff hired other workmen to do what defendant had left undone, and these men continued work until some time in April. Plaintiff testified that she did not enter into actual occupancy until some months later. The court accepted the plaintiff's testimony and, as damages for delay, allowed the rental value of the premises to April 1, 1921, at the rate of \$75 per month, which amount, according to uncontradicted testimony, represents the fair rental value at the time. The evidence justifies the action of the court in respect of the delay in completion.

The amount of \$60 awarded for the hardwood floors should be deducted from the judgment, reducing it to \$755; and, as thus modified, the judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

83 Cal. App. 635

BALDWIN v. PACIFIC AUTO STAGES, Inc.**BERNZOTT v. SAME.**

(Civ. 5798.)

District Court of Appeal, First District, Division 2, California. June 7, 1927.

- 1. Appeal and error** $\S$ 1010(1)—Findings that defendant was not negligent and that both plaintiffs were negligent, supported by evidence, must be affirmed.

Where only ground urged on appeal in personal injury actions was that evidence was insufficient to support findings that defendant was not negligent and that both plaintiffs were contributorily negligent, if there was any competent evidence in the record to support either finding, the judgment must be affirmed.

- 2. Highways** $\S$ 184(2)—Evidence held to sustain finding of negligence in driving automobile on left side of highway and into defendant's motorbus.

In action for damages from collision of automobile with defendant's passenger bus on a public highway, evidence held to sustain finding of plaintiff driver's negligence in parking the automobile along highway with lights out and suddenly flashing lights after car was driven onto the left side of the highway and into defendant's approaching bus.

- 3. Negligence** $\S$ 88—Where plaintiffs' intoxication was direct cause of accident, rule that intoxication does not constitute contributory negligence is inapplicable.

In action for personal injuries, where it was claimed that plaintiffs' intoxication not only contributed to accident, but was direct cause of it, rule that intoxication under certain circumstances does not constitute contributory negligence is inapplicable.

Appeals from Superior Court, City and County of San Francisco; H. D. Burroughs, Judge.

Separate actions by Margaret L. Baldwin and by William Bernzott against the Pacific Auto Stages, Inc. From judgments for defendant, plaintiffs appeal. Affirmed.

Walter E. Dorn, of San Francisco, for appellants.

John Ralph Wilson, of San Francisco, for respondent.

NOURSE, J. The plaintiff Bernzott sued for damages to his automobile caused by a collision with a passenger bus operated by the defendant on the public highway near San Carlos. The plaintiff Baldwin, a passenger riding with Bernzott at the time of the collision, sued for personal injuries. Both causes were consolidated for trial and were heard on the same evidence. The trial was had before the court sitting without a jury, and resulted in judgments for the defendant in both cases.

The plaintiffs have appealed on a joint bill of exceptions.

[1] The only ground urged on the appeal is that the evidence is insufficient to support the finding that the defendant was not negligent and the finding that both plaintiffs were guilty of contributory negligence. Either finding would support the judgments, and, under the well-known rule, if there is any competent evidence in the record to support the findings, the judgments must be affirmed.

[2] The plaintiff Bernzott was driving a Buick car up from San Jose going toward San Francisco at about 8:30 p. m. on November 19, 1920. With him at the time were his brother, the brother's wife, and Mrs. Baldwin. As they neared San Carlos, an autobus, operated by the defendant corporation and traveling southerly from San Francisco, collided with plaintiff's car near the middle line of the highway. Mrs. Baldwin suffered some personal injuries caused by glass flying from the broken windshield. The other occupants of the plaintiff's car were not injured. Both complaints charged the defendant with negligence upon the specific ground that the autobus was being operated on the wrong side of the highway. The trial court found that this allegation was not true, and also found that, at the time of the accident, the plaintiff's car was driven on the left, or wrong, side of the highway.

Evidence was offered to show that, as the bus was traveling south, it was preceded immediately by a Cole sedan and by a Ford, which suddenly pulled up and stopped near the right-hand outer edge of the highway; that the Cole swung sharply to the left to pass the Ford, and the driver of the bus followed the Cole to a point near the middle of the highway; that the Buick, driven by Bernzott, suddenly flashed on its lights and approached from the left-hand side of the highway, running diagonally across the highway until struck by the autobus. It was shown that when the collision occurred the autobus was alongside of the parked Ford; that it had been compelled to turn into the middle of the highway to avoid a collision with the Ford; that the other side of the highway was clear and free of all traffic; and that the collision might easily have been avoided if the plaintiff Bernzott had been driving in a careful and prudent manner.

Testimony was offered that automobile tracks were seen from plaintiff's car to a point off his right-hand side of the highway; that both plaintiffs were intoxicated at the time of the collision; that the plaintiff Bernzott was in such a bad state he was taken to the Redwood City jail and confined for the night; and that Mrs. Baldwin admitted to witnesses at the time that she had been drinking.

It was the theory of the defense that plaintiffs had parked their car off the right-hand

side of the highway with the lights out for "another little drink"; that as it was driven onto the highway the lights were suddenly flashed on and the car was driven into the approaching bus. In support of this theory testimony was offered to show that all the members of plaintiff's party had been drinking, that after the collision one of them hid a bottle of wine near a telegraph pole besides the highway, and that this was recovered and turned over to the traffic officer.

[3] On this appeal the plaintiffs point out that all the testimony tending to prove intoxication was denied, and they insist that we should rule that the preponderance of the evidence is with them. This was the function of the trial court, and, from a full examination of the record, we are satisfied that it made no mistake in its finding. Cases are cited to the point that intoxication under certain circumstances does not constitute contributory negligence. The rule is not applicable to a case where, as here, it is claimed that the intoxication not only contributed to the accident, but was the direct cause of it.

Judgments affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

83 Cal. App. 516

GRAHAM v. REED et al. (Civ. 4843.)★

District Court of Appeal, Second District, Division 1, California. June 2, 1927.

Hearing Denied by Supreme Court Aug. 1, 1927.

1. Public lands §54(9)—Patent from state held not subject to collateral attack, on ground land was mineral, by one subsequently establishing placer location (Act Cong. March 3, 1853 [10 Stat. 244]).

In action to quiet title, patent from state issued in 1890 held not subject to collateral attack by one claiming under placer location established in 1921, on ground that state did not acquire title; land being mineral, in view of Act Cong. March 3, 1853 (10 Stat. 244), granting land to state.

2. Public lands §54(9)—Finding that lands claimed under patent from state, which was not subject to collateral attack, were mineral, held void.

Where patent from state was not subject to collateral attack, in action to quiet title, on ground that, land being mineral, state never acquired title, finding that lands were mineral since time of grant from national Government to state was beyond court's power, and void.

3. Taxation §697(6)—One acquiring quitclaim deed from owners of undivided two-thirds of land sold for taxes held entitled to redeem whole; "party in interest" (Pol. Code, §§ 3780, 3817).

Where land was sold to state for taxes, one procuring quitclaim deed from persons holding undivided two-thirds may redeem whole of land, as against one claiming under placer location

established after sale for taxes, since grantee in quitclaim deed having interest at time of redemption was "party in interest," within Pol. Code, § 3780, in view of section 3817.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action to quiet title by John Graham against George Reed, also written George Reid, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John L. Campbell, of San Bernardino, for appellants.

Chas. L. Allison, of San Bernardino, for respondent.

McLUCAS, Justice pro tem. Plaintiff brought suit to quiet title to certain portions of section 36, township 6 north, range 4 west, San Bernardino base and meridian, situated in San Bernardino county. Judgment was rendered for plaintiff, and defendant appeals therefrom.

Plaintiff claims title through mesne conveyances from Charles S. McDuffee, patentee from the state of California, under date of April 14, 1890, and also as a redemptioner from a tax sale to the state of California for delinquent taxes for the year 1915; said redemption being made on the 17th day of March, 1923. Defendant claims title by virtue of a placer location under date of February 2, 1921.

[1] The chief question involved in the decision of this case is whether the patent to McDuffee is subject to collateral attack. Appellant contends that he is entitled to a reversal of the judgment and an order directing judgment to be entered upon the findings quieting his title to his said placer mining claim. In support of his contention appellant calls attention to the findings of the court and the allegations of the complaint as follows. Finding II of the court reads:

"That on the 3d day of March, 1853, and continuously ever since and on said 14th day of April, 1890, when said patent was issued to the said Charles S. McDuffee, the lands included in said section 36 were mineral in fact, and at the time of the survey of said lands and the return thereof by the United States, said lands were mineral and well known to be so."

As this appeal is upon the judgment roll alone, it does not appear upon what evidence the trial court based its finding that on the 3d day of March, 1853, and ever since, said lands were mineral in fact and were well known to be so at the time of the survey of said lands and the return thereof by the United States. In so far as disclosed by the findings, the placer claim of the defendant was not located until the 2d day of February, 1921. No other facts appear in the find-

ings to indicate that said lands were well known to be mineral at the time of the survey and the return thereof by the United States. Paragraph IV of the second cause of action in the complaint reads:

"That said lands and premises are valuable only for the lime rock and lime ore therein contained; that the surface of said lands is barren and unproductive and has no value for agricultural purposes and yields no income whatsoever except the income derived from the mining, extracting and sale of lime rock and lime ore therein contained."

Appellant concedes that said patent is not subject to collateral attack unless, first, the state had no title; second, it is absolutely void upon its face; third, the issuing thereof was without authority; or, fourth, was prohibited by statute; citing *Patterson v. Winn*, 11 Wheat. 380, 6 L. Ed. 500, and *Doll v. Meador*, 16 Cal. 324, 325. Appellant claims that the title to the land in question did not become fixed and absolutely vested in the state of California at the time of the survey and the return thereof by the United States, and that said title did not so rest in the state of California at the date of the issuance of said patent on April 14, 1890. As recited in the patent, whatever title was possessed by the state at the date of the issuance of the patent was held by virtue of the Act of March 3, 1853 (10 Stat. 244), granting to the state of California sections 16 and 36 of each township in said state for school purposes. Section 6 of said act reads as follows:

"And be it further enacted, that all the public lands in the state of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the state for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the Pre-emption Laws of 4th September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the state of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed."

In support of his argument appellant cites the case of *Ivanhoe Mining Co. v. Keystone Consolidated Mining Co.*, 102 U. S. 167, 26 L. Ed. 126, where the court interpreted the statute hereinbefore mentioned as follows:

"It follows from the finding of the court and the undisputed facts of the case, that the land in controversy being mineral land, and well known to be so when the surveys of it were made, did not pass to the state under the school section grant."

In the foregoing case, however, the facts are to be distinguished from those in the instant case. In that case plaintiff asserted title to the land in controversy under a patent from the state of California and the defendant under patents from the United States. The trial court found the land to be mineral, and that the patent of the United States was issued to defendant for three several mining claims—one located in 1851, one in 1853, and one in 1863; that the original locators of said claims and their grantees have held undisputed possession thereof ever since, and by such possession and the working of said mines the possessory title was vested in defendant at the time it filed its application for said patent in the land office of the United States on January 6, 1871, unless the state of California had acquired title to section 36 by grant from the United States. On the 18th day of June, 1870, application was made to the state authorities to purchase the land on which these claims were located, and a state patent was issued to plaintiff's vendee on October 3, 1872. The township in which the land lies was surveyed in the field in March, 1870, the survey approved September 3, 1870, and the plat filed in the United States land office at Sacramento October 7, 1870. Within three months after this latter date the application of the defendant was made for patent for the three mining claims and the patents were issued July 14, 1873.

On the other hand, in the present case it does not appear from the findings that the defendant ever received a patent from the United States, but merely that on the 2d day of February, 1921, 30 years after the state patent was issued to plaintiff's predecessor in interest, the defendant located placer mining claims on said land by posting thereon a notice of location, and that a copy of said location notice was recorded in the office of the county recorder of San Bernardino county in 1921. In the preceding case the claims were located about 20 years before the state patent was issued to defendant. In the case at bar it does not appear at what time the survey of said lands or the return thereof was made by the United States. Nor does it appear that the defendant ever made application for patents of the mineral claims from the United States.

The question as to whether a land patent issued by the state is subject to collateral attack is ably discussed in *Saunders v. La Purisima Gold Mining Co.*, 125 Cal. 159, 57 P. 656. The facts in that case are in many respects very similar to the facts in the present case. In that case defendants located a mineral claim on certain lands 6 years after the state patent therefor had been issued to plaintiff's predecessor in interest. On the trial defendants offered "to prove that the land in controversy—namely, the north extension of the La Purisima quartz mining

claim—was expressly excepted from the grant to the state of California by the act of Congress approved March 3, 1853, as the same is mineral land." Plaintiff's objection to the offer was sustained and thereafter the court granted a new trial on the ground that the court erred in sustaining the objection to defendant's offered evidence as to the mineral character of the land in controversy. Plaintiff appealed from the order granting a new trial. In reversing the order for a new trial, the Supreme Court said:

"The respondents rely upon *Hermocilla v. Hubbell*, 89 Cal. 5 [26 P. 611], in support of the order of the court granting them a new trial. Although the facts in that case are different from those in this, still it must be confessed that said case furnishes support to the contention of respondents. The opinion seems to rely upon *Mining Co. v. Consolidated Min. Co.*, 102 U. S. 168 [26 L. Ed. 126], and it is said with reference thereto: "That decision is controlling and must be followed here. The question then remains, Were the disputed premises at the time of the grant mineral land—that is, known to be valuable for minerals?"

"The facts as found in *Hermocilla v. Hubbell*, supra, were that during the year 1850, and continuously ever since, and when the said patent was issued on the 10th day of December, 1870, and at the time of the survey of said lands (being a portion of the sixteenth section), 'they were and have been, and now are, known to be public mineral lands of the United States, having therein known valuable mineral deposits.' Whereas, in the United States case, referred to by the Commissioner as controlling, and to be followed by this court, the facts were that there were three mining claims on the land in controversy—one located in 1851, another one in 1853, and the other in 1863, the last being 7 years before the public survey of the tract, which was in 1870. The mining patent was applied for on these locations nearly 2 years before the state patent was issued and subsequently and within a year thereafter the United States patent was issued on said mining locations. Hence the contest in that case was between two conflicting patents. Whereas, in *Hermocilla v. Hubbell*, supra, the contest was in the nature of a collateral attack upon a state patent, on the ground that the land was mineral land. It is said in the latter case: "The question then remains, Were the disputed premises at the time of the grant mineral lands—that is, known to be valuable for mineral lands?" But another and equally important question seems to have been overlooked by the court in that case, and that is, By whom and at what time are the facts to be ascertained and determined as to the character of the land at the time of the grant, whether mineral or non-mineral? And another question of equal importance is as to the effect of a patent, issued by competent authority, purporting to convey such land. The decisions of the Supreme Court of the United States upon both of these questions are so numerous and so uniform (and the decisions of this court are in the same line, with few exceptions) that both questions now ought to be considered well settled. The first is that by the laws of Congress providing for the patenting of certain public lands, upon the as-

certainment of certain facts, the proper officers of the land department of the general government have jurisdiction to inquire into and determine those facts; that is, if a large body of public lands be subject to sale or other disposition, but subject to reservation of such parts as may be found to be of a particular character, as swamp or mineral land, the land department has jurisdiction to determine the character of any part thereof, and its decision is conclusive. In *Steel v. Smelting Co.*, 106 U. S. 447 [1 S. Ct. 389, 27 L. Ed. 226], Mr. Justice Field, speaking for the court, says: 'We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlooked our decisions on that subject. That department, as we have repeatedly said, was established to supervise various proceedings whereby evidence of a title from the United States to portions of the public domain is obtained, and to see that the different requirements of acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of a class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceeding for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.'

"In this case it was shown that the land in question was surveyed and sectionized—whereas the act of Congress directed that in case of mineral lands it should not be sectionized—and that the plat of survey showing the land to be agricultural land, in other words, not mineral, was returned and properly approved. As a further measure of precaution, and to allow abundant opportunity for a full investigation and ascertainment of the character of the land, the disposal of the same was suspended for a number of years, and, finally, it having been determined that it was of the character of land subject to be granted to the state, a certificate was issued by the proper United States authorities to the state of California, certifying its right to the section of land in question under the grant of 1853. The state's patent thereupon issued to the plaintiff's grantor long prior to the intrusion of the defendants for the purpose of mining. Under the rule just cited, this concluded the investigation as to the character of the land, except on a direct proceeding to set aside the patent on the ground of fraud or other invalidity."

In *Gale v. Best*, 78 Cal. 235, 20 P. 550, 12 Am. St. Rep. 44, the plaintiff claimed under a patent to a tract of land under a railroad grant. The defendants claimed by right of possession, upon the ground that it was mineral land, and that all mineral lands are reserved in the grant of Congress to said railroad company. In affirming the judgment, the Supreme Court said:

"Our opinion is that, where a patent issues for public land under a law which provides for

its disposal as agricultural land, either to a railroad company or to pre-emption or homestead claimants, and there is no reservation in the law except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural; and afterward, in an action in a court of law, it is not competent to reopen the question of the character of the land. The opposite view would render the titles to a large region of California now rapidly filling up with agricultural settlers unstable, insecure, and almost worthless. It would affect, also, those holding through patents under the pre-emption and homestead laws, for mineral lands are exempted from the provisions of those laws. The theory of that view is that, if the land previously patented as agricultural can at any time be shown to be in fact mineral, then the title to it never passed from the United States, but it had always remained a part of the public domain; and as no statute of limitations runs against the government, the insecurity of the title under the patent would be perpetual, and an attack upon it could be made as successfully 100 years hence as now. Such, in our opinion, is not the law."

The foregoing case was cited and approved in *Dreyfus v. Badger*, 108 Cal. 58, 41 P. 279, where the plaintiff relied upon a state patent issued on state lieu school lands, and the defendant as a pre-emptor antedating his right as such prior to the patent by the state. In affirming the judgment of the lower court, the Supreme Court says:

"A defendant may defeat an action of ejectment by showing that plaintiff has no title. But where a patent, regular on its face, has been issued by the government (federal or state) for land which it owns, under a law providing for the disposal of the land patented upon the ascertainment of certain facts, the officers of the land department of the government have jurisdiction to determine such facts, and the issuance of a patent is, upon collateral attack, a conclusive declaration, as against all claiming under said government, that the facts have been found in favor of the patentee. 'And this rule applies to the determination of the particular character of the land which is the subject of the patent.' This was expressly held in *Gale v. Best*, 78 Cal. 235 [20 P. 550] 12 Am. St. Rep. 44, where we alluded to the authorities at some length, and, basing our conclusion on decisions of the Supreme Court of the United States in *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636 [26 L. Ed. 875], *Steel v. St. Louis, etc., Co.*, 106 U. S. 447 [1 S. Ct. 389, 27 L. Ed. 226], and *French v. Ryan*, 93 U. S. 169 [23 L. Ed. 812], we declared the law to be as above stated. It would be useless to here repeat the views there expressed. See, also, the late case of *Barden v. North. Pac. R. Co.*, 154 U. S. 288 [14 S. Ct. 1030, 38 L. Ed. 992], and *Irvine v. Tarbat*, 105 Cal. 237. These cases involved patents of the general government; but, upon principle, the rule applies with equal force to a patent of the state government. Moreover, it has been so expressly held by this court in *Doll v. Meador*, supra, where it was decided that 'the patent is the record of the state, that the land was sub-

ject to location under the grant of the United States, and has been located,' and in *Ah Yew v. Choate*, 24 Cal. 562, where it was held that the patent is also 'a record of the judgment of the state, by its officers duly appointed for that purpose, that the conditions and characteristics of the land were not such as to constitute it mineral within the meaning of the provisions of the statute.'" etc.

Worcester v. Kitts, 8 Cal. App. 181, 96 P. 335, is a case in which the question of collateral attack on state patents was again considered. The court said:

"The sole question in the case is, Are the state patents, under which plaintiff claims, conclusive as to the character and condition of the land? Concededly, the learned trial judge decided the case upon the authority of *Saunders v. La Purisima, etc., Co.*, 125 Cal. 159, 57 P. 656. In that case the land had been surveyed in 1870 and the survey approved and official plat filed. In this official plat the section was marked and returned as agricultural land and unoccupied. In 1884 the United States certified, through its proper officer, to the state of California, that the land was unoccupied, and that there were no valid claims thereto adverse to the state. The land had been surveyed and returned by the government as agricultural in character, and so certified by the government, 20 years before the state sold it, and the purchaser had occupied it for 6 years before any claim was made that it was mineral. The case referred to decided that it was too late to inquire into the character of the land, and that upon the facts as shown the patent was a conclusive determination of the question. The facts here are wholly different. Without stating all the allegations of the answer, it was shown that most of the land in question was mineral land, and well known so to be before the grant to the state; that when it was surveyed in 1867 some of the land was occupied and being mined for gold under mineral locations; that the survey and report and plat filed in the United States land office showed the land to be mineral; that subsequently many mineral locations were made and were being worked up to the time this action was commenced and after the patents issued; that the land never was certified to the state as nonmineral, or agricultural, and has never been listed to the state as school land or at all. The case, then, is altogether different in its facts from the facts in *Saunders v. Purisima, etc., Co.*, 125 Cal. 159, 57 P. 656, and it is contended, therefore, that it should not be governed by the latter case. But this is a collateral attack upon a state patent, which takes it out of the rule in *Hermocilla v. Hubbell*, 89 Cal. 5, 26 P. 611, relied on by appellants. Besides, that case was practically overruled in *Saunders v. La Purisima, etc., Co.*, 125 Cal. 159, 57 P. 656, and it was therein pointed out that a very important question was overlooked in *Hermocilla v. Hubbell*, 89 Cal. 5, 26 P. 611, namely, 'By whom and at what time are the facts to be ascertained and determined as to the character of the land at the time of the grant, whether mineral or nonmineral? And another question of equal importance is as to the effect of the patent, issued by competent authority, purporting to convey the land.' The court proceeds to

show, by adopting the rule laid down in *Dreyfus v. Badger*, 108 Cal. 58, 41 P. 279, and other cases quite fully commented upon, that 'where a patent, regular on its face, has been issued by the government (federal or state) for land which it owns, under a law providing for a disposal of the land patented, upon the ascertainment of certain facts, the officers of the land department of the government have jurisdiction to determine such facts, and the issuance of a patent is, upon collateral attack, a conclusive declaration, as against all claiming under said government, that the facts have been found in favor of the patentee. And this rule applies to the determination of the particular character of the land which is the subject of the patent.' In the *Dreyfus* Case the issue was between a state patent to lieu land and a claim under the pre-emption and homestead acts. Mr. Lindley states that 'the land department of the government, in recent years at least, by a uniform line of decisions, has held that mineral lands did not pass to the state under the school grants.' 1 Lindley on Mines, § 136. Still, the question must be determined by appropriate proceedings and may not be by collateral attack. Strong as the facts are as set forth in the answer, and conclusive as they might be if shown to be true, on a direct attack, we do not think they can be advanced in this action to overthrow the state patent. *Saunders v. La Purisima, etc., Co.*, 125 Cal. 159, 57 P. 656, seems to so hold, and if the doctrine of that case is to be modified, it must be by the court that enunciated it."

[2] The principles discussed in the foregoing authorities are deemed decisive in the case at bar. On the authority of these cases we hold that, where the state's patent was issued to plaintiff's predecessor in interest long prior to the location of defendant's mining claim, investigation as to the character of the land is concluded and the state's patent is not subject to collateral attack, but can only be attacked on a direct proceeding to set aside the patent on the ground of fraud or other invalidity. It follows that the finding of the trial court made on August 22, 1923, that on March 3, 1853, and ever since, the said lands were mineral in fact and well known to be so, was of no force and effect as being beyond the power of the court in a collateral proceeding, and therefore void. Defendant has not shown himself entitled to bring such suit under the circumstances of this case, where the state patent was issued in 1890 and neither the defendant nor any other person, so far as appears from the findings, made any attempt to locate a mineral claim on said lands or to do any mining thereon until more than 30 years had elapsed after the issuance of the state patent.

It is claimed by appellant that the patent issued to plaintiff's predecessor in interest is void ab initio, for the reason that "the patent was issued in violation of the statutes of California providing for the disposition of mineral lands." This argument assumes the premises which we have already held could

not be shown by way of collateral attack, namely, that the said land was mineral in fact and well known to be so at the date of the issuance of the patent. On its face the said patent is valid in every particular. It grants the said land to Charles S. McDuffee, and to his heirs and assigns forever, without any determination whatsoever as to the character of the land so granted. Appellant concedes that the grant by Congress to this state of the sixteenth and thirty-sixth sections by the act of 1853 was a grant in praesenti, and that at the time of the grant there were no known minerals or other exceptions noted in the grant. Appellant then proceeds to the conclusion that the patent issued by the state was void because violating its statutes as to mineral lands, thus assuming the very point in issue which, according to the language of the foregoing authorities, cannot be determined in collateral proceedings. Nowhere does it appear in the record that the state authorities ever took any affirmative action indicating the land to be mineral in character. On the other hand, the state issued its patent in the year 1890, as its patents are issued for all agricultural lands, without any terms, restrictions, or conditions whatsoever. Neither does it appear from the record or the findings that the land was ever designated by the United States survey as of mineral character.

[3] It appears from the findings that the property involved was sold to the state on June 30, 1916, for the taxes of 1915 assessed against Charles S. McDuffee; that on July 1, 1921, the tax collector of San Bernardino county made a deed conveying the said land to the state and a corrected deed dated September 22, 1921; that prior to July 1, 1921, the title to an undivided two-thirds of said land was granted by Charles S. McDuffee to S. Vere McDuffee. The court further finds:

"That on or about the 27th day of September, 1922, and while defendant was so occupying said mining claim, with full knowledge upon his part of the mineral character of said land, and the further fact that defendant Reid was in possession of said placer mining claim, working the same, for the mineral-bearing rock contained therein, plaintiff John Graham procured from said S. Vere McDuffee and wife a quitclaim deed conveying to him all their title, right, and interest in and to said 570 acres of land."

Appellant now urges that the plaintiff is a stranger to the title and could not redeem for the reason that the right of redemption was personal to former owners or those in privity with them before a deed was issued to the state. Section 3780 of the Political Code provides:

"A redemption of the property sold may be made by the owner, or any party in interest, within five years from the date of the sale to the state, or at any time prior to the entry or sale of said land by the state, in the manner provided

by section three thousand eight hundred and seventeen."

Appellant contends that the words "any party in interest" appearing in the foregoing section refer to an interest in the land during the 5 years prior to the deed to the state. We are cited to no case which supports appellant's position, and in the absence of such authority, we prefer to construe the words "any party in interest" as being without limitation, and therefore including any person who has an interest at the time of the redemption, though such interest was acquired after the deed was made to the state. In this conclusion we are fortified by the language appearing in section 3817 of the Political Code, as follows:

"In all cases where real estate has been sold, or may hereafter be sold for delinquent taxes to the state, and the state has not disposed of the same, the person whose estate has been, or may hereafter be sold, his heirs, executors, administrators, or other successors in interest, shall, at any time after the same has been sold to the state, and before the state shall have disposed of the same, have the right to redeem such real estate by paying to the county treasurer of the county wherein the real estate may be situated, the amount of taxes, penalties and costs due thereon at the time of said sale, with interest on the aggregate amount of said taxes, at the rate of seven per cent. per annum.
* * *

While the plaintiff acquired title to an undivided two-thirds interest only, we believe his interest was such as to entitle him to redeem the whole of said land as against this defendant.

For the reasons stated, it is ordered that the judgment be affirmed.

We concur: CONREY, P. J.; YORK, J.

MAHANA et al. v. LOS ANGELES ENGINEERING & MFG. CO. (Civ. 4469.)

District Court of Appeal, Second District, Division 2. California. June 3, 1927.

1. Sales $\S$ 412—Cross-complaint in buyer's action for breach of contract to manufacture electric flashers held insufficient to state cause of action requiring submission to jury.

In buyer's action for breach of contract for electric flashers which failed to function properly, cross-complaint alleging a modification of the original contract, and that plaintiffs agreed to assume full responsibility for successful operation of the flashers to be delivered under the modified agreement, but not alleging that any flashers were actually delivered, excepting 50 cams, held insufficient to state a cause of action requiring submission to jury.

2. Appeal and error $\S$ 1071(6)—Failure to make finding which would have been adverse to appellant will not work reversal.

Judgment will not be reversed for failure of trial court to make a finding, where such finding, if made, would have been adverse to the appealing party.

3. Sales $\S$ 89—In buyer's action, defendant had burden of proof on counterclaim alleging plaintiff assumed responsibility for successful operation.

Defendant, in buyer's action on contract for manufacture of electric flashers which failed to operate, held to have burden of proof on counterclaim alleging modification of original contract and plaintiff's assumption of responsibility for successful operation.

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

On motion for rehearing. Judgment modified and affirmed, and rehearing denied.

For former opinion, see 256 P. 279.

Fred Horowitz, of Los Angeles, for appellant.

Duke Stone and Perry F. Backus, both of Los Angeles, for respondents.

PER CURIAM. On motion for rehearing.

The opinion of this court in the above-entitled cause, reported in 256 P. 279, is amended as follows:

Strike out the last paragraph on page 281, commencing with the words "By its cross-complaint," and ending with the words "lack of such a finding," on page 281, and insert in lieu thereof the following:

[1] Appellant next insists that a material issue was presented by the pleadings and the evidence upon which the trial court made no finding, and that, because of such omission, reversible error was committed. By amendments to its answer and to its cross-complaint the defendant alleged:

"That on or about the 14th day of March, 1921, the plaintiffs and this defendant entered into an agreement, which said agreement provided that the original agreement, dated November 22, 1920, as aforesaid, be modified in the following respects: That a steel plunger, to be made in conformity with a model then and there determined upon, would be used in the dash pot or cylinder of said sign flasher, in the place and stead of the aluminum plunger thereto agreed upon between the plaintiffs and this defendant; that the said dash pot or cylinder in which said steel or aluminum plunger operated would be changed, and made in conformity with a certain design then and there determined upon. Said agreement further provided that, in the event said changes were so made, the plaintiffs would relieve this defendant of any responsibility, and that the plaintiffs would assume the full responsibility for the successful operation of the sign flashers to be delivered as agreed in said agreement dated November 22, 1920, as modified by the aforesaid agreement; that this defend-

ant thereupon immediately undertook to, and did, make the said changes in conformity to said model and design at a cost to this defendant of \$1,550."

This allegation required no finding, for it fails to state a cause of action on behalf of the defendant against the plaintiffs. It alleges that the plaintiffs assumed all responsibility for the successful operation of the sign flashers "to be delivered as agreed in said agreement of November 22, 1920, as modified by the aforesaid agreement," but it fails to allege that any sign flashers were delivered under said agreement as modified by the aforesaid agreement.

The amendment to the answer and to the cross-complaint further alleged:

"That on or about the 28th day of March, 1921, this defendant and plaintiffs entered into another agreement, which said agreement provided that the original agreement dated November 22, 1920, as modified as aforesaid, be further modified in the following particulars: That a fiber cam, to be made in conformity with a model prepared by plaintiffs, be used in the place and stead of the cam (the said cam being a part of said sign flashers) theretofore agreed upon between the plaintiffs and this defendant, and that this defendant should furnish to the plaintiffs, without cost, fifty of said cams to be placed upon the flashers theretofore delivered to plaintiffs. Said agreement further provided that, in the event said changes were so made the plaintiffs would relieve this defendant of any responsibility, and that the plaintiffs would assume full responsibility for the successful operation of the said sign flashers to be delivered as agreed in said agreement dated November 22, 1920, as modified as aforesaid. That this defendant immediately undertook to, and did, make the new cams in conformity with said model, and did deliver to plaintiffs fifty of said cams. That said changes cost this defendant the sum of \$150."

This paragraph contained an allegation that fifty of the cams were delivered, but appellant has pointed to no evidence in the record, and we have found none, showing that these particular cams provided for under this alleged amendment were in fact ever delivered. Besides, the allegation that fiber cams were delivered is insufficient to show a compliance with the requirement that "said sign flashers" be delivered as agreed in the original contract as modified by this amendment to the agreement, for, according to the amendment above quoted, the defendant was required to make delivery of the sign flashers, and not merely of cams, in order to be relieved of responsibility for the successful operation of the sign flashers.

[2, 3] A judgment will not be reversed for failure of the trial court to make a finding where such finding, if made, would have been adverse to the appealing party. Of course, the burden of proof was on the appellant as

to this issue, and the absence of evidence to sustain it would have left an unsupported finding.

With the foregoing amendment of the opinion, the judgment will stand modified and affirmed as previously decided, and a rehearing is denied.

83 Cal. App. 638

BRYSON v. GROSS. (Civ. 4841.) ★

District Court of Appeal, Second District, Division 1, California. June 7, 1927.

Hearing Denied by Supreme Court Aug. 4, 1927.

1. Appeal and error ⇨917(2)—Allowing motion to file another amended complaint, if copy stated cause of action, did not warrant presumption that only general and not special demurrer was sustained.

Provision of court on sustaining demurrer, where demurrer both general and special was interposed, that motion might be made to file another amended complaint if copy was filed with notice of motion stating cause of action, did not of itself warrant presumption that only general demurrer was sustained.

2. Limitation of actions ⇨178—Administrator's complaint to impress trust on proceeds of property conveyed by decedent, who had possession within five years previous, held not barred (Code Civ. Proc. § 318).

Action by administrator to impose trust upon proceeds of sale of land alleged to have been obtained from deceased through undue influence, if action for recovery of real property subject to five-year limitation under Code Civ. Proc. § 318, was not barred, where complaint alleged that deceased was owner and in possession of land described until his death within five years prior to commencement of action.

3. Executors and administrators ⇨129(3)—Administrator's complaint to impress trust on property alleging defendant obtained property by fraud when deceased was in impaired mental condition held to require trial upon merits (Civ. Code § 1575).

Complaint, in action by administrator to impress trust on property conveyed by decedent, alleging decedent was in impaired bodily and mental condition and that defendant, in whom deceased had confidence, took advantage of such condition and of deceased's financial distress by procuring him to execute deed by fraud and without adequate consideration, held sufficient to require trial upon merits rather than determination upon demurrer; "undue influence" being defined by Civ. Code § 1575, as using confidence or another's weakness of mind or necessity for purpose of taking unfair advantage.

4. Deeds ⇨188—Complaint alleging obtaining deed for inadequate consideration from distressed person held sufficient to obtain court's careful scrutiny of transaction.

Transaction by which conveyance is obtained from person in impaired mental or physical condition or in financial straits for inade-

quate consideration will be examined by court of equity with careful scrutiny, even though facts alleged do not constitute undue influence.

5. Executors and administrators ⚡129(3)—**Administrator in suit to impress trust on moneys received from property allegedly obtained from deceased by undue influence was not required to restore consideration.**

In suit by administrator brought to impose trust on certain moneys received by defendant from sale of property alleged to have been obtained from decedent by exercise of undue influence, plaintiff was not required to offer to restore anything of value which decedent may have received, as rules of rescission did not apply.

6. Trusts ⚡361—**Rules of rescission do not apply to suit to impose implied trust.**

Rules of rescission do not apply in suit to impose implied trusts on moneys received and to require accounting.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Frank Bryson, as administrator of the estate of Edmund Kochan, deceased, against Fred W. Gross. Judgment for defendant, and plaintiff appeals. Reversed.

F. R. McNamee, L. C. Preston, and Luke J. McNamee, all of Los Angeles, for appellant.

Frank Allender and William J. O'Brien, both of Los Angeles, for respondent.

McLUCAS, Justice pro tem. This is an appeal from a judgment of dismissal entered on an order sustaining a demurrer to plaintiff's third amended complaint without leave to amend. The order provided that if plaintiff desired he could move to be allowed to file a fourth amended complaint, provided he served with his notice of motion a copy of his fourth amended complaint stating a cause of action. Plaintiff elected to stand on his third amended complaint.

[1] The third amended complaint consists of three alleged causes of action, and was filed July 20, 1923. It does not appear from the record at what date the original complaint was filed. The demurrer is both general and special. It is contended by appellant that the demurrer was sustained wholly on the ground that the complaint did not state facts sufficient to constitute a cause of action, for the reason that the court provided that a motion might be made to file a fourth amended complaint if a copy was filed with the notice of motion "stating a cause of action." It does not otherwise appear in the record on what ground the demurrer was sustained, and we do not think the foregoing provision sufficient to warrant the presumption that the trial court sustained only the general demurrer. Accordingly, we address ourselves to a consideration of the whole demurrer and to a discussion of the grounds of demurrer relied upon by respondent.

[2] Respondent urges that the action is barred by the provisions of section 318 of the Code of Civil Procedure, which reads as follows:

"No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action."

It may well be questioned whether this is an action brought for the recovery of real property, or for the recovery of possession thereof, since nowhere does it appear in the complaint that plaintiff seeks to recover real property or the possession thereof, but only that the plaintiff seeks to impose a trust against the defendant solely, and not against defendant's grantee, upon the proceeds of the sale of land described in the complaint and to require an accounting therefor. It is not an action brought by the heirs of a deceased person to set aside a conveyance of land, nor to enforce a trust against the defendant and a purchaser with notice and to recover the possession of the lands, as was the case in *Murphy v. Crowley*, 140 Cal. 141, 73 P. 820, cited by respondent. Without deciding this to be an action for the recovery of real property or the possession thereof, we do not think that if such were the case the action would be barred by the provisions of section 318, Code of Civil Procedure since the complaint alleges that the decedent, Edmund Kochan, until his death on February 16, 1919, was the owner and in possession of the land described in the complaint, and that the deed from the decedent to defendant reserved a life estate to decedent; also, the deed attached to the complaint and made a part thereof contains the following language:

"Reserving nevertheless to the party of the first part the right to the use and occupation of the said property and to such crops as he may grow thereon during the period of the balance of his natural life."

It does not appear from the record when the original complaint was filed, but it must have been filed before July 20, 1923, the date the third amended complaint was filed. Five years had not elapsed from February 16, 1919, until July 20, 1923.

[3] It is contended by respondent that the complaint does not show undue influence in the transaction. The complaint alleges, in paragraphs V and VI of the first cause of action, as follows:

"That plaintiff is informed and believes, and upon such information and belief alleges, that during the month of August, 1915, the said Edmund Kochan was in failing health, of advanced age, to wit, of the age of more than seventy-five years, and while the owner and in possession of said land and premises, and residing there-

on, said Edmund Kochan suffered a stroke of paralysis which afflicted his body to such an extent that he lost his power of speech and of locomotion and rendered him practically helpless and unable to care for himself and impaired his mind to such an extent, that he lost his power of memory and thought, and he was thereafter incapable of knowing what he was doing, and of comprehending the ordinary routine of his daily life, and the terms and effect of any business transaction, or the management of his business affairs, and by reason of his said impaired bodily and mental condition and resultant lack of understanding, was incapable in law and in fact of transacting any business or of making any valid disposition of his property, and that from the time of said stroke of paralysis to and including the time of his death, said Edmund Kochan experienced no lucid periods whatsoever, but continued to be afflicted with such lack of understanding as aforesaid.

"That plaintiff is informed and believes, and upon such information and belief alleges, that on the 30th day of November, 1915, while said Edmund Kochan was incapable of understanding what he was doing by reason of said stroke of paralysis and the result—and consequences thereof as aforesaid, said defendant Fred W. Gross, well knowing said Edmund Kochan's mental and physical condition, and that he was then and there unable to resist, and unable to understand what he was doing, or to comprehend the terms and effect of business transactions, and particularly the conveyance of all his property to said defendant Fred W. Gross, went to said Edmund Kochan's home, dressed him up in clean clothes, lifted him into an automobile, and conveyed him to the downtown portion of the said city of Los Angeles, to the office of a lawyer and notary public, and then and there taking advantage of said Kochan's impaired mental condition and exercising an authority over said defendant by reason thereof, and for some nominal consideration, the amount of which plaintiff is unable to ascertain, said defendant procured said Kochan to sign and deliver to said defendant Fred W. Gross, a certain purported deed, under and by virtue of which said Kochan purported to convey to said defendant all of the land and premises hereinbefore described, reserving, however, a life estate therein in favor of said Edmund Kochan, under certain terms and conditions in said deed recited; said defendant then and there well knowing that on account of said Edmund Kochan's impaired mental and physical condition, that said Kochan had but a short time to live."

Paragraph VI of the second cause of action contains similar allegations, and further alleges that decedent reposed great confidence in defendant, and that decedent confided in and sought the advice and counsel of defendant, and that defendant, without any adequate consideration therefor, fraudulently induced and persuaded decedent to sign and deliver said deed under the circumstances hereinbefore related, and while decedent was in the impaired physical and mental condition as hereinabove stated. Paragraphs V, VI, and VII of the third cause of action contained similar allegations. It is further alleged:

"That plaintiff is informed and believes and upon such information and belief alleges, that

at the time said Edmund Kochan suffered said stroke of paralysis as aforesaid, and for several months prior thereto, said Kochan was greatly disturbed and worried by reason of his financial inability to meet certain taxes and special assessments levied upon and against his property for a public library, flood outfall, and other purposes, and on account of his advanced age and inability therefrom to acquire money as a wage earner, was unable to meet his obligations, and after said decedent suffered said stroke of paralysis he was unable to borrow money by reason of his impaired mental condition; that while said Kochan was in such mental condition and incapable of intelligently understanding the nature of any business, said defendant, Fred W. Gross, well knowing said Kochan's worry and anxiety over his inability to meet his obligations, and his mental condition and affliction as aforesaid, did then and there advise with said Kochan and promise to advance him from time to time money to meet his said obligations and to live upon, until his condition should improve, if said Kochan would secure the same in writing; that said Kochan, relying upon the statements and promises of said defendant Fred W. Gross, signed the said purported deed marked 'Exhibit A' hereto attached, believing the same to be as security for the money loaned and to be advanced by said defendant as aforesaid, and not otherwise; that said defendant Fred W. Gross, did from time to time advance to said Kochan under his promise aforesaid, certain sums of money, the amount of which plaintiff is unable to determine."

Undue influence is defined in section 1575 of the Civil Code as follows:

"Undue influence consists:

"1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;

"2. In taking an unfair advantage of another's weakness of mind; or

"3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

[4] Even though the facts alleged did not constitute undue influence, transactions such as alleged in the case at bar will be examined by courts of equity with zealous scrutiny. In *Richards v. Donner*, 72 Cal. 207, 210, 13 P. 584, 586, it is said:

"It is claimed that the donor was not entitled to relief from a court of equity, admitting the facts found to be true, because he failed to show undue influence on the part of the donee, and because the mistake of the donor, as to the character of his act, was the offspring of his own weakness, with which the donee had nothing to do. The learned judge of the court below evidently based his conclusion upon the doctrine enunciated and applied by this court in the case of *Moore v. Moore*, 56 Cal. 89. The court there refers to the case of *Allore v. Jewell*, 94 U. S. 506 [24 L. Ed. 260] and quotes approvingly from the opinion of Mr. Justice Field. That was an action brought to set aside a conveyance made by a person advanced in years, of great weakness of mind, though not amounting to absolute disqualification, for an inadequate consideration, and without independent

advice. There was no showing or claim of undue influence on the part of the grantee. The court there said: 'It may be stated as settled law that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or other cause, * * * and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside.' (See, also, *Haydock v. Haydock* [34 N. J. Eq. 570] 38 Am. Rep. 385)."

Accordingly, we think that the complaint contains a sufficient allegation of fact, though mixed with conclusions, to require a trial upon the merits rather than a determination upon demurrer.

Respondent further insists that the third amended complaint does not state a cause of action, first, by reason of the fact that it appears on the face of the complaint the cause of action is barred by laches. We have examined the allegations of the complaint, and think that the delay in not bringing the action before the year 1922 is sufficiently explained by these allegations.

[5, 6] Respondent argues that the complaint is faulty in that the plaintiff did not offer to restore anything of value which the decedent may have received under the contract or deed. The rules of rescission do not apply to this case, as this is not a suit for rescission, but a suit brought to impose a trust on certain moneys received by the defendant for the sale of certain property, and to require an accounting.

The remaining grounds of demurrer have been examined and are not believed sufficient.

It is ordered that the judgment be reversed.

We concur: CONREY, P. J.; HOUSER, J.

83 Cal. App. 542

PETERSON v. GILBERT et al. (Civ. 4855.)★

District Court of Appeal, Second District, Division 1, California. June 3, 1927.

Hearing Denied by Supreme Court Aug. 1, 1927.

1. Appeal and error ⇨994(3)—Credibility of evidence held solely for trial judge.

Credibility of evidence of attempt, within statutory period, and readiness at all times, to redeem property from execution sale, and refusal of tender, held solely for determination by trial judge.

2. Mortgages ⇨606—Evidence held to support findings of timely attempt and continuing readiness to redeem from execution sale and refusal to accept tender.

In action to compel defendants to file and record certificate of redemption from mortgage foreclosure sale, evidence held sufficient to sup-

port court's findings that defendant attempted to redeem property in good faith within statutory period after plaintiff purchased it at subsequent execution sale, that plaintiff failed and refused to accept tender, and that defendant was ready and willing at all times to make redemption and pay amount to which plaintiff was legally entitled.

3. Execution ⇨300—Purchaser not objecting to form of tender in redemption from execution sale, and refusing to state amount required, held estopped to deny that tender was made (Civ. Code, § 1511; Code Civ. Proc. § 2076).

Purchaser not objecting to form of tender in redemption of property from execution sale, declining to state amount to which he claimed to be legally entitled, and making excuses and evasions for purpose of lulling redemptioner into sense of false security until expiration of statutory period, with knowledge of latter's credulity and without suggesting that he was under no legal obligation to compute amount, waived technical defects in tender and was estopped to claim that no tender was made, under Civ. Code, § 1511, and Code Civ. Proc. § 2076.

4. Mortgages ⇨606—Answer, alleging attempt to redeem from execution sale and tender and refusal of amount required, held sufficient, though not alleging continuing readiness to redeem.

In action to compel defendants to file and record certificate of redemption from mortgage foreclosure sale of property purposed by plaintiff at execution sale, answer alleging that defendant in good faith attempted to redeem property from subsequent execution sale to plaintiff and tendered all sums to which latter was legally entitled, but that he neglected and refused to accept tender, and containing offer to deposit sum in court in payment of all of plaintiff's legal demands, held sufficient to enable person of ordinary intelligence to comprehend its meaning, though not alleging continuing readiness to redeem.

5. Appeal and error ⇨1170(5)—Defendant's failure to allege continuing readiness to redeem from execution sale did not entitle plaintiff to new trial, where he introduced controverting evidence (Const. art. 6, § 4½).

Where plaintiff, in suit to compel recording of certificate of redemption from mortgage foreclosure sale, introduced evidence controverting defendant's continuing readiness to redeem from subsequent execution sale to plaintiff, absence of allegation of such readiness in answer did not result in miscarriage of justice within Const. art. 6, § 4½, so as to entitle plaintiff to new trial.

6. Mortgages ⇨606—Evidence of defendant's mental incapacity held inadmissible in action to compel recording of certificate of redemption from mortgage foreclosure sale.

In action to compel recording of certificate of redemption from mortgage foreclosure sale prior to execution sale to plaintiff, testimony as to defendant's mental incapacity to manage her business affairs held inadmissible, where pleadings presented no issue as to defendant's sanity

and no attempt was made to explain theory on which testimony was offered.

7. Appeal and error $\Leftrightarrow$ 1033(3)—Admission of evidence of defendant's mental irresponsibility, precluding any dependence on her statements, held not prejudicial to plaintiff.

Admission of evidence, in action to compel recording of certificate of redemption from mortgage foreclosure sale prior to execution sale to plaintiff, that defendant was mentally irresponsible and that no dependence could be placed in her statements, held not prejudicial to plaintiff.

8. Mortgages $\Leftrightarrow$ 606—Judgment awarding purchaser at execution sale his entire outlay and quieting title in defendant, in action to compel recording of certificate of redemption from prior mortgage foreclosure sale, held proper.

In action to compel recording of certificate of redemption from mortgage foreclosure sale prior to execution sale to plaintiff, judgment awarding plaintiff his entire outlay, including legal interest and costs, and quieting title to property in defendant, held proper.

Conrey, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Emile Peterson against Lillian M. Gilbert and another. From the judgment rendered, plaintiff appeals. Affirmed.

George E. Clifford, of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondents.

HOUSER, J. This is an appeal by plaintiff from a judgment in an action wherein the relief sought was that of compelling defendants to file and record a certificate of redemption from a sale by a sheriff in execution of a judgment in a suit to foreclose a mortgage.

In substance, the facts are as follows: Defendant Lillian M. Gilbert, who by reason of her marriage after the institution of the action is now known as Lillian Mary Ann Hall, was the owner of several lots of land upon which she had given a mortgage to her codefendant herein, Louis Brown, as security for a certain indebtedness which Mrs. Gilbert owed to him. Neither the interest nor the principal indebtedness having been paid, the mortgage was foreclosed. Within the time allowed by law Mrs. Gilbert redeemed the property from the sale under the foreclosure proceedings, and a certificate of redemption was issued and delivered to her, but which she failed to place of record. In the meantime the plaintiff in the present action secured a judgment in another action against Mrs. Gilbert on an indebtedness owing by Mrs. Gilbert to the plaintiff. In execution of his judgment the plaintiff levied upon the same property which theretofore had been sold under the execution in the foreclosure proceedings against

Mrs. Gilbert and which property she had redeemed. At the sheriff's sale, under plaintiff's judgment against Mrs. Gilbert, plaintiff became the purchaser of the property. After the expiration of the statutory period from the date of plaintiff's purchase, no redemption from the sheriff's sale having been made and the certificate of redemption from the sale under the foreclosure proceedings not having been recorded, plaintiff brought the present action for the purpose of compelling defendants to record such certificate.

No answer to the complaint was filed by defendant Brown and his default was duly entered. In the answer filed by defendant Gilbert, in effect, she set up that in good faith she attempted to redeem the real property involved in the action from the sale to plaintiff, and for said purpose had offered and tendered to pay to plaintiff all sums of money to which in law plaintiff was entitled, but that plaintiff neglected and refused to accept such tender. By her answer said defendant also renewed said tender and offered to deposit a sum of money in court in payment of all legal demands by plaintiff, as by the court might be directed, and upon such payment being made, defendant prayed that her title to the property in question be quieted.

The court found in accordance with the allegations of the answer filed by Mrs. Gilbert, and by an interlocutory judgment decreed that upon the deposit by her in court for the use and benefit of plaintiff of the amount of money to which the court found plaintiff was entitled, the title to said property be quieted in Mrs. Gilbert. The conditions imposed by the trial court in its interlocutory judgment having been complied with, a final judgment was rendered by which the title to the property involved in the action was quieted in the said defendant.

[1, 2] The principal contention by appellant is that the evidence was insufficient to support the findings of fact that within the period allowed by law after plaintiff purchased the property at the sale thereof by the sheriff, defendant Gilbert in good faith attempted to redeem said property; that plaintiff failed, neglected, and refused to accept the tender and offer made by said defendant; and that at all times pertinent to said tender said defendant was ready and willing to make said redemption and to pay to plaintiff therefor the amount of money to which he was legally entitled.

It would serve no useful purpose to set forth at length the evidence given by defendant Gilbert relating to the time of making such tender, the manner in which it was made, nor the specific language and conduct employed by plaintiff in refusing same. Suffice it to say that said defendant testified in substance that on many occasions within the

time allowed by law for the redemption of property from sales of the character of that here involved, she had stated to plaintiff personally, as well as to his attorney, that she desired to redeem the property and to that end wished to ascertain the amount of money necessary to make such redemption—at the same time informing each of them respectively that she either had the money in her possession, or at least was in a position to get the money with which to do so; that on none of such occasions did plaintiff make any objection to the form or manner of such tender, but that at each of such times either plaintiff or his attorney, or both of them, declined to state the amount of money which plaintiff claimed as that to which he was legally entitled, but made various excuses and evasions, by reason of which said defendant was prevented from making such redemption until after the statutory period for so doing had expired, at which time plaintiff absolutely refused and declined to permit such redemption to be made. From other reliable evidence it appeared that on each of such occasions said defendant, through her codefendant, Brown, was ready, able, and willing to pay to plaintiff the full amount of money to which plaintiff was legally entitled, which latter fact was communicated to plaintiff.

While the evidence given by said defendant was somewhat voluminous, confused, and at times inconsistent, one part with another, the question of the credibility to be attached thereto was one solely for determination by the judge of the trial court. Separating the questionable portion of defendant's testimony from that part thereof which stood out clearly and unmistakably in support of the defense which was interposed by her, from an examination of the record herein it is clear that sufficient evidence was presented upon which to base the findings of which complaint is made.

[3] The statute (section 2076, Code Civ. Proc.) relating to the conditions as found by the trial court seems pertinent. It is as follows:

"The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

See, also, *Kofoed v. Gordon*, 122 Cal. 314, 54 P. 1115; *Smiley v. Read*, 163 Cal. 644, 126 P. 486.

As hereinbefore noted, plaintiff made no objection to the form of tender made by defendant. In the case of *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 P. 82, a similar situation was presented. Among other things, the court said:

"No objection was made at the time of the offer on the ground that it was insufficient in amount, or on any other ground, and consequently the objection made on this appeal, that the offer and tender was insufficient in amount, was waived, and must be now disregarded. Civ. Code, § 1501; Code Civ. Proc. § 2076; *Kofoed v. Gordon*, 122 Cal. 314, 54 P. 1115. The appellant is also precluded from now objecting: (1) That the interest was not included in the tender; and (2) that the tender was too indefinite, because no such objections were made at the time of the tender. This is clearly illustrated in *Kofoed v. Gordon*, supra (122 Cal. 314, 54 P. 1115).

"It is also clear that the respondent was not required to produce the money or permit it to be counted in order to constitute a valid tender, so long as the appellant did not accept the offer. 'The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted.' (Civ. Code, § 1496.)"

To the same effect, see *Sheller v. Livingston*, 25 Cal. App. 572, 144 P. 547; *McCue v. Bradbury*, 149 Cal. 108, 84 P. 993; *Pierce v. Lukens*, 144 Cal. 397, 77 P. 996.

In the case of *Howard v. Galbraith*, 13 Cal. App. 373,¹ is held that the want of ability or disposition of a defendant to perform a contract and the equivalent of his refusal to perform the same, not withdrawn before the expiration of the time limited by the contract, established a legal excuse for failure to make exact tender and demand for performance by the other party to the contract.

In *Benson v. Bunting*, 127 Cal. 532, 59 P. 991, 78 Am. St. Rep. 81, it is held that where one entitled to redeem from a sale under proceedings for the foreclosure of a mortgage was prevented from doing so within the statutory period by reason of the misrepresentations of the plaintiff in the suit, the principle of estoppel would be applied to the plaintiff in order that the defendant be enabled to make such redemption after the expiration of such statutory period.

In the instant case, during the entire time covered by the efforts made by defendant to induce plaintiff to state the amount of money which he claimed was owing to him on account of his judgment, it sufficiently appears from the evidence that in effect plaintiff was misleading defendant and lulling her into a sense of false security to the end that the statutory period allowed for redemption might expire and defendant thereby be foreclosed of her rights in the premises. While it may be said that plaintiff was under no legal obligation to compute for defendant the amount of money which would be legally required to make redemption, no statement or suggestion to that effect was ever made by plaintiff or by his attorney to defendant. From the various contacts with the defendant, plaintiff knew of defendant's credulity and led her to believe in his sincerity in the matter, at the same time apparently fully in-

¹ 109 P. 839.

tending to trade upon her weakness and eventually to take an unfair advantage of her. In such circumstances, following the principle announced in the case of *Benson v. Bunting*, 127 Cal. 532, 59 P. 991, 78 Am. St. Rep. 81, the plaintiff should now be held to have waived whatever technical defects which may have existed in the attempted tender made by defendant, and to be estopped from claiming that no tender was actually made.

Section 1511 of the Civil Code provides that—

"The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

"(1) When such performance or offer is prevented or delayed by the act of the creditor. * * *

"(3) When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect. * * *

If the payment of a judgment, upon which execution has been levied, may be considered as an "obligation" within the meaning of such statute, the application thereof to the facts in the instant case may not be doubted.

It therefore becomes manifest that neither on the facts nor in the law relating thereto, as decided by the trial court, should appellant be heard to complain.

[4, 5] Appellant also suggests that the answer of defendant Gilbert to the complaint fails "to state facts sufficient to constitute a cause of action * * * in that it does not contain an allegation of continuing readiness to redeem." While it is possible that in some respects the answer might have been more certain in its language, we are of the opinion that it contained allegations of sufficient directness to enable a person of ordinary intelligence to comprehend its meaning. That plaintiff thoroughly understood its import is made manifest by the evidence which was introduced at the trial on behalf of plaintiff in his attempt to controvert the very allegation which he now specifies was lacking in such answer. Whatever may have been the weaknesses of the pleading to which reference has been had, it clearly appears that they were overlooked by plaintiff on the trial, and that in any event he suffered no detriment by reason of any defects of the answer. The error (if such it was) did not result in a miscarriage of justice, and under section 4½ of article 6 of the Constitution cannot avail plaintiff to the extent that a new trial should be had on account of the frailty of the pleading.

[6] Appellant also complains that the trial court erred in admitting evidence, over plaintiff's objection, relating to the mental capacity and sanity of defendant Gilbert. The pleadings in the action presented no issue regarding the sanity of Mrs. Gilbert; nor is any attempt made by respondent to explain

upon what theory testimony of the character of that of which complaint is made was offered in evidence. It was to the effect that Mrs. Gilbert was incapable of managing her business affairs; that she was irrational in her speech and conduct; that she had no comprehension of ordinary business or legal terms; that she contradicted herself continually on unimportant matters; and that "she just simply does not know what she is talking about most of the time."

[7] While in the state of the pleadings we are convinced that such evidence was inadmissible, still we are unable to see how any injury resulted to plaintiff by reason of its admission. To the contrary, it would seem to have been a help to plaintiff in that it tended to weaken the credibility of Mrs. Gilbert's testimony relating to every vital issue in the case. It certainly did no harm to plaintiff to have the evidence introduced which tended to show Mrs. Gilbert's irresponsibility and that no dependence could be placed in her statements. It therefore clearly appears that, even though it be conceded that error was committed by the trial court in admitting the evidence to which reference has been had, the result was not prejudicial to plaintiff's substantial rights, and consequently cannot suffice as a reason for reversal of the judgment.

[8] By the judgment, the plaintiff was awarded his entire outlay in the premises, including legal interest thereon and costs, and title to the property involved in the action was quieted in the defendant. In equity and good conscience, what more could have been rightfully expected by the plaintiff is not apparent.

This court is convinced that a just judgment was rendered by the trial court. It should be, and it is, affirmed.

I concur: YORK, J.

CONREY, P. J. I dissent. The sole ground of respondent's defense is that she attempted to redeem from a sheriff's sale, by making to the purchaser an indefinite offer to pay the amount required for redemption, but that the plaintiff by his conduct prevented her from redeeming, by failing to give her information concerning the actual amount necessary to make such redemption. The evidence absolutely fails to show that any stated sum of money was ever tendered to the purchaser. The sale was a matter of record. The sheriff's return was on file. The amount required to redeem was merely a matter of computation from the figures in the record. The amount so ascertained could have been tendered. Then it would have been the duty of the purchaser to accept the amount offered, or else to state, to the party offering to redeem, any facts showing that the amount offered was not sufficient.

But until an actual tender made, of some

definite sum, the purchaser was not under obligation to act in the matter. He did not mislead respondent at all. He simply stood upon his rights. This he was entitled to do. The fact that the plaintiff might have been, or should have been, more kind and considerate in dealing with the defendant because she was losing her property, or more chivalrous toward her because she was a woman, does not affect the merits of the case. The law does not yet impose penalties for failure to observe any fixed standard of those moral and social virtues.

83 Cal. App. 493

PEOPLE'S FINANCE & THRIFT CO. v. SHUMAN. (Civ. 3208.)

District Court of Appeal, Third District, California. June 1, 1927.

- 1. Corporations ☞79—Agent sued for money had and received for plaintiff held to have no claim for damages for breach of contract to grant exclusive rights to organize branch company under evidence.**

In action for money had and received by defendant as agent in sale of stock for plaintiff corporation, in which defendant cross-complained for damages for breach of contract to give defendant exclusive right to organize branch finance company, evidence that defendant sent plaintiff check for balance due mistakenly made for less amount without claiming damages at time, together with statements and transactions between parties, justified finding that defendant's cross-complaint was entirely unfounded.

- 2. Appeal and error ☞1011(1)—Trial court determines facts, resolves conflicts in evidence, and its probative force.**

Trial court is trier of facts, resolves all conflicts arising in evidence, and determines evidentiary value or probative force of testimony of witnesses.

- 3. Appeal and error ☞1011(1)—Trial court's findings on questions of fact on conflicting evidence held conclusive on Court of Appeals.**

Findings of trial court on questions of fact on conflicting evidence are conclusive on Court of Appeals.

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Action by the People's Finance & Thrift Company against C. G. Shuman, in which defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Cowan, of Santa Rosa, for appellant, Henry Heidelberg, of San Francisco, for respondent.

HART, J. The plaintiff, a finance promotion corporation, organized and existing under the laws of this state, whose principal place of

business is in the city of Los Angeles, instituted this action to recover from defendant, as alleged in the first count of the complaint, the sum of \$1,165, as for money "had and received," and, as alleged in the second count of the complaint, for the additional sum of \$84.30, on account of moneys paid out by plaintiff for defendant at the special instance and request of the latter. The plaintiff prayed for judgment in the total sum of \$1,249.38, being the sum of the amounts sued for in both counts of the complaint.

The answer filed by defendant denied the allegations of the complaint, admitting, however, that plaintiff, prior to the commencement of the action, demanded payment from defendant of the sum alleged in the first count to be due it from the latter and that defendant refused to pay said sum or any sum to plaintiff; alleged that defendant has fully paid and discharged any debt or obligation he ever owed to plaintiff or that ever existed against him in favor of plaintiff, etc.

Defendant also filed a cross-complaint, demanding judgment against plaintiff for damages in the sum of \$12,000 for an alleged breach of a contract wherein and whereby plaintiff, so said pleading alleges, agreed to give and did give to defendant the exclusive right to organize and establish for plaintiff, in the city of Eureka, Humboldt county, a branch finance company, and to solicit subscriptions for and sell corporate stock therein, the alleged damages being based and computed upon the probable amount of stock therein which defendant would have sold had he not been prevented by plaintiff from proceeding with the carrying out of the terms of said agreement. It is alleged in the cross-complaint that plaintiff's business is that of "organizing and establishing branches and auxiliary connections in the state of California for the purpose of doing business in buying securities and making loans to customers on securities"; that plaintiff, for the purpose of extending the scope of its operations in that line of activity, appointed and constituted defendant its agent with authority to organize and establish such finance company and, to that end, to solicit and receive subscriptions for 750 shares of stock in such finance company, and agreed to pay the defendant for the services so performed the sum of \$16 per share for each share for which the said defendant should obtain a subscription, or which he should sell and that the said "defendant was skilled and experienced in said line of work and thoroughly understood the manner and method of organizing such branch institution and operating and conducting the same and receiving subscriptions for the stock thereof, all of which was well known to plaintiff, and in consideration thereof the said defendant did accept said

employment and was ready, able, and willing to fully perform and discharge said employment, and in order to discharge said employment, and organize the said institution in the territory aforesaid did cancel and forego other remunerative employment then offered him and other work at which he could have received and made a valuable profit, for the purpose of engaging in the work and employment offered by plaintiff and accepted by defendant and the said plaintiff did promise and agree with defendant that they would not employ any other person, or use any other means, either directly or indirectly for the purpose of selling and receiving subscriptions for said corporate stock of said corporation in the territory aforesaid, but notwithstanding, the said plaintiff did, against the wish and consent of defendant, enter the said territory aforesaid, and by other persons did solicit subscriptions for and sell said stock to the amount of 750 shares thereof and thereby did prevent this defendant from soliciting such subscriptions or selling such stock, and by reason thereof this defendant was prevented from earning and did lose the sum of \$16 per share for said 750 shares of said stock, and this defendant could have obtained said subscriptions and made said sales had he not been prevented by the acts of plaintiff, and by reason thereof defendant has sustained damages in the sum of \$12,000."

The plaintiff answered the cross-complaint, specifically denying the averments thereof, and alleging, "upon information and belief," that defendant never visited the city of Eureka in relation to the sale of the stock in any institution or financial corporation for or on behalf of plaintiff herein.

The court found that the allegations in plaintiff's first count or cause of action "are, and each of them is, true," and that the allegations of the second cause of action set up in the complaint "were not sustained by competent evidence or sufficient evidence, and they are, and each of them is, untrue." Those findings are followed by the following findings:

"The court further finds that on or about the 20th day of August, 1923, defendant, C. G. Shuman, became indebted to plaintiff herein in the sum of \$1,165 as and for payment of commission due plaintiff on 233 shares of stock sold by said defendant under agreement with plaintiff wherein and whereby said defendant agreed to pay plaintiff the sum of \$5 per share upon each and every share of stock sold by said defendant in the People's Finance & Thrift Company, of Napa, Cal.

"The court further finds that all of the allegations and denials contained in defendant's answer and cross-complaint are, and each of them is, untrue."

Judgment was accordingly entered for the plaintiff in the sum of \$1,165, and the defendant appeals therefrom.

[1] The sole contention here of the defend-

ant is that no evidence was offered or received "to overcome the evidence offered by appellant in support of the cross-complaint," and that therefore the finding "that all the allegations and denials in defendant's answer and cross-complaint are, and each of them is, untrue," is wholly devoid of evidentiary support. The contention is without substantial support.

It was not questioned at the trial, nor is it here, that, if the claim of damages as set up and demanded by the cross-complaint is unfounded, the defendant is indebted to the plaintiff in the sum for which it was awarded judgment. In other words, it is not disputed that defendant was indebted to the plaintiff in the sum of \$1,165, and that the judgment should stand, if the former's alleged offset by way of damages is, as the court found, not sustained by the proofs. It will be necessary, however, to present the facts of the transaction out of which that indebtedness originated, inasmuch as they are directly connected with the defendant's claim of damages.

As the cross-complaint states, the plaintiff is a corporation and engaged in the business of buying and also in making loans on securities and, to extend the scope of the activities of said business, has established branches in a number of different communities in the state. These organizations were and are commonly called "industrial finance companies," and the defendant's principal business was in installing such organizations in the smaller cities and the towns of the state of sufficient importance, industrially and otherwise, reasonably certain to assure success in the prosecution thereof. The defendant, as is alleged and admitted, was employed by the plaintiff as an organizer of these "industrial finance companies." Among the places in which he operated for the plaintiff in this line was the city of Napa. The terms of his employment for the organization and establishment of such finance company in said city were that he (defendant) was to negotiate for the subscription and sale of 750 shares of stock, at \$125 per share, to be disposed of as follows: One hundred dollars to go into the treasury of the company on the par value of the stock thereof, \$5 to be paid to the parent corporation (plaintiff), and \$20 to be paid to the defendant as compensation for his services in organizing and installing the local company. Defendant, under this arrangement, started operations in the city of Napa, either in the month of March or April, 1923, and completed the sale of the 750 shares of stock and the organization and establishment of the company within a few months thereafter. The defendant thereupon forwarded a check to the plaintiff for the full amount of the commissions on 517 shares of the stock, and, in return, plaintiff paid to defendant, out of said amount, the sum of \$20 for each share of the

517, retaining for itself the sum of \$5 per share. Thus there were left, to be accounted for by defendant to plaintiff, the commissions on 233 shares of the 750 shares sold. In August, 1923, the defendant forwarded to plaintiff a check for \$1,065, as the balance due the latter from the former for the amount unaccounted for by defendant to plaintiff (as above indicated), on the 233 shares. On said check the defendant indorsed a statement to the effect that said check was to operate as a receipt for the full settlement of the claims of plaintiff against defendant on account of the sale of the 750 shares of stock sold by defendant in the Napa city branch. This check was received for the plaintiff by its secretary-manager, Earl D. Pillsbury, at the city of Seattle, Wash., in the month of August, 1923. Perceiving that the check did not represent the full amount due plaintiff from defendant on the 233 shares of stock of the Napa company, to wit, the sum of \$1,165, Pillsbury returned the check to defendant (then at Stockton), together with a letter, dated at Seattle, August 27, 1923, in which, among other things it was stated:

"Am returning herewith your check for \$1,065.00, with your indorsement on the back reading as follows: 'This check is settlement in full for all accts. of C. G. Shuman and settlement in full for contract of organization of People's Finance & Thrift Co. of Napa, Calif.' Cannot accept this check with the indorsement as written for the reason it is not settlement in full as written, not even covering the settlement on Napa alone, which should be for 233 shares at \$5.00 per share, or \$1,165. The settlement heretofore made on Napa was for 517 shares, leaving 233 shares to be settled. * * * Please send corrected check for Napa, mailing it to me at San Francisco, where I will be next Saturday. If you wish to put any indorsement on the back, make it read as complete settlement on Napa, and leave out the balance of the matters, which are not settled at all" (referring to money claimed by Pillsbury to be due plaintiff for work at Oakland, and for bills for advertising in Stockton and Modesto, where companies had been formed).

The only question involved in this controversy is, as has been stated, whether the plaintiff violated its agreement with the defendant, giving him, as he alleges in his cross-complaint, the exclusive right to establish a branch or local finance company for plaintiff in the city of Eureka. Defendant was subjected to an extended examination as a witness—first by plaintiff under section 2055 of the Code of Civil Procedure, and then as a witness for himself—and his testimony covered the entire period of time during which he was in the employment of plaintiff, commencing about September 1, 1922, and terminating with the organization and establishment by him of the Napa city branch of the latter. It will not be necessary, though, to enter upon a minute examination herein of the testimony. That the defendant and the

plaintiff entered into a written contract on December, 1922, but dated January 1, 1923, whereby the former was granted by the latter the right or "privilege," on certain specified terms and conditions, to organize and establish a local finance and securities company in the city of Eureka, said contract limiting the life thereof to the period of 90 days from its date, is not disputed. At some time—whether within the life of said contract or after the time during which it was by its terms to exist had expired does not clearly appear—the defendant, so he testified, visited Eureka and made a preliminary survey of the situation with reference to the contemplated organization of a finance company there, and interviewed two bankers and secured their promise to co-operate with him after the organization of such company by acting as escrow agents, and also talked with and obtained the promise of certain automobile dealers in said city that they would hypothecate with or sell to the company, if organized and established in Eureka, their commercial paper. Whether said contract was in writing renewed or the time for its performance thus extended, the record does not show, but it does appear that he was given some further time after the termination of the period of time during which the written contract was of force and effect within which to organize and open for business a branch company for the plaintiff in Eureka; that, however, he proceeded no further in that direction than as above indicated. But it appears from his own testimony that, either in March or April, 1923 (defendant did not seem to be certain which of those two months), Shuman went to Napa city and proceeded to organize a company in that place for himself and not for the plaintiff. Those two months, it will be noted, were comprehended within the period during which the life of the Eureka contract was to exist. At some time before the month of March or April, 1923, the plaintiff, so defendant testified, gave him the right or privilege of organizing and installing for it a branch company in the city of San Francisco. It appears that, just prior to the time at which defendant proceeded with and was engaged in organizing a company in Napa city, the plaintiff gave another party the privilege of organizing the San Francisco branch, without the consent of Shuman. Subsequently, E. D. Pillsbury, manager of plaintiff, had an interview or conversation with defendant relative to the work the latter was doing in Napa city. In that interview or conversation, defendant referred to the act of plaintiff in taking from him (defendant) the San Francisco territory to operate in, and declared in effect that the plaintiff had mistreated him in that particular matter; that for that reason he intended henceforth to operate for himself or some other company. Several other conversations were thereafter had between

the parties relative to operations in Napa city, when, finally, so testified the defendant, it was agreed upon the part of Pillsbury that defendant should be granted and given the right to open a branch company in the city of Eureka and, as a consideration therefor, the defendant would turn over to plaintiff the Napa city branch which he had organized for himself and not for plaintiff or as its agent. The defendant, as above explained, was to receive \$20 per share, the plaintiff to receive \$5 per share and the balance (\$100) to be turned over to the treasury of the local company. A short time later, the formal work of organizing the branch in Napa took place, Pillsbury being present. At that time the defendant, so he testified, said to Pillsbury that he intended to go to Eureka within a few days and proceed with the organization of a company there. Pillsbury, testified defendant, said "All right." About a week after that, so defendant said, he called Pillsbury on the phone from Napa, and stated to him that he (defendant) intended immediately going to Eureka to proceed with the organization in that city of a company, and that Pillsbury replied by saying that he had sent another party to organize a company there, and offered to give defendant the right to organize a company in Petaluma in place of Eureka, which proposition defendant testified that he refused. After some further talk on that occasion, in the course of which defendant charged Pillsbury with breaking his contract with him with respect to the Eureka transaction, defendant said to Pillsbury:

"If you have gone into Eureka, naturally, I will withdraw out of there, but I am going to start a business for myself."

Continuing, defendant stated that Pillsbury "still wanted me to operate in Santa Rosa for them, and I refused to do it, and went ahead for myself." Defendant soon thereafter, and simultaneously with the operations prosecuted in Eureka by plaintiff's agent in the establishment of a company at that place, proceeded with and pressed the organization of a similar company in Santa Rosa, either for himself or a corporation in Spokane, Wash., carrying on business of the same character as that in which the plaintiff is engaged. Some time (the date is not given) after Pillsbury returned to defendant the check for \$1,065, with a letter, stating that, because the check erroneously bore the indorsement that it represented payment in full of all demands held by plaintiff against defendant, the former could not and would not accept the same, inasmuch as there was still a balance due plaintiff on the Napa transaction, the defendant addressed a letter to Pillsbury, evidently in response to the letter in which said check was returned as stated, in which, among other things he said that—

"On my (defendant's) return from a trip East, I found your letter regarding check which I mailed you for settlement of Napa. I did make a mistake of \$100, but, since you bring up the advertising accounts, I think it is best to arrange a meeting to settle all matters."

The "advertising accounts," referred to in said letter, it is to be borne in mind, involved the expenses incurred in the different localities in which defendant organized companies for the plaintiff for advertising and publicity purposes; that a dispute arose between plaintiff and defendant as to the payment of those expenses, that is, whether defendant was to pay all such expenses, or only half thereof, or, in certain instances, whether he was obligated to pay any part thereof; that the said "advertising accounts" constituted the foundation for the second count or cause of action set up in plaintiff's complaint, in which it was alleged, in general language, that the plaintiff, having paid those accounts in full, was entitled to reimbursement from defendant for the proportion thereof that he was to bear.

While under examination by plaintiff under the provisions of section 2055 of the Code of Civil Procedure, the defendant, after stating that, upon completing the organization of the Napa company, he remitted to plaintiff by check the full amount received by him on 517 of the 750 shares of stock sold in said company, and that plaintiff, upon receipt of said check, returned to him \$1,034, or \$20 for each share of said stock, testified as follows:

"Q. (By counsel for plaintiff) That left a balance of 233 (of the 750) shares to be accounted for, didn't it, Mr. Shuman? A. There were 233 shares I made no statement on.

"Q. As a matter of fact, about August 20, 1923, you did send them a check for \$1,065, didn't you? A. Yes, sir.

"Q. How is it you sent them a check for \$1,065 instead of \$1,165, which would be \$5 a share? A. I fully intended to send them a check for the total amount, but through an error in computing the balance due them, which was unintentional, I sent them only \$1,065.

* * *

"Q. And you intended to send them a check for \$1,165? A. I did.

"Q. And through a mistake of your own, you sent \$100 short; that is correct, is it? A. Yes, sir."

In the fall of 1923, and after the check above mentioned was returned by Pillsbury to the defendant, the two met at Santa Rosa, so testified the first named, in his deposition, which was received in evidence, and talked over their business affairs. In the course of this conversation, Pillsbury, among other matters, introduced the subject of the balance due the plaintiff from defendant in the sum of \$1,165 on the Napa transaction. The defendant in that conversation, Pillsbury deposed, did not make any reference to any

counterclaim that he claimed to have against the plaintiff or which he intended setting off as against the indebtedness here sued for, but did say, in effect, that the plaintiff had agreed to pay one-half of the bills incurred in the organization of companies in Modesto and Sacramento. He further stated on that occasion, Pillsbury proceeded to say, that his attorney had objected to any action being taken by him without his (the attorney's) consent. Defendant thereupon made an appointment to meet Pillsbury "the following week," but failed to keep the appointment. Subsequently, however, Pillsbury met defendant in the law office of the latter's attorneys (Case & Forslund) in the city of Stockton, and there, in the presence of a Mr. Arbaugh, Mr. Forslund, and plaintiff's attorney, held a conversation with him. In that conversation defendant admitted that he owed plaintiff \$1,165 as a balance on the Napa transaction, but declared that he had a counterclaim against the plaintiff. Pillsbury, in his deposition, stated that defendant had never before made any claim against or demand, written or otherwise, for the payment of a claim upon plaintiff for or on account of the latter's alleged violation of any agreement between him and plaintiff relative to the organization of a company in the city of Eureka. The sole subject of controversy between defendant and plaintiff, Pillsbury deposed, related to differences between him and plaintiff in regard to the matter of the expenses incurred in the organization by defendant for plaintiff of companies in certain localities. Pillsbury testified:

"Q. Do you know whether or not Mr. Shuman ever had a contract for the installation of a company at Eureka? A. No written contract, to my knowledge.

"Q. Did you ever have any communication with Mr. Shuman in regard to the installation of a company at Eureka? A. Yes.

"Q. Where did that conversation take place? A. At the time the Santa Rosa conversation took place.

"Q. That was long after Eureka had been established by this company itself? A. Yes."

On October 20, 1922, it appears from Pillsbury's deposition, one Wimsett, then president of plaintiff, wrote and sent to defendant a letter in which, among other things, the writer said:

"Pursuant to our telephone conversation, I will advise that I will hold the contracts on Santa Rosa and Eureka for a period of two weeks from today during which time you may take your choice as to which of those two points you care to enter after you have completed the work on the Oakland Bank. I wish, however, that you would make your choice as soon as you possibly can in order that I may give one of the places to some of the men who will be out of territory very shortly."

This letter, having been sufficiently identified as Wimsett's letter, was admitted in evidence here, with Pillsbury's deposition.

Further examined by counsel for plaintiff, Pillsbury testified:

"Q. Did Mr. Shuman complete the installation of the Oakland institution? A. No.

"Q. Did Mr. Shuman ever notify you or the plaintiff here, in any way, to your knowledge, that he accepted the option given him for the installation of Eureka? A. No.

"Q. Did Mr. Shuman ever engage in the sale of stock in the city of Eureka for this company? A. No.

"Q. Did Mr. Shuman ever sell any stock for this company, or in any institution in Eureka? A. No.

"Q. Did this company, or its officers, or yourself, as far as you know, ever give Mr. Shuman any contract for the establishment of an institution in the city of Eureka? A. No."

On October 26, 1923, Pillsbury addressed a letter to defendant, in which, among other things, he said:

"Have been expecting to hear from you ever since I received your telegram that you could not meet me in San Francisco at the time we had the appointment. I would have been glad to have met you and Mr. Case (the latter defendant's attorney) to have gone over these matters, but really do not see that it is necessary to get together, as there is no dispute as to the amount due."

The letter proceeds to remind defendant of the meeting of himself and Pillsbury at Santa Rosa, at some time, not stated, at which meeting Pillsbury agreed that the plaintiff "would stand one-half of the bills due" for certain advertising for publicity purposes, provided defendant would pay the other half, and then continues:

"As far as Napa is concerned, there is no question as to the amount due being \$5 per share on 233 shares, or \$1,165. I cannot for the life of me see why you should not send us this amount so that we can get these matters straightened out."

The foregoing letter, so far as the record gives any information on the subject, was never answered by the defendant. It is well to note that the letter was dated, and presumably sent to and received by defendant, before the commencement of this action by plaintiff on the 7th day of December, 1923.

It would seem that no review, by way of analysis, of the foregoing statement of the evidence is necessary to show that the finding that the salient allegations of the cross-complaint are untrue is not justly subject to attack. The evidence relative to the Eureka proposition, aside from that afforded by the letter to defendant from Wimsett, and dated October 20, 1922, and the written agreement dated January 1, 1923, is very indefinite. As before suggested, it is not made to appear that, upon the expiration of the term specified in the agreement dated January 1, 1923, there

(257 P.)

was, either by writing or verbally, an extension or a renewal of said agreement, except in so far as such renewal may be inferred from defendant's testimony that, after he had completed the Napa organization, he said to Pillsbury that he purposed going to Eureka within a few days and proceed with the organization of the Eureka branch, and that, in reply, Pillsbury said, "All right." But it is clear from an examination of the testimony in its entirety that defendant not only permitted the contract dated January 1, 1923, to lapse without taking any substantial steps within the term prescribed thereby looking to the exercise of the privilege or option therein given him to install a company in Eureka, but expressly abandoned all intention of taking up and carrying out the organization of a company in said city. It will be noted that it was either in the month of March or April, 1923, and within the period of time prescribed by the contract dated January 1, 1923, to which the life of his option as to Eureka was limited, he began preliminary operations for the establishment of the Napa company, and, so it is fairly and reasonably inferable from the testimony, he devoted himself exclusively to that territory until the organization of the Napa company was completed; and then (accepting his own testimony) he declared it to be his intention not to go into Eureka and then proceeded, on his own account, or for a Spokane company, to organize the Santa Rosa institution. The testimony of Pillsbury supports this conclusion. He stated, as shown, that defendant never attempted to exercise his option to establish a company at Eureka; that he never solicited or attempted to solicit stock subscriptions in Eureka for a company in that city. The only differences existing between plaintiff and the defendant during the entire period of time from the date of the refusal by plaintiff to accept defendant's check for \$1,065 as in full settlement of the Napa transaction to the later date on which, for the first time, defendant, in the city of Stockton, asserted a counterclaim to his \$1,165 indebtedness to plaintiff for and on account of the Napa business, were relative to certain bills incurred for publicity purposes in the establishment of companies in certain places. And it may parenthetically be suggested that, as to these differences or the subject-matter thereof, the court's decision in this case is adverse to plaintiff. (Vide findings on second count of plaintiff's complaint.) That defendant's claim of damages as to the Eureka matter was an afterthought and having for its basis the dispute upon the proposition whether defendant was to bear any of the expenses for publicity, etc., is clearly sustained by the consideration that, in the month of August, 1923, he sent his check for \$1,065 to plaintiff as in settlement of the Napa transac-

tion, and his admission in the trial of this case that his failure to make the check in the full amount due plaintiff on that account (\$1,165) was owing entirely to an error of his own in computation; that his intention was to forward to the plaintiff the full amount due on the sale of the 750 shares of stock at \$5 per share. It is entirely improbable that any business man of experience and intelligence would, as defendant did, forward to plaintiff a check for \$1,065, only \$100 less than the amount due, in payment of the balance due it from him on the Napa transaction, if, at the time, he believed he had a just claim for damages against plaintiff far in excess of his entire indebtedness to plaintiff. This suggestion at least addressed itself to the question of the credibility of the defendant's testimony, and was sufficient to justify the trial court, to which the decision of the questions of fact was submitted, in rejecting the defendant's testimony, in so far as thereby he undertook to support the validity of his asserted claim for damages against the plaintiff for the reasons alleged in the cross-complaint and herein explained. And it is to be assumed from the decision that the trial court did reject it.

[2, 3] The plaintiff contends that the defendant could not, in any event, recover damages for a breach of the contract as to the Eureka transaction for the reason that the case here is one in which a reasonable estimate or appraisal of damages cannot be made or awarded. The cases of *Friedman v. McKay Leather Co.*, 179 Cal. 566, 569, 178 P. 139, *Alderson v. Houston*, 154 Cal. 1, 96 P. 884, and *Parke v. Frank*, 75 Cal. 364, are cited in support of that proposition. But we do not deem it necessary to consider that proposition to determine whether the rule as stated in the cases named applies to the facts of the instant case. After a painstaking examination of the record, we are prepared, as must be manifest from what has been said before, to rest the decision here upon the proposition that this case, upon the evidence, is one for the trial court's decision; that is, for the decision of the question whether there was a breach of any contract between plaintiff and defendant as alleged in the cross-complaint. It was, as is well understood, for that court, as the trier of the facts, to resolve all conflicts, if any, arising in the evidence, and to determine the evidentiary value or probative force of the testimony of any witnesses testifying before it by tests which are obviously not available to a court of review. The findings are conclusive upon this court upon the questions of fact.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

53 Cal. App. 616

KORNMAN v. NELSON. (Civ. 4428.)

District Court of Appeal, Second District, Division 2, California. June 6, 1927.

1. Brokers §43(2)—Oral contract to pay tenant commission for selling house held void under statute requiring such agreements to be in writing (Civ. Code, § 1624, subd. 6).

Oral contract to pay tenant commission for selling house held void under Civ. Code, § 1624, subd. 6, requiring agreement authorizing or employing agent or broker to sell real estate for commission or compensation to be in writing, and notwithstanding tenant may have performed valuable services at owner's request.

2. Brokers §42—Tenant cannot recover commission for sale of house where not licensed as broker (Real Estate Brokers' Act, § 20).

Where tenant was not licensed as real estate broker or real estate salesman, he cannot recover commission for sale of house of landlord under Real Estate Brokers' Act (St. 1919, p. 1252, § 20).

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action to recover commission on sale of real property, brought by Willie Kornman against A. C. Nelson. Judgment for plaintiff, and defendant appeals. Reversed.

C. C. Mishler, John F. Keogh, and Julius V. Patrosso, all of Los Angeles, for appellant.

Ira L. Brunk, of Los Angeles, for respondent.

MURPHEY, Justice pro tem. In this action the complaint alleges that the defendant became indebted to the plaintiff in the sum of \$350 for services rendered at the special instance and request of the defendant. This issue was met by appropriate and sufficient denials on the part of the defendant. In response to this issue the court found, "that within one year prior to the filing of the complaint and issuance of summons herein the defendant agreed with the plaintiff to pay plaintiff as a consideration for assisting in the sale of certain real estate 5 per cent. upon the sale price of a certain parcel of real estate located in the city of Los Angeles, should he, the defendant, sell said real estate, and that said defendant sold said real estate for \$7,000"; upon which finding judgment went for plaintiff for the amount demanded. The testimony adduced at the trial stated in the most favorable light to support the plaintiff's contention is substantially as follows: Respondent rented a house from the appellant in the city of Los Angeles, which house appellant had for some time, unsuccessfully, endeavored to sell. Upon the occasion of the renting of the house respondent states that the appellant agreed that if she would show the property to prospective

purchasers while occupying it as a tenant and would place intended purchasers in touch with appellant, he would pay the respondent a commission of 5 per cent. of the selling price in the event that a sale of the property was made to any such person. The testimony further shows that the respondent did not show the house to a great many persons and did show the house several times to one Maguire, who became the purchaser thereof; that the respondent and her husband performed considerable work in rehabilitating and caring for the lawn on the premises during the time they occupied the house and prior to the sale thereof.

Assuming this to be a correct statement of the facts of the employment and disregarding the strenuous and specific denials of the appellant, it is the contention of the appellant, first, that the findings of the court are without support in the evidence; second, that the alleged oral contract for the payment of a commission is void under the provisions of subdivision 6, § 1624, of the Civil Code; and, third, that the alleged contract for the payment of a commission was illegal and void for the reason that the respondent was not licensed under the Real Estate Brokers' Act. It is an admitted fact that the alleged agreement was not evidenced by any writing nor any written memorandum of any kind or character. It is also admitted that the respondent had no broker's license.

[1] The respondent has not favored this court with any brief in support of the conclusions of the trial court. Whether this was because his investigations were fruitless in that behalf or because he considered the conclusions so manifestly impregnable that to supply authorities would be a work of supererogation and an insult to the intelligence of this court is not disclosed. Whatever may have been his disposition in the matter, we have been unable to find any authorities to support this judgment. It is apparent that respondent's compensation was contingent upon the sale of the property and the amount thereof dependent upon the sale price. We are unable to distinguish this case either as to the facts or the law applicable thereto from the situation developed by the case of *Dolan v. O'Toole*, 129 Cal. 488, 62 P. 92. At page 489 (62 P. 92) it is said:

"Defendant was the owner of a certain mine, and had contracted with a third party for the sale of it upon certain terms—in substance, that the purchaser should be put in possession for a specified time for the purpose of examination and development, and, if found satisfactory, to pay therefor a specified price. Plaintiff was an experienced miner and expert, and was well acquainted with the location of the mine and the work done in it, and while the conditional purchasers were in possession under their contract and prospecting for ore, defendant made a contract with the plaintiff

for his services 'to be rendered in aiding him (defendant) to consummate the sale under the contract' and for which, if the sale was made, he was to receive 10 per cent. of the purchase price. It appearing that the said contract for plaintiff's services was oral, objection was made and sustained to the evidence. It was then offered by the plaintiff to be shown that at the request of the purchasers plaintiff gave them directions where to work to develop ore, that his directions were followed successfully and resulted in such development of ore as induced the purchase under said contract. The court sustained the objection to the offered evidence and rendered judgment for the defendant, and plaintiff appeals. Section 1624 of the Civil Code provides: 'The following contracts are invalid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent. * * * 6. An agreement authorizing or employing an agent or broker to * * * sell real estate for compensation or commission.' In *Shanklin v. Hall*, 100 Cal. 26 [34 P. 636], the court below made the following findings of fact: 'That on the 17th day of April, 1890, the plaintiff and defendant entered into an oral agreement, whereby it was agreed between them that plaintiff should use his knowledge and influence on behalf of, and render his services to, defendant to enable him to sell or exchange the lands mentioned in the complaint herein, for which plaintiff was to be paid by the defendant the sum of \$450 as soon as the sale or exchange was effected through his, the plaintiff's, knowledge, influence, or services rendered to him, the defendant,' and that the plaintiff rendered the services as agreed, and that a transfer of the land was made by virtue of such services of plaintiff; and the court below concluded that plaintiff was entitled to recover. Upon appeal this court came to the opposite conclusion, holding that the contract was void under the provisions of the Code above cited. Counsel for appellant attempts to distinguish *Shanklin v. Hall*, supra, from the case at bar, and for this purpose refers to the testimony in that case, showing that *Shanklin* was engaged in the real estate business, and that he made new terms with the proposed purchaser which were accepted by *Hall*. But this statute is not confined to those who make a business of buying and selling real estate for others, but includes every person who in any case comes within its provisions."

In this connection it may be noted that this court in the case of *Patterson v. Torrey*, 18 Cal. App. 349, 123 P. 224, stated that the fact that plaintiff performed valuable services at defendant's request constitutes no ground for recovering compensation therefor in the absence of some note or memorandum subscribed by the defendant whereby plaintiff was employed or authorized to

negotiate the sale. To the same effect is *Hicks v. Post*, 154 Cal. 22, 96 P. 878, where the Supreme Court said:

"The fact that, acting under an invalid agreement, he made efforts to find purchasers, cannot, of course, operate to prevent the other party from asserting the invalidity of the contract. To hold the contrary would be to abrogate the statute of frauds." [Quoting *Shanklin v. Hall*, 100 Cal. 26, 34 P. 636; *Dolan v. O'Toole*, supra.]

[2] There are numerous cases cited in each of the foregoing cases and a long line of authorities independent of these and to the same effect which are in our judgment conclusive as to this phase of the case. Furthermore, we are satisfied that the respondent's case comes squarely within the inhibition of the Real Estate Brokers' Act (St. 1919, p. 1252), the material portions of which, having a bearing on this controversy, are as follows:

"A real estate broker within the meaning of this act is a person, copartnership or corporation who, for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate. * * * One act, for a compensation, of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, * * * shall constitute the person, copartnership or corporation making such offer, sale or purchase, exchange or lease, * * * a real estate broker within the meaning of this act." Section 2.

Section 20 bars a recovery of a commission by a person not licensed as therein provided, and reads as follows:

"No person, copartnership or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section two hereof without alleging and proving that such person, copartnership or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

The contract sued upon is clearly comprehended within the terms of this statute, and is therefore illegal and void, and cannot support a judgment in favor of the respondent, who was not licensed in the manner therein provided.

The judgment is reversed.

We concur: WORKS, P. J.; CRAIG, J.

83 Cal. App. 585

YOUNG v. SAN JOAQUIN LIGHT & POWER CORPORATION. (Civ. 3264.)

District Court of Appeal, Third District, California. June 4, 1927.

1. Appeal and error ⇨843(1)—Trivial objections, not affecting parties' substantial rights, will not be considered on appeal.

Minor and trivial objections, not affecting substantial rights of parties, will not be considered on appeal, in this case.

2. Negligence ⇨136(17)—Negligence in failing to extinguish fire near inflammable matter on adjoining property held for trier of fact.

Evidence held to present question of fact for trier of fact as to whether defendant's employees negligently left fire within 10 or 12 feet of inflammable matter on plaintiff's adjoining property, when a wind was blowing from fire towards plaintiff's property, in condition likely to set fire to such material, and as to whether fire was caused thereby.

3. Negligence ⇨21—Maintenance of fire near combustible material, when wind is blowing toward material, may be negligence.

Maintenance of fire in close proximity to combustible material during dry season of year, and when wind is favorable for causing burning embers to be carried to the nearby combustible material, may be reasonably held to be negligence, though under other circumstances it might be ordinary care.

4. Appeal and error ⇨996—Reasonable inferences, drawn from evidence by trial court, cannot be disturbed on appeal.

If inferences of fact, drawn from evidence by trial court, be reasonable, they cannot be disturbed on appeal.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by W. S. Young against the San Joaquin Light & Power Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

F. H. Pearson, for appellant.

W. J. Minville, of Dinuba, and Gallaher, Simpson & Hays, of Fresno, for respondent.

PLUMMER, J. The plaintiff had judgment in an action brought to recover losses sustained by reason of a fire resulting from the alleged negligence of the defendant's employees, and the defendant appeals.

The record shows that on the 25th day of August, 1923, and for some time preceding, the plaintiff owned and occupied a certain lot of land in the city of Dinuba, county of Tulare, state of California, on the front of which was situated his residence, and on the rear of which was located certain machinery, buildings, etc., known and called the Alta Soda Works. The tract of land just referred to extended in a westerly and east-

erly direction; immediately to the north of the lot of land just referred to was a certain other lot occupied by the defendant and used by the defendant as a storage yard. This lot was so occupied by the defendant under a lease from the plaintiff. The two lots referred to faced upon a street, and along the rear thereof existed an alleyway. The lot occupied by the appellant, as just stated, was used for storage purposes in its business as a public utility. A roadway or driveway extended from the rear to the front of the lot occupied by the appellant, the lot itself being completely inclosed by a woven wire fence 7 feet in height. A gate was maintained both at the front and the rear of said lot. The driveway just referred to extended over said lot practically along the center line thereof. The material on the lot occupied by the defendant was piled up along the south side thereof adjoining the buildings in which the plaintiff conducted his soda works, the material consisting of cross-arms, crates, barrels, boxes, excelsior, and other wooden articles intended to be disposed of or used for fuel purposes. On the day in question, certain employees of the defendant were engaged in burning the insulation off of a quantity of copper wire. This fire was kindled and maintained in the roadway just mentioned a few feet north of the pile of material to which we have referred.

The record shows that some two tons of copper wire were handled by the employees of the defendant on the day in question and the insulation burned therefrom; that the coils of wire from which the insulation was burned were allowed to remain in the place where the fire had been kindled and maintained. It would appear from the testimony that two fires were kindled and maintained and used in the burning of insulation from copper wire, as just stated. This process continued from some time in the forenoon until approximately 1:30 in the afternoon. The time when the defendant's employees ceased the operations referred to appears to be only approximately stated, but the conclusion is reasonable that the operation ceased at about the time stated. The record shows that the last time any of the employees of the defendant were upon the premises mentioned was in the neighborhood of 2 o'clock. A short time after the defendant's employees had left the premises, to wit, about 3 o'clock, a fire was discovered in the pile of material to which we have heretofore referred, which fire was communicated to the plaintiff's soda works, and the building in which the soda works were maintained was completely destroyed and the machinery more or less damaged.

[1] Upon this appeal it is urged that the testimony is insufficient to justify the findings of the court that the fire resulted from the negligence of the defendant's employees.

Some minor objections are also urged, but as they are only trivial in their nature and do not affect the substantial rights of the parties, they will not be considered in this appeal. The action was tried before the court sitting without a jury, and the opinion filed by the court in deciding the action is so clear and distinct and so accurately portrays the situation revealed by the record that we will take therefrom the following excerpts:

"The defendant occupied and used the lot just north of plaintiff's property. On this lot and piled along and against a woven wire fence which separated defendant's lot from plaintiff's, defendant had piled a lot of material consisting of crates, excelsior, barrels, cross-arms, and other material. This pile was, on the day of the fire, placed along the fence for 15 or 20 feet, being either piled against or very close to the little building used as a storeroom by plaintiff; the pile of material was as high as the fence, 7 feet, and was about 10 feet in width.

"Some time during the forenoon of the day of the fire several of the employees of the defendant came to the lot occupied by defendant and there proceeded to burn the insulation off of several tons of copper wire. A driveway extended from east to west, lengthwise through the lot, and at about the center line running east and west. To burn this insulation the employees built two fires in the driveway. Each fire was 10 or 12 feet north of the pile of material or rubbish. One of the fires was about 15 feet from the storeroom building, and the other about 25 feet. The insulation was burned by placing the copper wire on the fire. All the wire from which the insulation was burned was left in a pile on the place of the fire. The burning of the insulation continued until noon and then, with a short intermission, until some time in the afternoon, but ending before 2 p. m.

"It cannot be said positively that the fire kindled by defendant's employees, and by them left smouldering, set fire to the rubbish in defendant's lot, for no one actually saw how the fire caught in the pile of rubbish. But there was no other fire near the rubbish except the fires kindled by defendant's agents. No persons were on the lot except defendant's employees. The lot was inclosed with a 7-foot woven wire fence. The gate at each end of the lot was kept locked when defendant's employees were absent therefrom. The fire they kindled was seen to be still burning as late as 2:30 p. m. It was within 10 feet of the pile of inflammable material, and the wind was blowing from the fire toward the material. It must therefore be held that the fire which caught the rubbish came or spread from the fire kindled by defendant's agents.

"The evidence established that defendant's employees were negligent. The burning of the insulation from the wire was in the course of their employment for defendant, and defendant is, therefore, liable for damages which arose from their negligence. The fire occurred at the driest season of the year. A wind was blowing from the north toward the pile of rubbish. It is a matter of common knowledge that in this valley the prevailing wind in the summer season is from the northwest, and that it is generally of strength sufficient to carry sparks quite a distance. Yet the defendant's employees

left a smouldering fire within 10 feet of an inflammable pile of rubbish, which defendant had piled against or almost against a frame building occupied by plaintiff. Ordinary care required that defendant's employees see that the fire was entirely out at the time they left the premises. They knew that the fire was within 10 feet of a large pile of inflammable rubbish, and that the wind might carry sparks from the fire to the rubbish."

There is also testimony in the record that the fire was still burning at about 2:30 p. m., being about 30 minutes after the last of the defendant's employees had visited the premises. There is also testimony that some of the defendant's employees, who visited the place about 2 o'clock, saw heat waves coming from the place of the fire and felt heat as they passed by the place or places where the fire had been maintained. The testimony further states that shortly after 3 o'clock the pile of material in the defendant's lot was seen to be on fire. Effort was made to put out the fire by the use of a garden hose and at the same time the fire department was called out, but by the time it arrived the fire had spread to the plaintiff's buildings. The testimony in the record also shows that the wind was blowing from a northerly to a southerly direction, which would be from the fire toward the pile of material distant some 10 or 12 feet therefrom.

A witness by the name of Borthwick, called on behalf of the plaintiff, testified that he saw black smoke on the lot occupied by the defendant's employees, where the fire was maintained some time in the forenoon of the day in question, that he last saw black smoke coming from said premises about 2 o'clock in the afternoon. He fixed the time by stating it was some time after he got back from lunch.

The testimony of Mrs. Young, the wife of the plaintiff, was to the effect that she saw smoke during the forenoon, and in the afternoon a short time before the fire she also saw smoke arising from the place where the fire had been maintained in the forenoon; that she saw two or three men working on the premises in the forenoon, but one only was there in the afternoon; that when they were burning a great mass of stuff, the flames would shoot up several feet; that during the forenoon the fire gave off a black smoke; that later on, as it burned down, it gave off a "sort of blue smoke." There was also testimony to the effect that in addition to the lumber, crates, cross-arms, etc., there was excelsior taken from the crates that had been used as packing around the insulators, the language of the witness being "excelsior brought up there and dumped in there"; that the pile of material extended down to within about 10 feet of the driveway.

The testimony on the part of defendant indicated that the burning of insulation in

the afternoon was conducted by a man by the name of Clark, who was no longer in the employ of the company, and no one seemed to know his whereabouts.

One of the witnesses for the defendant testified as to the distance of the fire from the edge of any of the material just referred to. His statement was that it was about 10 or 12 feet; that the fire was maintained in the driveway; that the driveway was all clear, that there was no débris in the driveway; that in burning the insulation, it fires up and makes a big smoke for a while, and then is gone; that no ashes are left. This witness stated that a man by the name of Clark did the burning in the afternoon; that he and another employee of the defendant left the premises and returned to the premises along about 2 o'clock; that on their way back they picked up Clark, who had been left at the premises, and stopped at the gates to see that they were locked; that the gates were locked; that Clark was working at the fire when this witness left, but whether he was burning insulation or not, he did not know; that when they returned to the lot they looked at the gate to see that it was locked, "looked at the gate, and looked over the fire where we had been burning this stuff, everything looked all right."

"Q. What did you see there at the time? A. Nothing but little heat waves coming a little bit hot.

"Q. Did you go inside the yard? A. No.

"Q. Was there anybody in there at that time? A. No. My purpose in going back to the lot was to see if the gates were locked, also, to get Clark if the fire was out. When I came back to see if the gates were locked, I also noticed the heat waves."

This witness and the others mentioned then went out on a job about two miles away. On redirect examination, this witness then testified as follows:

"Q. You say you noticed heat waves coming from the fire? Do you mean from the fire? A. No.

"Q. Or from the place where the fire had been? A. From the wire, where the wire was at.

"Q. In other words, you mean the wire was probably still hot? A. Yes, sir.

"Q. You did not see any fire there, and you didn't see any smoke? A. There was no fire or smoke."

Another witness called by the defendant testified that he went into the lot about 2 o'clock p. m., found the gates locked, and there was no one in the yard when he arrived and when he left; that he locked the gate when he left; that he did not see any smoke; that he and another employee walked on the north side of the piles of wire and noticed the heat; that one of the piles was about two or three feet high; that it was dry and dusty around the fire; that he

did not notice anything combustible; that he could feel the heat, but there was no smoke.

Another employee of the defendant also testified that he did not notice any of the heat waves; that he accompanied Mr. Furman, who testified as to the heat waves; that he saw no smoke.

The testimony of all of the witnesses was that the wind was blowing from the north-westerly direction, that is, from the fire toward the material piled as mentioned herein. There is no testimony on the part of any witness as to anything having been done toward putting out the fire. The witness, who testified that he visited the premises to see if the gates were locked, did not go inside; he only looked in. He saw heat waves only and no smoke. The testimony of this witness that he saw no smoke and no fire, after having testified that he saw heat waves, was in response to the following question:

"Q. You did not see any fire there, you did not see any smoke? A. No; there was no fire or smoke."

The weight to be given to this suggested testimony was primarily for the trial court in determining whether there was or was not any fire or smoke upon the premises at the time the defendant was examining the gates to see if they were locked and only looked over and did not enter upon the lot.

[2] Other witnesses had testified that they saw smoke, a thin blue smoke. It is evident that whether it was a thin blue smoke or only heat waves, whatever it was the different witnesses saw, it came from a fire and the trial court was at liberty to draw such an inference or conclusion. The trial court was at liberty, also, to draw the inference that it was negligence for the employee to leave any substance that would cause either heat waves or smoke to arise therefrom within 10 or 12 feet of such an inflammable substance as excelsior, when a wind was blowing from the direction of the fire toward the excelsior.

There is also testimony in the record to the effect that, when the firemen came to put out the fire, the hose which they used caught on fire, when drawn across one of the places where the employees of the defendant had kindled and maintained a fire, as referred to.

While, as said by the trial court, no witnesses saw the actual start of the fire, and, as shown by the record, no witness testified as to what, if anything, was done toward putting out the fire, the fact that any burning substance was in such close proximity to the material of the kind and character piled upon the premises sufficient to cause either blue smoke or heat waves to arise therefrom, when the wind was blowing in that direction, that might reasonably be calculated to carry the fire to the inflammable material, lays a foundation sufficient to justify the court in inferring from such facts that the employees

of the defendant left the premises without taking the reasonable precautions, which the circumstances demanded, to see that the fire which they had kindled was extinguished.

[3] It is evident that when a fire is maintained in such close proximity to combustible material at a time of the year when everything is dry, and when the wind is favorable for causing burning embers to be carried to the nearby combustible material, that what might be ordinary care, under other circumstances, might reasonably be held by the trial court negligence under the circumstances attendant upon this case, and so clearly set forth in the excerpts which we have taken from the opinion of the trial court.

As said in the case of *Cobb v. Twitchell* (Fla.) 108 So. 186, 45 A. L. R. 865:

"Upon the state of facts before us, and in the absence of mitigating circumstances, a jury might reasonably conclude that the defendant, or his servants, did not observe reasonable prudence and ordinary care under the circumstances, in that they were not sufficiently thorough in extinguishing the original fire."

And, also, on the point of negligence, the court in that case further says:

"Such negligence, however, may be predicated not alone upon the circumstances under which the fire was kindled, or upon a failure to observe requisite precautions preliminary thereto, but may be established as well by appropriate proof that the defendant, after properly setting out the fire, failed to manage and attend it with reasonable prudence and ordinary care appropriate to the circumstances" (citing cases).

"The degree of care required to be used in any given case to avoid the imputation of negligence must be according to the circumstances or in proportion to the danger reasonably to be anticipated; such care as is ordinarily sufficient under similar circumstances to avoid danger and secure safety. Negligence may be inferred from circumstances properly adduced in evidence, provided those circumstances raise a fair presumption of negligence; and circumstantial evidence alone may authorize the finding of negligence. * * *

"When the question of negligence depends upon a disputed state of facts, or when the facts, though not disputed, are such that different minds may reasonably draw different conclusions from them, the question is for the jury," or the trial court.

We think, under the circumstances disclosed by the record, it was reasonable and proper for the trial court to draw the inference that the defendant's employees had been negligent in not seeing that the fire was not entirely extinguished.

[4] While, of course, we cannot say that the defendant's employees were guilty of negligence, as a matter of law, in placing the fire where they did, it is a question of fact for the jury to determine whether they did or did not properly safeguard the same before leaving the premises, and if the infer-

ence drawn by the court is reasonable we are not at liberty to disturb the same. We think the testimony reasonably justifies the inference drawn by the trial court and the findings based thereon.

This court, in the case of *Paiva et al. v. California Door Co.*, 242 P. 887, had occasion to set forth the law relative to inferences that might be drawn from facts established by circumstantial evidence, and in that case held, from the circumstances so established, the inference could be reasonably drawn as to the origin of the fire. In the *Paiva Case* the stump of a tree was shown to be on fire at a certain time, and that no other fires were kindled thereafter. This court said:

"Taking it then as a justifiable inference that the stump was burning on Monday morning, and giving consideration to the further proved fact that a strong wind was blowing past the stump in the general direction of the place where the fire started, it would not be unreasonable, in the absence of other explanation, to infer that the fire was caused by sparks from the burning stump" (citing a number of cases).

This language is pertinent to the instant case. It was not unreasonable for the trial court to draw the conclusion that the fire was communicated to the inflammable material 10 feet away by reason of the wind that was blowing in a direction that would tend to communicate the fire in question started and left by the defendant's employees in close proximity thereto.

In view of the testimony that a blue smoke was arising from where the fire had been maintained and also that heat waves were arising therefrom, whichever statement may be considered as correct, the inference is certainly reasonable that proper precautions were not taken to extinguish whatever remained of the burning embers, or of the burning insulation, or of the heated wire, under the circumstances disclosed by the testimony, especially with the wind blowing from a northerly direction and the season of the year, which, common knowledge teaches us, renders all kinds of wooden materials readily susceptible to fire.

As stated in 11 Ruling Case Law, 945:

"In determining whether a person in starting a fire on his own land exercised such care, caution, and diligence as a prudent and reasonable man would have exercised under the same circumstances, an important factor to be taken into consideration is whether there was at the time a wind which was reasonably calculated to spread fire. It has also generally been considered that the condition of the season as to dryness is an important element in determining whether a person exercised proper care in starting a fire on his own land."

This principle would apply equally whether one had taken reasonable care in the extinguishment of a fire which had been maintained by one on his own premises.

All the subjects which we have discussed in this opinion are fully considered in an elaborate note contained in 45 A. L. R. beginning on page 870. See, also, *Dibble v. San Joaquin Light & P. Co.*, 47 Cal. App. 112, 190 P. 198.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

83 Cal. App. 582

FINK & SCHINDLER CO. v. GAVROS et al.
(Civ. 5747.)

District Court of Appeal, First District, Division 2, California. June 4, 1927.

1. Sales ⇨358(1)—In action on account, evidence of independent account between parties is properly excluded, where there is no confusion of items.

In action on account for goods sold and delivered, evidence that other work not involved in the suit had been performed by the plaintiff is properly excluded, where there is no evidence that items in the two accounts were confused.

2. Evidence ⇨213(2)—Evidence of statements made during mere discussion of disputed account is admissible, discussion not necessarily being attempt at compromise.

The parties' mere discussion of items of the disputed account is not an attempt at compromise so as to render statements then made inadmissible in an action on the account.

3. Judgment ⇨251(1)—Court may enter judgment partly on findings of agreed price and partly on value, where both are pleaded in separate counts for entire claim.

Court may properly enter judgment in part on the findings on first count of an action for goods sold and delivered pleading their reasonable value and in part on the findings on second count pleading the agreed price.

4. Sales ⇨181(11)—Evidence failing to show delivery or tender of fixtures held insufficient to support recovery therefor.

Evidence failing to show delivery or tender of fixtures sold held insufficient to support recovery therefor notwithstanding evidence of manufacture and countermand by defendants after failure of business.

Appeal from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Action for goods sold and delivered by the Fink & Schindler Company against John Gavros and others. Judgment for plaintiff, and the defendants appeal. Judgment modified, and, as modified, affirmed.

Dahlin & Jackson and Lloyd Peterson, all of San Francisco, for appellants.

George W. Walker and Russell W. Cantrell, both of San Francisco, for respondent.

STURTEVANT, J. The appeal is by the defendants from a judgment rendered against them in an action brought against them by the plaintiff to recover on an account for goods sold and delivered. The plaintiff pleaded its cause of action in two counts. In the first count it pleaded the reasonable value, and in the second count it pleaded the agreed price. Each count was for the sum of \$1,404. On the first count the plaintiff was by the findings awarded \$730, and on the second count it was awarded \$599. The services rendered by the plaintiff consisted of installing certain alterations and additions to the premises known as 6294 Mission street in an attempt to improve it as a restaurant or café.

[1] The appellants complain because the trial court excluded evidence to the effect that the respondent had performed other work on the premises at or about the same time as the work which is the subject of this dispute. Conceding that appellant had done so, the two accounts might be confused and commingled by the litigants. Nevertheless the appellants have not called to our attention any ruling made by the trial court that tended to create confusion. To have gone indiscriminately into other collateral matters would have tended to create, rather than to avoid, confusion.

[2] The appellants also claim that the trial court erred in receiving evidence of an attempt to compromise the dispute. The vice in this contention is that the trial court did not do so. The parties met and discussed the items of the account. Some of the statements made by the respective parties were received in evidence. A matter of compromise was not suggested nor attempted, and no evidence on that subject was received.

The last item included in the respondent's bill of particulars was "three oak booths." After the trial was had the appellants made a motion for a new trial and offered affidavits purporting to show the nonexistence of the booths. The motion was denied, and the appellants claim the ruling was error. We will not stop to discuss the contention, for it will presently appear that the respondent was not entitled to recover on that item.

[3] The appellants claim that the judgment does not accord with the findings. In support of the point they contend that the trial court should have given its entire award on the first count or on the second count, and should not have given a part of the award on the first count and a part on the second count. The point is without merit.

[4] Finally, it is contended by the appellants that the findings are not supported by the evidence. At least in part that contention must be sustained. As appears from the bill of particulars, the appellants placed fifteen separate orders with the respondent. The last order was for three oak booths. The

uncontradicted evidence is to the effect that said order was placed October 5, 1922; that the price, \$390, was agreed upon; that the booths were to be installed in a week or ten days. In February, 1923, the appellants were "closed up." At no time were the booths built. The respondent offered evidence that the booths were not installed because the appellants subsequently countermanded the order. The respondent also offered evidence that when the order was countermanded the lumber had been framed and was ready to be glued together and to be installed, and that all expense in the manufacture had been incurred except the sum of \$75. In reply the appellants offered evidence that they never countermanded any order until after their place of business was closed in February, 1923; that continuously after the order was placed they requested the respondent to install the booths, but they were not installed, and the fact that they were not installed was one of the reasons for the failure of the venture of the appellants. To this evidence the respondent made no reply. When the trial court ordered judgment the expression used was "that plaintiff be granted judgment herein as prayed." A judgment according to that order would have included the full price, \$390, for the booths; nevertheless counsel drew findings deducting \$75, apparently as an allowance on the booths. Under such a set of facts the respondent was not entitled to make any charge whatever for the booths. 35 Cyc. 169, 175. It follows that the allowance contained in the findings, \$599, covering the agreed price on part of the goods, was excessive to the extent of \$315.

The judgment is modified by deducting therefrom \$315, and, as so modified, it is affirmed. The appellants will recover their costs incurred on this appeal.

We concur: KOFORD, P. J.; NOURSE, J.

83 Cal. App. 598

JAMESON v. SHEPARDSON et al. (Civ. 3270.) ★

District Court of Appeal, Third District, California. June 4, 1927.

Hearing Denied by Supreme Court Aug. 1, 1927.

1. Gifts ⚡5(1)—Purchaser's transfer of interest under sale contract by agreement whereby defendant relieved purchaser from obligations thereunder held not "gift" (Civ. Code, § 1146).

Agreement under which defendant undertook to relieve plaintiff from obligations which she had assumed under contract to purchase land and plaintiff assigned interest under sale contract held not to constitute gift, in view of statutory definition in Civ. Code, § 1146.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

2. Escrows ⚡9—Performance must be made within time limited by escrow agreement, or within reasonable time in absence of stipulation, and depository cannot accept performance thereafter.

Performance must be made within time limited by escrow agreement, and depository has no authority to accept performance thereafter, but, in absence of stipulation as to time, performance within reasonable time is sufficient.

3. Escrows ⚡9—Time is not of essence of escrow agreement unless clearly specified.

Time will not be held to be of essence of escrow agreement unless it is so clearly specified.

4. Vendor and purchaser ⚡179—Equity will not deprive party of property rights for technical breach of contract, where there was substantial compliance with requirement to make payment under land contract.

Where agreement was executed for purpose of securing payment of certain sum under land contract on particular day, and such sum was paid before there had been default or forfeiture under agreement calling for its payment, there was substantial compliance, and equity is unauthorized to deprive party paying of property rights on technical objection that he failed to deposit one-third gross receipts of property.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Carrie M. Jameson against Marin J. Shepardson and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Edward Bickmore, of Merced, and Conley, Conley & Conley, of Fresno, for appellant.

Arthur Allyn, of Fresno, for respondents.

PLUMMER, J. Plaintiff began this action to recover possession of 9.57 acres of land situate in the county of Madera, state of California, to quiet her title thereto and for other relief. Defendants had judgment, and plaintiff appeals.

This action involves the question of the performance of the conditions of a certain agreement entered into between the plaintiff and Marin J. Shepardson, dated February 16, 1924.

The record shows that on or about the 3d day of August, 1923, the plaintiff entered into a written contract with the Sierra Vista Lands, Inc., to purchase the 9.57 acres of land above referred to; that on the 16th day of February, 1924, there remained due on the contract with the Sierra Vista Lands, Inc., certain payments, falling due and in the amounts here stated, to wit: \$1,510 on August 3, 1924; \$1,887.50 on August 3, 1925, and \$1,887.50 on August 3, 1926, together with interest thereon at the rate of 6 per cent. per annum.

The agreement with the Sierra Vista

Lands, Inc., contained the following condition:

"In the event that the buyer defaults in the payment of any sum of money herein agreed to be paid when the same becomes due hereunder, or shall make default in performing any of the covenants or conditions herein contained, by him to be kept and performed, and if any such default shall continue for a period of 30 days, then the seller, at its option, shall have the right to immediately terminate this agreement and enter into and take possession of said land, and the whole thereof."

The agreement further provides that in such a contingency the buyer forfeits all right to recover any payments made previous to the taking of the possession of the premises by the seller.

On the 16th day of August, 1924, the plaintiff and the defendant Marin J. Shepardson, entered into an agreement concerning said premises, which agreement states the reasons for the entering into such agreement, and so far as material here is in the following words and figures:

"This agreement made and entered into this 16th day of February, 1924, between Carrie M. Jameson, of the county of Merced, state of California, the party of the first part, and Marin J. Shepardson, of the county of Madera, state of California, the party of the second part, witnesseth:

"That, whereas, the party of the first part has heretofore purchased under contract from the A. R. Bishop Company, Inc., a certain tract of land, consisting of about 10 acres, near Minturn in the county of Madera, state of California, together with certain buildings and improvements thereon; and

"Whereas, said party of the first part feels unable to carry on the business for which said property was purchased and is desirous that said property and business be properly managed and handled; and

"Whereas, the party of the second part and her husband, Clyde Shepardson, are willing to undertake the management of said property and business and assume the contract heretofore entered into by the party of the first part:

"Now, therefore, it is mutually agreed by and between the parties hereto as follows:

"The party of the first part agrees to transfer and assign to the party of the second part her interest under said contract, said assignment to be placed in escrow and to be delivered to the party of the second part on August 3, 1924, in the event that the covenants to be performed by the party of the second part are duly performed; said assignment shall be a gift, by the party of the first part to the party of the second part, of the interest of the party of the first part under said contract and in and to said land. The party of the second part agrees that in consideration of the foregoing, she and her said husband will carry on, conduct, and manage said business and said property in a diligent, careful, and competent manner and will exert every energy to make said business a success.

"Said party of the second part further agrees

that she and her said husband will render to the party of the first part a monthly statement of said business showing the receipts and expenditures thereof and in general the condition of said business, said monthly statement to be rendered on the first day of each month.

"Said party of the second part further agrees that not less than one-third of the gross receipts of said property and business shall be deposited in the Chowchilla National Bank of Chowchilla, to the credit of Carrie M. Jameson and Marin J. Shepardson, and that no money deposited in said account shall be withdrawn therefrom except upon check signed by both Carrie M. Jameson and Marin J. Shepardson; it being understood and agreed that said money so deposited in said account shall be applied upon the payment due to the said A. R. Bishop Company, Inc., on account of the purchase of said property, on August 3, 1924.

"It is understood and agreed that the party of the first part shall reserve the privilege of building a home on one-half acre of said land, within one year from date, and that if said party of the first part shall desire to build such home one-half acre shall be granted to her by the party of the second part.

"In witness whereof, the parties hereto have hereunto set their hands the day and year first above written, executing in duplicate. Carrie M. Jameson, Party of the First Part. Marin J. Shepardson, Party of the Second Part.

At the same time and as a part of the same transaction, the plaintiff executed an assignment in favor of Marin J. Shepardson of all and singular the rights acquired in and to the premises hereinbefore referred to, obtained by her under and by virtue of the contract of purchase theretofore entered into with the Sierra Vista Lands, Inc., and of the contract so entered into with the said land company. This assignment was consented to and approved by the Sierra Vista Lands Company. The agreement entered into between the plaintiff and the defendant Marin J. Shepardson, and the assignment just mentioned were drawn by one A. R. Schottky, and the latter instrument was left with the said Schottky, to be delivered to the defendant Marin J. Shepardson, upon compliance with conditions mentioned in the agreement entered into between her and the plaintiff. The witness Schottky testified that there were no written instructions given to him concerning the delivery of the agreement to the defendant, but that certain oral instructions were given to him, of which he made a memorandum upon the envelope in which the assignment was inclosed, when he placed it in a safe in his office. This witness testified that the assignment was to be delivered by him to the defendant if the payment called for in the contract with the Sierra Vista Lands, Inc., company, to be made on August 3, 1924, was complied with. His version of what the plaintiff stated, when the assignment was delivered to him in escrow, is as follows:

"If the payment is made, so I am not stuck on this contract to the Sierra Vista Company, then this is to be delivered to Marin."

And, further, in reply to the court, the witness said:

"She [referring to the plaintiff] made it very clear and definite to me that this was to be delivered to Marin J. Shepardson if the payment to the Sierra Vista Company was made."

And, further, upon cross-examination, the escrow agreement was drawn first, and the assignment drawn second.

"I remember this, before they left the office, and that assignment was acknowledged by Mrs. Jameson, that either by question of mine, or by direct word from her to me, that that understanding was repeated, and so when she left there, I put those instruments, the assignment, away with the understanding that I got from her that it was to be delivered when the payment was made. * * * The last thing I got from them was this escrow proposition, because, naturally, I wanted to make that clear to myself, as to just how I was holding that, because I was charged with the responsibility as escrow holder."

The controversy in this case revolves entirely around that part of the agreement, dated February 16, 1924, which provides that:

"The party of the second part shall deposit not less than one-third of the gross receipts of the property and business in the Chowchilla National Bank of Chowchilla to the credit of Carrie M. Jameson and Marin J. Shepardson, and that no money deposited in said account shall be withdrawn therefrom except upon check signed by both Carrie M. Jameson and Marin J. Shepardson; it being understood and agreed that said money so deposited in said account shall be applied upon the payment due to the said A. R. Bishop Company, Inc., on account of the purchase of said property, on August 3, 1924."

It may be here stated that the A. R. Bishop Company was the representative of the Sierra Vista Lands Company, and was attending to the business of the company, in so far as the payment of the lands were concerned mentioned in the agreements under consideration. The testimony shows that this provision of the contract was not strictly complied with, in so far as it required the deposit of certain moneys in the Chowchilla Bank, but the testimony does show that the \$1,510 required to be paid to the Sierra Vista Lands Company on the 3d day of August, 1924, but, under the terms of the contract executed and delivered to the plaintiff and assigned by her to the defendant Marin J. Shepardson, 30 days were allowed within which to make any such payment before a default could be declared. This appears from the provisions of the land company's contract, which we have hereinbefore set forth. The testimony also

shows that instead of making the deposits of money in the Chowchilla National Bank, as called for in the agreement with the plaintiff, the defendants, with the knowledge of the plaintiff, spent several hundred dollars in making improvements upon the property.

The court also found that the plaintiff waived the deposit of the portion of the proceeds of the business in the Chowchilla Bank, as called for therein. This finding is challenged as not being supported by the evidence. Whether such finding is or is not sufficiently supported, we think wholly immaterial.

Upon being presented with proof of the payment of the sum of \$1,510 by the defendants, as called for in the contract of sale executed by the Sierra Vista Lands Company, the escrow holder, Schottky, delivered the assignment to the defendant Marin J. Shepardson.

With these circumstances existing and transactions being had, the appellant sought recovery of the premises, the annulling of the delivery of the assignment, and the setting aside of the agreement entered into between her and the defendant Marin J. Shepardson, and a decree of the court quieting plaintiff's alleged title to the premises.

[1] In the court below, and upon appeal, the contention is made that the agreement between the plaintiff and the defendant Marin J. Shepardson constituted only a gift; that, being a gift, the plaintiff was entitled to have the contract complied with strictly or according to the letter thereof. While the contract uses the word "gift," it is evident from the reading thereof and the obligations to be performed by the defendant and the undertakings on her part therein set forth that the transaction was not and is not a gift. Section 1146 of the Civil Code defines a gift:

"A gift is a transfer of personal property, made voluntarily, and without consideration."

In 28 Corpus Juris, 620, we find the word "gift" defined as follows:

"A gift has been defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor. The term is also used to designate that which is given; anything given or bestowed; any piece of property which is voluntarily transferred by one person to another without compensation. A gift is a gratuity, and not only does not require a consideration, but there can be none; if there is a consideration for the transaction it is not a gift. A gift is dependent upon no agreement, but upon the voluntary act of the donor only. The word 'gift' ordinarily applies to personal property only, but, in its larger signification, it applies to either realty or personalty."

Measured by the authorities cited to support the text, which we have quoted from

Corpus Juris, the agreement entered into between the plaintiff and the defendant Marin J. Shepardson cannot be classed as a gift. It was an undertaking on the part of said defendant to relieve the plaintiff from the obligations which she had assumed, when entering into the contract with the Sierra Vista Lands Company, which alone, irrespective of other considerations mentioned, took the agreement out of the category of gifts.

[2-4] The paragraphs from the agreement entered into between the plaintiff and the defendant Marin J. Shepardson, which we have last quoted, shows clearly the intent and purpose of the parties in providing for the deposit of the proceeds of the business in the Chowchilla Bank, to wit, the accumulation of a fund to be applied upon the payment coming due on August 3, 1924. That is the whole intent and purpose of the requirements set forth in the agreement concerning rendering of accounts and the deposit of money. While this was not strictly complied with, the testimony shows that the agreement was substantially complied with, from the fact that the \$1,510 were paid on the contract during the 30 days allowed therefor. It will be here observed that in the agreement entered into between the plaintiff and the defendant Marin J. Shepardson time is not made the essence of the contract. There is not one word in the contract which would justify the conclusion that the parties entering into the same had in mind or intended that the agreement should become of no force or effect unless the \$1,510 were paid exactly on the 3d day of August, 1923, or if the specific portion of the proceeds of the business was not deposited in the Chowchilla Bank, nor, so far as the testimony shows, was there anything limiting the time when the assignment should be delivered to the defendant Marin J. Shepardson,

save and except the making of the payment called for in the land company's contract. Under such circumstances, the rule of law, stated in 10 Cal. Jur. 954, § 14, applies, to wit:

"Performance must also be made within the time limited by the escrow agreement, if any, and a depositary has no authority to accept performance thereafter. If there is no stipulation as to the time within which performance of the condition must take place, performance within a reasonable time is sufficient; and time will not be held to be of the essence of the escrow agreement unless it is so clearly specified."

We do not need to cite authorities to show that, where an agreement has been executed for the purpose of securing the payment of a certain sum of money upon a particular day, if the sum of money is paid before there has been any default or forfeiture under the agreement calling for its payment, there has been a substantial compliance, and that a court of equity is not authorized, under such circumstances, to annul an agreement and deprive a party of property rights upon mere technical objections, none of which reach the substantial merits of the questions involved.

We have not set forth anything herein concerning the notices served by the plaintiff upon the escrow holder, and the defendants, in seeking to annul and have annulled the agreement and assignment herein referred to, as they do not affect anything which we have hereinbefore stated, or the conclusions that have been arrived at in considering the matters determinative of this appeal.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

83 Cal. App. 758

CALIFORNIA NAT. SUPPLY CO. v. PORTER
et al. (Civ. 4671.)

District Court of Appeal, Second District, Division 2, California. June 13, 1927.

1. Payment $\S$ 73(4)—Delivery and acceptance of note for materials, together with parties' conduct, held to justify conclusion that payment resulted, precluding foreclosure of lien.

Delivery and acceptance of note for materials for building, derrick, outbuildings, and appurtenances and drilling of oil well, together with conduct of parties, especially seller's action in suing on note, *held* sufficient to justify conclusion that such delivery and acceptance constituted payment so as to preclude foreclosure of mechanic's lien filed by seller.

2. Mechanics' liens $\S$ 214—Cause of action on mechanic's lien abated after seller secured judgment on note given for materials covered by lien.

Where seller of materials for construction of building, derrick, outbuildings, and appurtenances and for use in drilling oil well secured judgment on note given therefor, cause of action based on mechanic's lien was at once abated, since, though seller might have foreclosed lien or sued on note, it could not do both.

3. Judgment $\S$ 562—Judgment by court of competent jurisdiction on merits bars future suit between same parties on same cause of action.

A judgment rendered by a court of competent jurisdiction on the merits bars any future suit between same parties on same cause of action so long as it remains unreversed and is not vacated or annulled.

4. Mechanics' liens $\S$ 214—Seller, by securing judgment on note given for materials, waived right to foreclose mechanic's lien.

Seller's securing judgment on note given for materials resulted on principle of estoppel, in a waiver of right to seek another remedy by asserting and foreclosing mechanic's lien as a means of realizing on the same obligation.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Suit by the California National Supply Company against Arthur Lee Porter, the Richfield Union Petroleum Company, and others. Judgment for defendants named, and plaintiff appeals. Affirmed.

Flint & MacKay, of Los Angeles, for appellant.

Minor Moore, of Los Angeles, for respondents.

CRAIG, Acting P. J. The appellant instituted a suit against the respondent Porter as the owner of certain real property in Orange county, and the respondent corporation as lessee, praying foreclosure of a mechanic's lien filed by appellant and evidencing an alleged indebtedness for materials furnished the respondent Richfield Union Oil Company

for the construction of a certain building, derrick, outbuildings, and appurtenances and the drilling of an oil well upon the premises. The case was tried before the superior court and a judgment was rendered in favor of the respondents, from which the plaintiff appeals.

It appears from the pleadings that on the 6th and 7th days of April, 1921, appellant furnished and delivered materials of an alleged value of \$2,500.22, for which it filed a mechanic's lien dated October 17, 1921, and that on January 13, 1922, this action was commenced for the foreclosure of the lien, and appellant alleged in its complaint that no part of the price of the materials had been paid.

Upon the trial respondents introduced evidence tending to show that the other defendants named in the complaint had no interest in the subject-matter of the action, which the trial court found to be a fact. There was also introduced a promissory note for the same amount, signed by the respondent corporation, together with a letter addressed to appellant, dated July 1, 1921, purporting to inclose "our company's note in the sum of \$2,500.22, dated June 15, 1921, and due August 1, 1921, with interest from date until paid at the rate of 7 per cent. per annum, and which note we are sending you in settlement of the account which you hold against our company." Respondents further introduced a letter from the appellant supply company, dated July 2, 1921, reading, in part, as follows:

"We beg to acknowledge receipt of your letter of July 1st, inclosing note for \$2,500.22 in payment of your account with the California National Supply Company."

It was also shown, and it is not denied, that appellant subsequently to the dates last mentioned had filed in the superior court of Orange county a suit upon said note, and had recovered judgment thereon, which judgment was introduced in evidence, and it was stipulated that the sums of money specified in the note upon which the suit was founded, and in the mechanic's lien which appellant was seeking to foreclose, represented the agreed price of the same materials.

The trial court found that "said defendant executed its promissory note to the plaintiff"; that the plaintiff accepted the same in full payment and satisfaction of its claim; that the plaintiff filed a notice of its claim of lien in the office of the county recorder, but that the same was not filed within the time required by law; the conclusions of law recited that the notice of claim of lien was invalid, "that the claim sued upon has heretofore been paid to defendant, * * * and for this reason plaintiff should recover nothing by its action," etc. Judgment was entered accordingly.

Appellant contends that this judgment was erroneous for the reason that a note, if not paid, does not constitute payment and satisfaction of the original obligation, unless the creditor shall have expressly so agreed upon its acceptance, and that the evidence of indebtedness does not constitute a bar to subsequent proceedings for the foreclosure of a mechanic's lien. Many authorities are cited which announce this rule, and appellant argues that the language of the correspondence above quoted, transmitting and acknowledging receipt of said note "in settlement of the account," and "covering your account," was not such as to amount to an unqualified acceptance of it in satisfaction and extinguishment of the indebtedness represented thereby.

[1] That the rule contended for has been declared in numerous cases is beyond cavil, but there are other equally important considerations which the appellants apparently overlook. It is not denied that they retained the note from its date until October 15, 1922, brought a suit upon it, and caused judgment to be entered thereon for the purchase price of the identical goods, wares, and merchandise for which recovery is sought in this proceeding. The judgment may be affirmed upon the ground upon which the decision of the trial court was apparently based, that the delivery and acceptance of the note constituted payment. The language of the letters above quoted, together with the conduct of the parties, especially the action of the plaintiff in suing upon the note, justified the conclusion that the parties intended to and did expressly make the settlement by the giving and receiving of a promissory note, payment, and satisfaction of the claim which the plaintiff theretofore had against the defendants.

[2] However, no possible doubt can exist that the plaintiff's cause of action abated when it recovered judgment on the note. In the defendant's answer it is affirmatively alleged that they had theretofore executed and delivered to the plaintiff a promissory note for the full amount demanded, in settlement and satisfaction of such obligation, and that the plaintiff had brought suit upon said note and converted the same into a judgment on October 15, 1922, and prior to the trial here in controversy. The parties stipulated that such judgment was founded upon the promissory note above mentioned, and that it was docketed. There was no finding upon this particular issue, but in view of the pleadings there should have been one. However, under the evidence and the stipulation, had a finding been made it could only have been to the effect that the allegations contained in the answer in that behalf were true. When the judgment on the promissory note was secured, plaintiff's cause of action on the claim here sued upon was at once abated. There was but one obligation. Assuming that the

giving of the note did not constitute payment, it did not create a new obligation, but only a new and different evidence of the one which theretofore existed. It might have right to sue upon the note, but it could not do both. The object of either action would be to obtain a personal judgment against the defendants. *Fresno Planing Mill Co. v. Manning*, 20 Cal. App. 766, 130 P. 196, presents a situation the same in principle as that under consideration. Suit was instituted for proceeded to foreclose its lien, or it had a the purchase price of materials furnished, and the pendency of proceedings for foreclosure of a mechanic's lien was pleaded in bar. Upon motion of the plaintiff, the trial court struck out such defense, and in reversing the judgment it was said:

"It is not the policy of the law to permit different suits to be instituted and pending between the same parties concerning the same subject-matter; and hence the rule that an action abates upon a showing of the institution and pendency of a prior action between the same parties upon the same subject-matter."

"The reason for this rule is founded upon the theory that if the first suit affords an ample remedy to the party claiming to be aggrieved, it would be not only unnecessary but vexatious to permit the prosecution of a second suit formed upon the same cause of action."

"* * * The only possible purpose in making the defendants in this action defendants in the prior action would be to secure a personal judgment against them for the satisfaction of the identical debt which is made the basis of the present action. The purpose of the present action is also to secure a personal judgment against the defendants upon practically the same cause of action upon which they were joined as defendants in the previous action. In short, the causes of action and the relief sought in the two suits, in so far as the defendants here are concerned, are alleged to be substantially the same. Consequently the pendency of the prior action was a material defense in the present one, which it was proper to present by way of answer; and it follows that the trial court erred to the prejudice of the defendants in granting the plaintiff's motion to strike out such defense upon the ground of its immateriality."

[3, 4] It is true that in the present action the plaintiff sought to avail itself of an additional remedy not afforded in the former suit on the note, but the causes of action are identical. The obligation is the same whether the suit be to foreclose the lien or to secure judgment on the note. It is elementary that a judgment rendered by a court of competent jurisdiction on the merits bars any future suit between the same parties upon the same cause of action, so long as it remains unreversed and is not vacated or annulled. 23 Cyc. p. 1106, and many cases there cited. Appellant admits that the judgment merged the cause of action upon the note, and that the latter became extinct, but it is argued that the "extinguishment of the notes

* * * cannot extinguish a claim which the notes themselves leave alive." This reasoning is fallacious. Adopting appellant's own theory that the note did not extinguish the original obligation, it is obvious that the obligation represented by the note is the same obligation as existed before the note was executed, and that both give rise to but one cause of action. Therefore, if the judgment extinguished the cause of action upon the note, it extinguished the entire obligation against the defendants in this transaction. The cause of action upon the note became merged in the judgment, and, also, it may be said that upon the principle of estoppel the securing of a judgment upon the note results in a waiver of appellant's right to seek another remedy by asserting and foreclosing the lien as a means of realizing upon the same obligation. This doctrine is stated in many cases, and has been held applicable to mechanics' liens. 2 Herman on Estoppel and Res Judicata, p. 966. The same principle is also stated in volume 10 of the California Jurisprudence, at pages 1 and 3.

And so, whether we consider the court's finding that the note was received as full payment and satisfaction of the existing obligation to have been supported by the evidence, or accept appellant's contention that the note was intended only for the purpose of evidencing the account and of changing the form of the account without affecting its existence, the plaintiff and appellant has proved no cause of action in this suit. It therefore becomes unnecessary to consider other points raised.

The judgment is affirmed.

We concur: THOMPSON, J.; MURPHEY, Justice pro tem.

83 Cal. App. 798

UNION TOOL COMPANY (a Corporation), plaintiff and appellant, v. **Arthur Lee PORTER** and **Richfield Union Petroleum Company** (a Corporation), defendants and respondents; **Jane Roe Porter**, **R. T. Burge**, **Comanche Oil & Refining Company** (a Corporation), **Anaheim Union Water Company** (a Corporation), **John Doe**, **Richard Roe**, **Jane Doe**, **Doe Company** (a Corporation), and **Roe Company** (a Corporation), Defendants. (Civ. 4671.)

District Court of Appeal, Second District, Division 2, California. June 13, 1927.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Flint & MacKay, of Los Angeles, for appellant.

Minor Moore, of Los Angeles, for respondents.

CRAIG, Acting P. J. The action involved in this appeal was filed against the same defend-

ants as those named in that of the California National Supply Company, this day decided, and was instituted for the foreclosure of the appellant's mechanic's lien upon the same property and for materials furnished for the same project, as therein described. Both cases were tried together upon similar facts, and the findings, conclusions of law, and judgments are the same in form and effect. Hence, upon the authority of California National Supply Co. v. Arthur Lee Porter and others, 257 P. 161, the judgment in this case must be affirmed, and it is so ordered.

We concur: THOMPSON, J.; MURPHEY, Justice pro tem.

83 Cal. App. 627

JOHNSON et al. v. CURLEY et al.
(Civ. 3269.)

District Court of Appeal, Third District, California. June 6, 1927.

1. Cancellation of instruments $\S$ 45—Where assignees of beneficiary under trust deed were silent as to actual notice of suit to cancel, court presumes they had such notice.

Where assignees of beneficiary under trust deed made no showing that they were without actual knowledge of pending of suit to cancel deed for fraud, and their assignor actually appeared and defended, court will presume that assignees had such notice.

2. Judgment $\S$ 691—General rule is that cestui que trust must be party to suit affecting trust estate to be bound by judgment therein.

General rule is that, in proceedings affecting trust estate, trustee and cestui que trust are so independent of each other that latter must be party to suit to be bound by judgment or decree rendered therein.

3. Trusts $\S$ 246—Trustee may sue or defend suit respecting trust estate, if instrument creating trust does not inhibit.

Trustee may sue at law respecting trust estate or defend suit brought against him, if instrument by which trust is created does not inhibit, and cestui que trust, though absolute owner in equity, is regarded in court of law in light of stranger.

4. Appeal and error $\S$ 913—In absence of record of evidence, reviewing court assumes trustee was authorized to act for beneficiaries under trust deed, where judgment was against beneficiaries.

Where record of evidence is not before reviewing court on appeal from judgment against beneficiaries of trust deed in quiet title action, court presumes that such deed conferred on trustee authority to act for beneficiaries.

5. Cancellation of instruments $\S$ 35(3)—Assignees of beneficiaries under trust deed held proper but not necessary parties to action to declare deed void for fraud (Code Civ. Proc. $\S$ § 367, 369, 387).

Assignees of beneficiaries under trust deed held not necessary parties to action to have deed declared void for fraud, in view of Code Civ. Proc. $\S$ § 367, 369, since, under declaration

of trust, trustee had duty to represent them, notwithstanding that they were proper parties and might have been joined on application under section 387.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action to quiet title by L. E. Johnson and others against Mrs. J. A. Curley and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

David Cosgrave, of Burlingame, for appellants.

McCoy & Gans, of Red Bluff, and V. S. Kipp, of San Diego, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a decree rendered in favor of plaintiffs, quieting title to 200 acres of land in Tehama county.

The question involved in this action is whether the beneficiary under a trust deed is a necessary party to an action to set aside the deed on the ground that it was procured by fraud, or whether, on the contrary, the trustee as a party defendant represents the beneficiary so as to bind him by a decree declaring the deed void.

The plaintiff Johnson is the owner of the property in question, subject to two bona fide trust deeds represented by parties plaintiff. L. W. Lovey was the former owner thereof. March 22, 1920, while Lovey was the owner, one L. H. Brown purported to execute another trust deed affecting the title to the premises in question to the Berkeley Bank of Savings & Trust Company, as trustee, and in which Alpha E. Thornbury was named as beneficiary. October 22, 1920, Lovey instituted an action in Tehama county against Brown, as trustor, the Berkeley Bank of Savings & Trust Company, as trustee, Alpha E. Thornbury, as beneficiary, and others, to set aside said alleged trust as fraudulent. After trial, a decree was duly made, entered and recorded October 13, 1921, declaring said purported deed of trust from Brown to the Berkeley Bank of Savings fraudulent and void, and directing the cancellation thereof and a reconveyance from Brown to Lovey. This purported trust conveyance was accordingly duly canceled by Brown on November 17, 1921, and a deed of grant from Brown to Lovey was duly executed and recorded January 4, 1922. No appeal was taken from this decree, and it became final. No claim of interest in this property was made by the defendants in this case until May 22, 1924, more than 3½ years after the filing of said suit to cancel the Brown deed. No claim has ever been made in this action, or at all, that said decree canceling the Brown deed was procured by fraud.

In spite of the fact that Alpha E. Thornbury, the original beneficiary of the fraudu-

lent Brown deed appeared by attorney and defended in the action to cancel that instrument, it now appears in this action that she had previously executed an assignment of her interest in this trust deed to the three defendants in this action, Curley, Westover, and Goggin, and that said assignment was recorded July 1, 1920. It does not appear why Thornbury, who claims to have previously disposed of all her interest in this deed, should have defended against that action to cancel the deed, unless we may presume that she represented and defended the interest of her assignees. These beneficiaries, by assignment, however, were not made parties defendant in that action, which resulted in the cancellation of the Brown trust deed of March 22, 1920. It is now claimed by the appellant in this case that the failure to make them parties defendant in the former action was a fatal omission, and that these beneficiaries by assignment are not bound by that decree of cancellation of the trust deed.

[1] It is also a significant fact that no showing or claim, by these defendants, was alleged in the pleadings, nor made at this trial, to the effect that they were without actual knowledge of the pending of the suit to cancel the Brown deed for fraud. From their silence as to actual notice of this trial, and from the fact that their assignor, actually appeared and defended in that action, we must presume that these beneficiaries did have such notice.

On May 22, 1924, these defendants, as beneficiaries by assignment, purported to substitute David Cosgrave as a trustee thereof in the place of the Berkeley Bank of Savings. Whereupon said substituted trustee proceeded to publish notice of sale under said canceled Brown deed, and on July 5, 1924, purported to sell and convey said property to these defendants, Curley, Westover, and Goggin, as purchasers thereof. This suit to quiet title was then instituted, and the trial court found that said purported sale was void, and that these defendants have no right, title, or interest in or to said real property.

[2, 3] The general rule is that, in all proceedings affecting a trust estate, whether brought by or against third persons, the trustee and cestui que trust are so far independent of each other that the latter must be made a party to the suit in order to be bound by the judgment or decree rendered therein. Hence a judgment against the trustee alone, the beneficiary not being a party thereto, does not bind the latter as a general rule, and so, in an action where it is sought to subject the trust estate to the satisfaction of the judgment, the beneficiary may challenge the validity of the judgment and show that it is not enforceable against the trust property. 26 R. C. L. 1343, § 208. But this general rule is subject to many exceptions,

and the necessity of making a beneficiary a party to an action involving the trust depends altogether upon the nature of the action and the authority conferred upon the trustee by the declaration of trust, and these elements must be determined by the particular facts of each case. 26 R. C. L. 1344, § 209; *Mitau v. Roddan*, 149 Cal. at page 7, 84 P. 145, 6 L. R. A. (N. S.) 275. The trustee "may sue at law respecting the trust estate or defend a suit brought against him if the instrument by which the trust is created does not inhibit. The *cestui que trust*, though the absolute owner in equity, is regarded in a court of law in the light of a stranger." 26 R. C. L. 1341, § 205.

Pomeroy's Remedies and Remedial Rights, § 357, says:

"There is a broad distinction between the case of an action brought in opposition to the trust to set aside the deed or other instrument by which it was created, and to procure it to be declared a nullity, and that of an action brought in furtherance of the trust to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first case, the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all, and defend them."

In *Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843, the syllabus gives a concise and clear statement of this principle as it was applied in that case, as follows:

"Where a trustee represents his beneficiaries in all things relating to the trust property, they [the beneficiaries] are not necessary parties to a suit against him by a stranger, to enforce or declare void the trust. In such cases the beneficiaries, although not parties, are bound by the judgment, unless it is impeached for fraud or collusion between [the trustee] and the adverse party."

See *In re Franklin Brewing Co. (D. C.)* 254 F. 911.

[4] In the instant case the appeal is from the judgment only. The record of the evidence is not before this court. It must therefore be presumed that the trust deed involved in this action conferred upon the trustee all necessary power and authority to act for and in behalf of the beneficiaries in everything relating to the trust, including the right to appear and defend the action in their behalf, in which the deed was canceled as fraudulent and void. And in this case no contention has ever been made that there was collusion on the part of the former trustee or that the decree of cancellation was procured by fraud.

In *Rogers v. Rogers*, 3 Paige (N. Y.) 379, and in *Wakeman v. Grover*, 4 Paige (N. Y.) 23, the court distinguishes between actions attacking the validity of the trust deed itself and actions adverse to the beneficiaries, but consistent with the validity of the deed, holding that in the former the beneficiaries

are bound by the suit against the trustee alone, while under the latter circumstances the beneficiaries will not be bound unless they are parties to the action.

In the case of *Sherman v. Goodwin*, 15 Ariz. 47, 135 P. 719, in a suit to quiet title against a trust deed, a decree against the trustee was held to be binding upon the beneficiary, although he was not a party to the action. In support of this conclusion the court quotes at length and with approval the decision of our Supreme Court in the case of *Watkins v. Bryant*, 91 Cal. 492, 27 P. 775. With respect to the failure to include the beneficiary as a party defendant, Mr. Justice Cunningham, in his opinion says:

"The duty of the trustee under the trust deed to protect the interest of the holder of these notes would have been only partially performed, if, when the action was commenced in hostility to the trust, he should fail to notify the beneficiary of such action pending, or to inform the court of the rights of a beneficiary not a party to the action, to the end that the court could perform its duty and bring in the omitted party, if such party was necessary to a complete determination of that action."

In the case of *Rejall v. Greenhood (C. C. A.)* 92 F. 946, Mr. Justice Morrow says:

"The general rule is that a judgment or decree is not evidence against one who is a stranger to the proceeding; but to this rule there is at least one exception, and that is, in an action brought in hostility to a trust, to set aside a deed or other instrument by which the trust was created, and to procure it to be declared a nullity, the suit may be maintained without the presence of the beneficiaries, since the trustee represents all, and defends for all. A decree rendered in the suit binds them as effectually as if they had been made parties, and is conclusive against them."

In 15 *Encyclopedia of Pleading and Practice*, 639, it is said:

"In the case of trust relations, the doctrine of representation is very clearly applicable, for such relations are created for the very purpose of furnishing a representative for the *cestui que trust*. Accordingly, in many but not all cases, trustees sufficiently represent their *cestuis que trustent*, either as complainants or defendants, and the latter are therefore not necessary parties."

Upon examination of the authorities cited by appellant there appears to be nothing in conflict with the foregoing rule which binds a beneficiary by a judgment rendered against his trustee in an action to declare a trust deed void, even though the beneficiary is not a party to the action. Appellants' authorities uphold the general rule to the effect that an action must usually be prosecuted against the real party in interest, but they do not refute the well-established exception to that rule, which exception is so clearly expressed by

Mr. Pomeroy in his text on Remedial Remedies, and which is consistently supported by a long line of authorities.

In the case of *Watkins v. Bryant*, 91 Cal. 492, 27 P. 775, relied upon by respondents, the facts were quite similar to those in the case at bar. In that case an assignee of an interest in the property involved sought to escape from the effect of a former judgment canceling a trust deed on the ground of fraud, for the reason that the beneficiary had not been made a party to the suit. It is true, as the appellant in this case contends, that the statute of limitations was involved in that case, and that that decision might have rested upon another exception to the general rule, to wit, that the beneficiaries were so numerous as to make it "intolerably oppressive to require the plaintiff to bring them all into court." But these additional reasons for upholding the former decree canceling the trust deed involved in the *Watkins* Case deprives it of none of its force in holding that the facts of that case brought it within the doctrine of the exception to the rule announced in *Pomeroy's Remedial Remedies*, § 357, heretofore quoted. After reciting this language with entire approval, the court then said:

"It is contended, however, for the appellant that the decree canceling the deed of trust was absolutely void as to this plaintiff, as he was not a party to the suit in which that decree was rendered. The answer to this is that, although not named as a party in that action, he was represented therein by the trustee, Davis. * * * *Pomeroy's Remedial Remedies* § 357. This, as an exception to the general rule, applies to the case at bar, and seems to be well supported by the following and other authorities: *Kerrison v. Stewart*, 93 U. S. 155 [23 L. Ed. 843]; *Corcoran v. Chesapeake Canal Co.*, 94 U. S. 744 [24 L. Ed. 190]; *Rand v. Walker*, 117 U. S. 344 [6 S. Ct. 769, 29 L. Ed. 907]; *Richter v. Jerome*, 123 U. S. 246 [8 S. Ct. 106, 31 L. Ed. 132]; *Union R. R. Co. v. Dull*, 124 U. S. 173 [8 S. Ct. 433, 31 L. Ed. 417]; *Rogers v. Rogers*, 3 Paige [N. Y.] 378 [379]; *Winslow v. Minn. R. R. Co.*, 4 Minn. 313 [Gil. 230] 77 Am. Dec. 519; *Paul v. Fulton*, 25 Mo. 156; *Bank of British N. Am. v. Suydam*, 6 How. Prac. [N. Y.] 379; *Jones on Mortgages*, 1399; *Mitchell v. Bank of St. Paul*, 7 Minn. 252 [Gil. 192]; *Chew v. Brumagen*, 80 U. S. [13 Wall.] 497 [20 L. Ed. 663]; *Code Civ. Proc.*, § 369."

The statute provides that every action must be prosecuted in the name of the real party in interest. *Code Civ. Proc.* § 367. But several exceptions to this rule are in-

cluded within section 369 of the Code of Civil Procedure, which provides that:

"An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. * * *"

This section is construed with respect to its application to trustees in *Mitau v. Roddan*, 149 Cal. at page 7, 84 P. 145, 6 L. R. A. (N. S.) 275. Construing a statute in language precisely like that of section 369 of the Code of Civil Procedure, the Supreme Court of Washington, in *Merz v. Mehner*, 57 Wash. 324, 106 P. 1118, with respect to section 8256, *Pierce's Code of Washington*, says:

"He [the trustee] is authorized to sue without joining the person for whose benefit the suit is prosecuted. If that is true, it necessarily follows that he could be sued as a representative of the *cestui que trust*."

Since this statute is intended to authorize the maintenance of litigation through a representative of the real party in interest, as a matter of convenience, there appears to be no real reason to distinguish between the case in which the trustee is the actor affirmatively seeking relief in behalf of the beneficiary, and those cases in which, in the performance of his duties, he may be called upon to defend the interests of the beneficiary, so long as the trustee acts in good faith, and his own interests are not in conflict with those of the beneficiary.

[5] In the case at bar, we conclude that these defendants were not necessary parties to the action declaring the Brown deed of trust void on the ground that it was procured by fraud, for the reason that under the declaration of trust it became the duty of the trustee to represent them, and all beneficiaries, in the prosecution of that case. These defendants were, however, proper parties to that action, and, upon application pursuant to section 387 of the Code of Civil Procedure, might have been joined as parties defendants. Their assignor, Thornbury, did appear and defend in said action in their behalf, and since it is not denied by these defendants, we must presume they had full knowledge of the prosecution of that action and voluntarily refrained from intervening or defending in person. They are therefore not in a position to complain.

For the foregoing reasons, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

83 Cal. App. 573

LOVEALL v. BEVERLEY. (Civ. 4594.)

District Court of Appeal, Second District, Division 2, California. June 3, 1927.

1. Quieting title ☞15—Defendant failing to exercise option for oil lease cannot complain that plaintiff was only life tenant without power to grant mineral right.

In action to quiet title to interest in real property against claims based on option for an oil lease, defendant, who did not exercise option in accordance with agreement, is in no position to complain that plaintiff was not able to perform because of being only life tenant without power to grant right to withdraw mineral resources from freehold.

2. Quieting title ☞44(2)—Testimony that option for oil lease against which plaintiff was seeking to quiet title was associated with similar option held properly excluded.

In action to quiet title against claims based on an option for oil lease, testimony to show that option for lease was associated with a similar option obtained from plaintiff's daughter on adjoining land held properly excluded.

3. Quieting title ☞44(2)—Evidence of escrow instructions in transaction with defendant after expiration of option held properly excluded, in action to quiet title against option.

In action to quiet title to interest in real property against claims based on option for an oil lease, evidence of escrow instructions in transaction by another with defendant after expiration of option held properly excluded.

4. Quieting title ☞44(2)—Testimony as to whether plaintiff suing to quiet title against option had given other option held properly excluded.

In action to quiet title to interest in real property against claim based on option for oil lease, testimony relative to whether plaintiff had made any other option or lease since executing such option held properly excluded.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Emma R. Loveall against F. L. Beverley. Judgment for plaintiff, and defendant appeals. Affirmed.

Kennicott & Williams, of Los Angeles, for appellant.

C. F. Holland, of Los Angeles, for respondent.

JOHNSON, Justice pro tem. This is an action to quiet title to plaintiff's interest in certain real property situated in Los Angeles county against claims of defendant, based on an agreement, which, in terms, gave defendant, for a limited period, an option for an oil lease.

The complaint alleges ownership and possession by plaintiff of a tract of land comprising 8.77 acres, and an adverse claim by

defendant which is without right. The answer denies the allegations of the complaint, and alleges that by a written agreement dated November 23, 1921, plaintiff agreed to lease the property in suit to defendant or his nominees for the purpose of prospecting for and developing oil and other substances, but that plaintiff had refused to perform, notwithstanding defendant's readiness to perform his obligations; and defendant prays that his interest under the agreement be established and plaintiff be required to perform on her part. The court found that plaintiff owned a life interest in, and was in possession of, the property; and that by the agreement of November 23, 1921, plaintiff gave the defendant the right to obtain and draw a lease of plaintiff's interest in the property for the purpose of prospecting for and developing oil and other substances, with provision for a royalty of one-sixth of such oil as might be produced, and for a rental of a certain fixed sum for the first 12 months and a larger fixed sum for the next 12 months; and that the agreement had been recorded in the records of Los Angeles county. The court further found that on May 18, 1922, plaintiff gave defendant written notice that he had failed to comply with the terms of the agreement or of the lease, and that, unless he did comply and pay the agreed rent within 30 days, plaintiff would terminate the agreement and lease. There are findings, in addition, that defendant did not comply with the agreement; that his rights had terminated; and that plaintiff had not failed or refused to comply with her part of the agreement. Judgment was entered in favor of plaintiff quieting her title, and from this judgment defendant appeals.

The evidence shows that the agreement of November 23, 1921, was one whereby, in consideration of \$1, plaintiff gave defendant "the exclusive right to obtain and draw up a lease upon my property," being the property described in the complaint and comprising 8.77 acres. The agreement specifies certain terms and conditions of the proposed lease, including royalty and cash rentals, as found by the court; and it provides, further, that:

"The right to draw a lease shall extend to the 8th day of December, 1921, and if bona fide negotiations are on that day going forward it shall be extended to the termination of such negotiations."

It stated also that the lease should contain the general standard terms, and was to be approved by a competent attorney. From the evidence it appears that within a few days after the agreement was made defendant had a lease drawn by his attorney, which was laid before plaintiff. Plaintiff signed the lease so presented, and almost immediately left it in the hands of defendant's attor-

ney, who, however, regarded it as deposited with him in escrow and not as delivered to him for transmission to the defendant. At any rate, it was never put in the possession of the defendant, nor did he ever sign it. There was no exercise of the option within the time specified in the agreement, nor were any negotiations then pending whereby defendant became entitled to an extension. About March 7, 1922, which was three months after the term of the option had expired, Percy Kingsland, a broker, called on plaintiff at the instance of defendant, and stated to plaintiff that he had arranged with a man named Howard to purchase the lease from defendant, and that certain money for the purpose had been deposited in escrow, but that he had learned from defendant that there was some difficulty about getting the necessary papers to complete the transaction. From the testimony offered it appears that a deposit had been made with the Security Bank & Trust Company under written escrow instructions signed by Howard and approved by defendant. Plaintiff referred Kingsland to her son, who, when visited by Kingsland, informed him that plaintiff had only a life estate in the property, and that other parties in interest could not be gotten together to complete the title. The proposed transaction with Howard seems then to have been abandoned. Thereafter plaintiff served the written notice mentioned in the court's findings, which is dated May 15, 1922, but nothing further was done by defendant; and this action to quiet title was begun on June 29, 1922.

[1] Defendant contends that the judgment quieting plaintiff's title should be reversed on the ground that she was never at any time able to perform, since a life tenant is without power to grant the right to withdraw mineral resources from the freehold. That, however, is not a pertinent argument when addressed, under the circumstances in evidence, to this particular agreement. The agreement was not one whereby plaintiff agreed to give, and defendant to take a lease. It was a mere option, and by its terms the option was expressly limited to December 8, 1921. There is no contention of any exercise of the option within the time named, nor was there any extension in writing, though there was a letter dated January 18, 1922, in which plaintiff asked for an explanation as to the delay in payments to her. She appears to have been under the impression that she was entitled to rents from the date of her agreement, but, as a matter of fact, no rentals were paid at any time. The notice, dated May 15, 1922, given by plaintiff to defendant, was equivalent to a renewal of the option for 30 days, but defendant did not avail himself of the privilege. Since the option was not exercised, it can make no

difference to defendant in this action whether plaintiff was a life tenant or owner in fee. As the agreement was recorded by defendant and casts a cloud on plaintiff's title, she is entitled to have whatever title she has quieted.

[2] Defendant specifies as error the exclusion of certain testimony offered by him to show that the option for a lease from plaintiff was associated with a similar option obtained by defendant from plaintiff's daughter for a lease on adjoining land belonging to the daughter. Though such other option was obtained at the same time as plaintiff's, and though plaintiff acted therein as agent for her daughter, plaintiff was affected only by the option to which she was herself a party, and the daughter's option had nothing to do with the issues in this case. The exclusion of the offered testimony was therefore proper.

[3] Error is also charged in refusing to receive in evidence escrow instructions dated March 7, 1922, given by Howard to the Security Bank & Trust Company. Howard's transaction, however, was with defendant and not with plaintiff; and while the witness Kingsland told plaintiff that money had been deposited in escrow, the escrow instructions were never exhibited to her; and, besides, defendant's option had expired three months previously. The court was correct in its ruling.

[4] The court was likewise correct in excluding testimony as to whether plaintiff had made any other option or lease since November 23, 1921. There was evidence, however, that there had never been any attempt to produce oil from the land, and that at the time of the trial it was used only for agricultural purposes.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

83 Cal. App. 735
RIECK v. CHAPMAN. (Civ. 5334.)

District Court of Appeal, First District, Division 1, California. June 13, 1927.

1. Attorney and client ⇨123(1)—Relation of attorney and client requires utmost good faith and honesty on part of attorney.

Relation of attorney and client is one of highest trust and confidence, requiring on part of attorney the utmost good faith and honesty.

2. Attorney and client ⇨127—Evidence in accounting action held to support conclusion that attorney was indebted to client.

In action by client against former attorney for money had and received and accounting, evidence held to support conclusion of trial judge that attorney was indebted to client in certain amount.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Emilie E. Rieck against Arthur E. T. Chapman. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert M. Clarke and Albert Sidney Brown, both of Los Angeles, for appellant.

Youngworth, McClean & Hartman and Wm. B. Ogden, all of Los Angeles, for respondent.

TYLER, P. J. Action by a client against her former attorney for money had and received and an accounting.

The complaint contains three causes of action. Under the first it is alleged in substance that on or about the 1st day of May, 1919, plaintiff employed the defendant as her legal adviser at an agreed fee of \$10,000, which sum plaintiff paid to the defendant; that between the 1st day of May, 1919, and the 1st day of November, 1920, plaintiff paid into the hands of defendant at his request, but for her use and benefit, the sum of \$6,950.75, for which defendant promised and agreed to truly and honestly account for, which he failed to do. The second cause of action alleges that between the 6th day of August, 1919, and the 1st day of January, 1921, the defendant received from divers and sundry persons the sum of \$8,093.95 to and for the use of plaintiff. The third sets forth that between the 1st day of January, 1920, and the 31st day of December, 1920, plaintiff, at the request and upon the advice of defendant, paid into his hands the sum of \$20,500, which defendant represented he could loan to third persons upon their secured promissory notes, and that, acting upon such promise, plaintiff paid over to defendant said sum to be used for such purpose; that thereafter plaintiff demanded of defendant an accounting of the money so received; that in compliance therewith defendant delivered to plaintiff five promissory notes and mortgages purporting to secure the principal sum of \$20,500; that plaintiff thereafter discovered that one of said notes represented an indebtedness from defendant to plaintiff which was secured by a mortgage upon property standing in the name of a third person who held the legal title thereto to the use of defendant, but that such security was insufficient in value to secure the payment of the note; that another of said notes represents an indebtedness of a business partner or associate of defendant and is secured by a second lien of mortgage upon real property of insufficient value to secure the payment thereof; that the remaining notes are also secured by mortgages upon property insufficient in value; that plaintiff upon discovering the facts offered to rescind and reassign and return the notes to defendant, who refused to accept the same or repay plaintiff her money. The prayer is for an

accounting and general relief. Defendant in his answer denied the allegations of plaintiff's complaint, and by way of counterclaim set up that on or about May 1, 1919, she received from him the sum of \$2,000, which she agreed to pay upon demand; that thereafter defendant demanded payment thereof, but plaintiff failed to pay the same. Defendant also filed a cross-complaint, and in the second cause of action therein set forth alleged that he had rendered professional services as an attorney to plaintiff in the sum of \$25,000, of which only \$15,867.75 had been paid, leaving a balance due in the sum of \$9,132.25, for which sum judgment was prayed. The allegations of the cross-complaint were denied by plaintiff. At the close of the trial judgment was rendered that cross-complainant, Chapman, take nothing by his cross-action; that plaintiff and cross-defendant have and recover the sum of \$5,452.59. Motion for a new trial was made and denied. The appeal is from the judgment and order.

[1] The sole question here presented is the sufficiency of the evidence to support the findings. From a careful reading of the entire testimony we are of the opinion that the findings are fully supported by the evidence. The relation of attorney and client is one of the highest trust and confidence, requiring on the part of the attorney the utmost of good faith and honesty. A client, and especially a woman without business experience, as the record shows plaintiff to have been, is largely, if not wholly, guided and influenced by the advice of the attorney, for which reason his conduct and acts, when questioned, should be closely scrutinized, and the burden is upon him to show that he has been fair and honest. That plaintiff did have full confidence in defendant there is no doubt. Certain allegations in his answer indicate that he not only won his client's complete confidence, but her affections as well, and she testified that no one else had so completely controlled her. In disposing of the case the learned trial judge filed a written opinion and ordered that findings be prepared in conformity with the views therein expressed. As his conclusion carefully reviews the facts, we adopt it as part of this opinion. It is as follows:

"This is an action for accounting between a client and her former attorney. The evidence shows that the defendant, Mr. Chapman, was first employed by Mrs. Rieck, the plaintiff, in February, 1919, for the purpose of securing a divorce for her and handling negotiations regarding a property settlement between herself and husband. Apparently, various sums of money were paid by the plaintiff to Mr. Chapman, of which neither party kept any record. The plaintiff, unfortunately, was able to assist the court but little, her testimony being most vague and unsatisfactory. It may be said, in fact, that she displayed a most lamentable ignorance concerning her affairs, and a lack of

memory that verged upon the extreme. The matter and manner of her testimony during the trial of this case would indicate that Mrs. Rieck was a woman almost devoid of business acumen and of knowledge of business affairs. This being the case, it would seem to have been particularly incumbent upon the defendant to have so handled her affairs that no doubt whatever could be cast upon any of the transactions between them. It appears, however, that Mr. Chapman kept no account whatever, and both parties were compelled to rely upon their memories as to the purpose for which payments were made by Mrs. Rieck, and as to the purposes for which money was expended by Mr. Chapman, and as to the amounts expended by the latter on behalf of his client.

"It appears that for his services in and about the divorce action and the property settlement it was agreed that Mrs. Rieck should pay Mr. Chapman a fee of \$10,000. And at this point it may be well to note that one branch of the case involves the question of what arrangement was made as to this fee, the plaintiff contending that \$10,000 was to cover all of the services and that she guaranteed to pay him that amount if he did not secure it from Mr. Rieck; the defendant, on the other hand, claiming that the arrangement was that he was to receive a fee of \$10,000 from Mrs. Rieck irrespective of any amount which he might succeed in obtaining from Mr. Rieck. The question of the fee will be discussed later on in this opinion.

"It also appears that this \$10,000 was paid by Mrs. Rieck to Mr. Chapman, not in cash, but in United States Liberty bonds in the denomination of \$1,000 each, Mr. Chapman's contention in this regard being that these bonds, which at the time of their receipt by him had a market value of \$830 each, were not taken at their par value, but at their market value. And on this point I am inclined to agree with Mr. Chapman, because it appears from the testimony that subsequently Mrs. Rieck took back two of these bonds, paying full par value for them.

"Without attempting to go into details of the transactions between the parties or to review the evidence in detail, it may be stated that the evidence shows to the satisfaction of the court that Mr. Chapman received the following sums for or on behalf of Mrs. Rieck, most of them being evidenced by exhibits filed in the case."

The amounts of these exhibits are then set forth. They total the sum of \$8,448.62. The opinion continues:

"This sum of \$8,448.62 is, of course, irrespective of the \$10,000 fee.

"I find that the defendant, Mr. Chapman, is entitled to the following credits, the respective items being evidenced in some cases by exhibits filed in this action."

Then follows an enumeration of defendant's exhibits, totaling the sum of \$6,386.03. Continuing, the opinion recites:

"Deducting the latter amount from the \$8,448.62 received by the defendant leaves a balance of \$2,062.59 unaccounted for by the defendant, and which the court finds due from defendant to plaintiff.

"Turning now to the subject of fees, the evidence was extremely conflicting as to a written agreement signed by the parties covering this matter. This agreement was prepared in the office of Mr. Chapman, and apparently no copy was furnished to his client. It remained in his possession for some time, and Mr. Chapman testifies it was inadvertently lost or destroyed. The testimony of the plaintiff and her witnesses is to the effect that this agreement was in the nature of a guarantee that Mr. Chapman should receive at least \$10,000 as fees and that if he did not succeed in obtaining this amount from Mr. Rieck she would either pay the same or make up the deficit. Mr. Chapman and his witnesses, on the other hand, testify that the agreement bound Mrs. Rieck to pay \$10,000 to Mr. Chapman, irrespective of any sum he should receive from her husband. It seems exceedingly strange that an attorney preparing such an agreement should not supply his client with a copy; and it further seems a strange circumstance that this agreement should have been lost or destroyed, important as it was to Mr. Chapman. It further seems very strange that a lawyer should prepare such an agreement without at the same time making an office copy. But this carelessness seems to be on a par with the other financial and business transactions between the parties.

"With respect to the terms of the agreement referred to, I find that it was in accordance with the testimony of the plaintiff and that \$10,000 was the total fee charged and agreed upon. I am more inclined to this view because the nature and value of the services as testified to would seem, in my opinion, to have been most liberally compensated by a fee of this size, bearing in mind that Mr. Chapman's efforts did not result in obtaining the whole of the very large property settlement secured by the plaintiff, but at most in raising it from \$150,000, the sum offered by Mr. Rieck, to \$200,000.

"The evidence shows that Mr. Chapman received from Mr. Rieck the sum of \$6,250 to be applied on attorney's fees, certain attorneys in Pittsburg who represented Mrs. Rieck at that place, where Mr. Rieck resided, sharing in the total sum paid by Mr. Rieck for legal services rendered to Mrs. Rieck in and about the divorce and property settlement. Mr. Chapman received from Mrs. Rieck the sum of \$2,000 through the redemption by her of two of the Liberty bonds originally paid him, and he further received eight Liberty bonds at a value of \$830 apiece, making a total of \$6,640. The total amount received by him, therefore, was \$14,890. Mr. Chapman, therefore, was overpaid in the sum of \$4,890, and should account to Mrs. Rieck for this amount in addition to the amount heretofore found.

"Mr. Chapman in his cross-complaint claims to be entitled to additional fees for services rendered subsequent to and apart from the divorce and property settlement case. His testimony as to this is to the effect that he drew several wills for Mrs. Rieck, one for another person at her request; that he attended to certain property matters for her, advised her with relation to a motorcycle in which she was hurt, and gave her a great number of consultations at his office. I find that these subsequent services were of the value of \$1,500, which in the final accounting should be deducted from the amount found due from Mr. Chapman to Mrs.

Rieck. The figures may be summarized as follows:

Due from defendant to plaintiff on the accounting apart from attorney's fees.....	\$2,062 59
Due from defendant to plaintiff on account of attorney's overpaid.....	4,890 00
Total	\$6,952 59
Due from plaintiff to defendant for legal services outside of divorce and property settlement matter	1,500 00
Balance due from defendant to plaintiff	\$5,452 59

"As to the defense that an accounting has already been had between the parties the finding will be for the plaintiff.

"In conclusion, * * * the relations between the parties were of a fiduciary nature. The plaintiff is very evidently a woman utterly unused to business affairs. She left everything to Mr. Chapman in the fullest trust and confidence. She paid him large sums of money apparently whenever he requested her to do so. It would seem that the most ordinary prudence and good faith, to say nothing of proper business methods, would have suggested to the defendant—nay, would have commanded him—to keep a proper account of every sum received from his client and of every sum spent on her behalf; instead of which it appears that no record whatever was made in any book of account or otherwise of any sum paid to the attorney by his client, nor did the former even give receipts to the latter.

"Counsel for the plaintiff will, unless findings be waived, prepare findings and a judgment in accordance with the foregoing.

"Dated February 1, 1923.

"[Signed] Charles S. Burnell, Judge."

[2] The conclusion reached by the learned trial court finds full support in the evidence. No other question is presented.

The judgment and order are affirmed.

We concur: CASHIN, J.; KNIGHT, J.

83 Cal. App. 684

GEORGE et al. v. DALY CITY BANK et al.*
(Civ. 5810.)

District Court of Appeal, First District, Division 2, California. June 9, 1927.

Rehearing Denied July 8, 1927. Hearing Denied by Supreme Court Aug. 8, 1927.

1. Trusts $\S$ 44(1)—Evidence held to clearly establish that husband's bank account was in trust for wife.

Evidence affecting husband's opening of bank account jointly with wife held to clearly establish a trust in favor of wife.

2. Husband and wife $\S$ 49½(8)—Evidence held to warrant finding of husband's gift of bank account to wife.

Evidence held sufficient to warrant finding of valid gift of bank account by husband to wife.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by William George and another, executors, against the Daly City Bank and Florence Smart Daly, to recover money on deposit, in which second named defendant filed a cross-complaint claiming the deposit as her own. From a judgment for plaintiffs, the second named defendant appeals. Reversed and remanded, with directions.

Hearing denied by Supreme Court; SEAWELL and PRESTON, JJ., dissenting.

Joseph T. O'Connor, Alexander McCulloch, and A. H. Brandt, all of San Francisco, for appellant.

Karl C. Partridge, Edward F. Treadwell, and Cullinan & Hickey, all of San Francisco, and Earl F. Treadwell, of San Mateo, for respondents.

STURTEVANT, J. During his lifetime, John D. Daly, deceased, opened a savings account in the Daly City Bank. After his death, the executors of his will commenced an action against the bank and Florence S. Daly, the surviving widow of the deceased, to recover the amount then on deposit, together with interest. Mrs. Daly appeared and filed an answer and cross-complaint, claiming the deposit as her own. The plaintiffs answered the cross-complaint, and a trial was had before the court sitting without a jury. The trial court made findings in favor of the plaintiffs, and, from a judgment entered thereon, Mrs. Daly has appealed and has brought up a bill of exceptions.

The appellant contended in the trial court, and now contends, that the facts show that the deposit was (1) a gift to her; and (2) a trust in her favor as the sole beneficiary. The pertinent evidence is brief and is uncontradicted.

[1] Among other things, Mrs. Daly testified that she and John D. Daly were married about 1919. At that time Mr. Daly was a widower, the owner of a considerable sized estate and about 77 years of age. There were then living a son and four daughters, all adults, and the offspring of the first marriage. Mrs. Daly at the time of her marriage was 35 years of age, resided at 1884 San Jose avenue, San Francisco, and was the owner of the premises. She and her sister were the joint owners of a considerable sized estate which was not producing very much of an income, and she was engaged in teaching music to pupils in her own home. Before their marriage, Mr. and Mrs. Daly discussed the location of their future home. It was the desire of Mrs. Daly that the husband should come and jointly occupy her house as a home. On the other hand, Mr. Daly was reluctant to do so, and declared a husband should provide a home for his wife. After the marriage, Mr. Daly went to live at Mrs. Daly's home. The accounts for the upkeep of the home were paid by Mr. Daly, and they

continued to occupy the same residence until his death. Mr. Daly had a commercial bank account in the Crocker Bank, and he also had a commercial account in the Daly City Bank, of which institution he was a large stockholder and the president. Both accounts were his separate property. They had a safe deposit box in the Daly City Bank, and to that box Mr. Daly and Mrs. Daly each had a key. The bank book, herein discussed, was in the box at the time of Mr. Daly's death.

About three years after they were married, Mr. Daly said that he wished his wife would go up to the bank, that he wished to open an account for her—for her little home. That was not the first time he referred to the subject of home. They discussed the subject several times. Nobody else was present on those occasions. He said that he felt that every husband should provide a home for his wife; however, as Mrs. Daly's interests were at her residence, he went to her home to live. When he asked her to go to the bank, the two of them went up to open the account. Mr. McArthur was the cashier at the window. Mr. Daly went to that window and said to Mr. McArthur: "I wish to open an account for my wife." The cashier prepared a book and a card. Mrs. Daly insisted that Mr. Daly's name should also appear on the account. Mr. Daly drew a check on his commercial account in the same bank for the sum of \$5,000. This was on November 23, 1921. The cashier entered the deposit in the savings account book and handed the book to Mr. Daly. Mrs. Daly and Mr. Daly signed the deposit card. The book was marked, "Savings Deposits No. 1032, Daly City Bank, in account with John D. Daly or Florence Smart Daly." The following instruction was set forth in the passbook:

"To withdraw money: Payments will in no case be made by the bank except the passbook be produced and the amount entered therein, and only on the written order of the depositor, or his or her legal representative."

Immediately after Mr. Daly had received the book, he gave it to Mrs. Daly, saying, "This is your little home." She took it home and kept it in a drawer until Mr. Daly asked for it to make a second deposit. That deposit was in the sum of \$4,000, and was made on August 24, 1922. When she delivered him the book, he took it to the bank and made the second deposit, but did not return the book to his wife. He told her that he had left it in their safe deposit box, as he thought it was a safer place than it would be in his pocket, as he was "going down the road." On that particular day he "was going down the road" with a friend. After the first deposit had been made, but the exact date does not appear, Mr. Daly stated to his wife that in case anything happened to him

she was immediately to go and draw the money so she would in no way be embarrassed for funds.

Mr. McArthur, the cashier named above, was called as a witness by the plaintiffs and was called as a witness by the defendant. Among other things, he testified that each deposit was moneys drawn by Mr. Daly from his commercial account and put in the savings account. Among other things, he testified:

"I recall the occasion on or about the 23d day of November, 1921, when Mr. Daly opened up the account in question. Mrs. Daly was with him at that time. Mr. Daly stepped up to my window and said he wished to open an account for his wife. I got the necessary papers out, and he signed the signature card, and I made the entry in his book, and he handed me a check on the commercial department of the bank; he also at the same time said he wished his name placed on the book, and he signed, and Mrs. Daly stepped up to the window and she signed, and I made an entry on the book, 'John D. Daly or Florence Smart Daly.' There was no other conversation. * * * There was no discussion at all as to his plans of any kind or his wishes. That was his wish, that he wanted the account made out for his wife. He did not discuss this account with me at any subsequent occasion. When he made the second deposit of \$4,000, nothing was said. I had no discussions with Mr. Daly about the account. When he made the second deposit of \$4,000, nothing was said except how he wanted it deposited. The book was handed in with the check."

The foregoing evidence is uncontradicted. Mr. Daly committed no act and made no declaration at any time which in any way further explained or modified the transaction either in the presence of, or in the absence of, Mrs. Daly or the officers of the bank, or any other person.

As stated above, the appellant claims that the foregoing shows both a gift and a trust. The respondents on the other hand contend that the evidence is insufficient to show either, and, furthermore, if there was any evidence in the record on which the trial court could base an inference in favor of the respondents and against the appellant, then, and in that event, the record presents a conflict of evidence, and, under well-settled rules, this court should affirm the judgment. Taking up the latter part of the contention of the respondents, the record discloses that the decedent made a will; that in the will he recited that he had previously made certain gifts to certain members of his family; that in the will he made a bequest to the appellant; that in the will he made no mention of the fact that he had made any gift to, or that he had created any trust in favor of, the appellant. On these facts the respondents contend that the trial court might infer that the decedent had not made the gift and had not created the trust. There was nothing on the face of the will, or the codicils thereto,

from which it may be inferred that in any one of those documents, or all of them, the decedent had recited every gift which he had made to every one or all of the persons therein named. We are unable to sustain the contention that the inference claimed creates a conflict in the evidence. *Maupin v. Solomon*, 41 Cal. App. 323, 324, 325, 183 P. 198. The case entitled *County of Sonoma v. Stofen*, 125 Cal. 32, 57 P. 681, is inapplicable. On the other hand, the case is far stronger in its facts than were the cases entitled *Field v. Shorb*, 99 Cal. 661, 664, 665, 34 P. 504, *Bauer v. State*, 144 Cal. 740, 745, 78 P. 280, and *Hynes v. White*, 47 Cal. App. 549, 190 P. 836, each of which is opposed to respondents' contention. In the instant case there were the two witnesses, Mrs. Daly and Mr. McArthur, who testified positively, and to the same effect, to the facts which proved the appellant's case. The testimony of neither individual was broken down in the least by the cross-examination.

The evidence introduced clearly proved a trust in favor of the appellant. *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 P. 370; *Bell v. Moloney*, 175 Cal. 366, 165 P. 917.

Furthermore, as stated in *Bell v. Moloney*, supra, "there was also abundant evidence to support the finding of a valid gift *inter vivos*."

[2] In her cross-complaint on which she went to trial, the appellant alleged a trust payable to her "in case of the death of said John D. Daly." After the evidence was all in, by permission of court, she filed an amended cross-complaint. In that pleading she repeated the limitation as to when the trust was payable, and she inserted for the first time the allegations concerning a gift. An examination of the evidence above set forth discloses no limitation to the effect that the money was payable only "in case of the death of said John D. Daly."

The judgment is reversed, and the cause is remanded for a new trial, with directions that the parties may be allowed to amend their pleadings as they may be advised before going to trial.

We concur: KOFORD, P. J.; NOURSE, J.

83 Cal. App. 621

MELLOR v. RIDEOUT. (Civ. 3265.) ★

District Court of Appeal, Third District,
California. June 6, 1927.

Hearing Denied by Supreme Court Aug. 4, 1927.

1. Bills and notes §167—Note secured by mortgage held not negotiable, having been executed before statute was passed (Civ. Code, § 3265, as amended in 1923).

Note secured by mortgage on real property held not negotiable, and hence subject to Civ. Code, § 1459, having been executed before sec-

tion 3265 was amended in 1923 to make notes secured by mortgages negotiable.

2. Evidence §208(2), 265(8)—Admission in pleading is admissible in another action, but, if pleader can amend and thereby destroy admission, it is not ordinarily entitled to overwhelming weight.

An admission contained in a pleading in an action is admissible in evidence in the trial of another action, but, if the first action has not been brought to trial and it is within the power of the pleader to destroy the effect of the admission by amending his pleading, it is not ordinarily entitled to overwhelming weight.

3. Bills and notes §518(1)—Evidence held to warrant finding that cross note was supported by valuable consideration (Civ. Code, § 3110; Negotiable Instruments Law, St. 1917, p. 1531; Code Civ. Proc. §§ 1957, 1963, subd. 2; § 2061, subd. 2; Civ. Code, § 1614).

Where parties exchanged promissory notes at the same time, for equal amounts, bearing the same rate of interest, trial court was warranted in finding that the notes were cross notes, and hence that one of such notes had a valuable consideration and was not an accommodation note, under Civ. Code, § 3110, and Negotiable Instruments Law (St. 1917, p. 1531), presumptions authorized by Code Civ. Proc. §§ 1957, 1963, subd. 2, and section 2061, subd. 2, and Civ. Code, § 1614, not being overcome by allegation in complaint in another action that note was without consideration.

Appeal from Superior Court, Yuba County;
Eugene P. McDaniel, Judge.

Action to foreclose mortgage brought by Roy M. Mellor against Dunning Rideout, as executor of the last will and testament of the estate of Lycurgus Orr, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Perky, McConnell & Hill, of Los Angeles, and Butler, Van Dyke & Desmond, of Sacramento, for appellant.

Warren Steel and Homer Lingenfelter, both of San Francisco, for respondent.

FINCH, P. J. This action was instituted to foreclose a mortgage given to secure the payment of a promissory note for \$5,000, dated June 6, 1922, payable on or before one year after date, and bearing interest at the rate of 6 per cent. per annum. Both instruments were executed by Lycurgus Orr, who died prior to the commencement of this action. The answer denies the execution of the instruments and, "as a further and separate defense herein and by way of counterclaim," alleges that plaintiff's assignor, John R. MacLean, for a valuable consideration, on June 6, 1922, executed and delivered to Orr a promissory note for \$5,000, payable 30 days after date, and bearing interest at 6 per cent. per annum, and that the amount thereof became due and payable prior to the assignment by MacLean of Orr's alleged note. The com-

plaint alleges and the court found that MacLean assigned the Orr note and mortgage to A. P. Knox July 8, 1922, and that on the same day Knox assigned them to the plaintiff.

At the trial the plaintiff introduced proof to establish the execution of the instruments, their assignment to him, and that the note had not been paid. The proof of the defendant was equally formal as to the MacLean note. In rebuttal, the plaintiff introduced in evidence the complaint in an action instituted by Orr against MacLean for the cancellation of the Orr note and mortgage. The complaint in that action, duly verified by Orr, was filed July 3, 1922, five days before the assignment by MacLean. It is therein alleged that Orr was induced by MacLean's false representations to purchase 13,800 shares of the capital stock of Standard Petroleum Company at 10 cents a share; that thereafter, "on and immediately prior to June 6, 1922," MacLean made similar false representations to Orr and falsely stated that he, MacLean, then "had an option to purchase \$5,000 worth of the said capital stock of said Standard Petroleum Company at the said par value of 10 cents per share; that if plaintiff would execute to him, the said defendant John R. MacLean, the plaintiff's promissory note for the sum of \$5,000, secured by a mortgage on plaintiff's real property hereinabove described, he, the said John R. MacLean, could and would hypothecate the same for cash and secure the said capital stock pursuant to his said option, and could and would sell the same to other parties at 50 cents per share; and that he, the said John R. MacLean, could and would so take up such option and resell the said stock within two or three weeks from said date, and would then repay plaintiff the amount of plaintiff's said note and mortgage, together with interest, and also the amount in full that plaintiff had theretofore paid for the said 13,800 shares of the said stock so that plaintiff would then have all of said 13,800 shares of stock without cost to himself; * * * that plaintiff was at said time of the age of 79 years and was then, and had been for some time prior thereto, infirm physically, and in mind, by reason of his advanced years"; that by reason of said false representations the plaintiff was induced to execute the promissory note and mortgage; that subsequent to June 6, 1922, plaintiff learned and discovered for the first time that such representations were false; "that no consideration passed to or has been received by this plaintiff or by anybody else for his use and benefit, for the execution and delivery of the said promissory note of \$5,000 and the mortgage so executed and delivered to secure the payment thereof."

The court found, in the instant case, that each of the aforesaid notes was executed "for a valuable consideration," and that "the said promissory note executed by said John R. MacLean to said Lycurgus Orr on the 6th day

of June, 1922, as aforesaid, now is and at the time of the commencement of this action was a full and complete set-off to the said promissory note in plaintiff's complaint set forth." Judgment was entered in favor of defendant for costs, and the plaintiff has appealed.

Appellant contends that the evidence does not support the finding that the Orr note was given for a valuable consideration, but that it shows that the instrument is an accommodation note, upon which Orr was liable to MacLean's assignee, notwithstanding MacLean's note to Orr was due and payable at the time of the assignment. All other grounds urged for a reversal are based upon that contention and, hence a determination against appellant thereon will be decisive of the case. Appellant relies on the provisions of section 3110 of the Civil Code, which defines an accommodation party and his liability to a holder for value, in the language of the Uniform Negotiable Instruments Law. The title of the act adopting that law is as follows:

"An act to repeal title fifteen of part four of division third of the Civil Code of the state of California, and to add a new title fifteen of part four of division third of said Code in place thereof, relating to negotiable instruments, and to make the law of negotiable instruments in the state of California uniform with the law of other states." Stats. 1917, p. 1531.

[1] The Orr note was not negotiable, it having been executed prior to the amendment in 1923 of section 3265 of the Civil Code, making notes secured by mortgages negotiable. Section 1459 of the Civil Code provides:

"A nonnegotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement."

It is not necessary, however, to decide whether the provisions of section 3110 of the Civil Code are applicable to nonnegotiable notes, because the evidence is sufficient to warrant the inference that the Orr note was given for a valuable consideration. It is a disputable presumption "that a promissory note * * * was given * * * for a sufficient consideration." Code Civ. Proc. § 1963, subd. 21. "A written instrument is presumptive evidence of a consideration." Civ. Code, § 1614. A presumption is evidence. Code Civ. Proc. § 1957. Jurors "are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against * * * a presumption * * * satisfying their minds." Code Civ. Proc. § 2061, subd. 2. Appellant contends that Orr's statement in his verified complaint that the note was given without consideration "must of necessity overcome and dispel the legal

presumption arising from the written instrument," quoting from *Williams v. Hasshagen*, 166 Cal. 386, 390, 137 P. 9, 11, as follows:

"Disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The facts being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled."

In *Mar Shee v. Maryland Assurance Corporation*, 190 Cal. 1, 7, 210 P. 269, 272, it is said:

"There seems to be some confusion in the decisions of this state with respect to the extent to which, under various circumstances presumptions of law are to be regarded as evidence of facts."

[2] The court then reviews the authorities in this state, including *Williams v. Hasshagen*, supra, and proceeds:

"From the foregoing we deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

Disregarding the question whether the facts alleged in the Orr complaint show a consideration for the execution of his promissory note, it cannot be said that the evidence is insufficient to support the finding under discussion. Parties frequently fail to comprehend fully the legal phraseology in which their attorneys state the facts in a pleading. It does not appear whether any steps were taken in the action instituted by Orr further than filing the complaint. It has been held in this state "that a pleading which has been superseded by an amendment can no longer perform any office as a pleading, and cannot be used on the trial as admissions to contradict a fact alleged in a subsequent amendment." *Schuh v. R. H. Herron Co.*, 177 Cal. 13, 17, 169 P. 682, 683. While an admission contained in a pleading in one action may be received in evidence against the pleader in the trial of another action, if the first action has not been brought to trial and it is within the power of the pleader to destroy the effect of the admission as evidence by amending his pleading, the admission is not ordinarily entitled to overwhelming weight.

[3] Besides, there is persuasive evidence in support of the presumption of a consideration. Orr and MacLean exchanged promissory notes at the same time, for equal amounts and bearing the same rate of interest. The correspondence in date, amount, and interest warrants the inference that the instruments were cross notes. *Mutual Loan Ass'n v. Brandt*, 35 Misc. Rep. 270, 71 N. Y.

S. 770. "The rule is well established that a promissory note given by the maker, in exchange for a note given by the payee, is for a valuable consideration, and not an accommodation paper, although made for the mutual accommodation of the parties." *Elliott on Contracts*, § 3402; *Daniel on Negotiable Instruments* (6th Ed.) § 187; *Ambrose v. Hammond Lumber Co.*, 43 Cal. App. 597, 600, 185 P. 691.

The judgment is affirmed.

We concur: THOMPSON, Justice pro tem.; PLUMMER, J.

83 Cal. App. 725

SCHLAKE v. McCONNELL. (Civ. 5802.)

District Court of Appeal, First District, Division 2, California. June 11, 1927.

1. Principal and agent §23(5)—Finding that another was defendant's agent in exchanging stock for realty held supported by evidence that defendant told plaintiff such other person was his agent.

In action to rescind contract for exchange of real property for stock in concessions corporation, evidence that defendant stated to plaintiff that another was his agent and directed plaintiff to transact business with other person as such agent supported finding of agency for defendant in exchange of stock.

2. Principal and agent §116(1), 119(1)—Agent exchanging stock for realty held presumably authorized to talk, and liability of principal could not be limited to words authorized by principal's undisclosed instructions.

Where evidence showed that person procuring exchange of stock for realty was agent of defendant in disposing of stock, such person is presumed to have had authority to talk, and liability of defendant as principal cannot be limited to such portions of agent's talk as may have been authorized by defendant's undisclosed instructions.

3. Exchange of property §8(1)—Finding that company whose stock was exchanged for realty was represented to be free from debt would support false representation, though insolvency was not proven.

In action to rescind for fraud contract to exchange stock in concessions company for real property, finding that company was represented as "free from debt and not indebted in any manner" would be material fact sufficient to support alleged false representation, though insolvency of company was not proven.

4. Exchange of property §8(4)—Finding that stock taken by plaintiff in exchange for realty was worthless held supported by evidence in action to rescind for fraud.

In action to rescind for fraud contract to exchange stock in consolidated concessions company for realty, evidence that stock had no value when delivered to plaintiff, and that con-

cessions company possessed no property except stock in separate corporations composing consolidation, and that company was indebted to defendant on promissory note, supported finding that stock was worthless.

5. Evidence $\S$ 596(1)—Slight evidence is sufficient to sustain burden of introducing prima facie case by proving existence of negative.

Where party had burden of introducing prima facie case by proving existence of a negative, slight evidence is sufficient.

6. Exchange of property $\S$ 8(4)—Contract to exchange stock for realty could be rescinded if finding as to one material fraudulent representation was sustained, without proving every alleged false representation.

In action to rescind for fraud contract to exchange stock in concessions company for realty, it was not necessary that plaintiff prove every alleged false representation, but he was entitled to rescission if finding was sustained as to one material, fraudulent representation.

7. Exchange of property $\S$ 8(4)—Finding that plaintiff, seeking to rescind contract to exchange realty for stock, relied on representations by defendant's agents as to company's financial condition, held sustained by evidence.

In action to rescind for fraud contract to exchange stock in concessions company for realty, finding that plaintiff relied on representations of defendant's agent held supported by evidence that plaintiff would not have made deeds if he had not believed agent's statement as to company's financial condition of which he had no independent knowledge.

8. Appeal and error $\S$ 1011(1)—Trial court determines conflicts in testimony.

Conflicts in testimony are addressed to trial court.

9. Exchange of property $\S$ 5—Rescission of contract to exchange realty for stock day after plaintiff learned facts showing fraud held sufficiently prompt (Civ. Code, $\S$ 1691).

In action to rescind for fraud, contract to exchange realty for stock in concessions company, rescission by plaintiff day after he learned facts showing fraud held sufficiently prompt under Civ. Code, $\S$ 1691.

10. Contracts $\S$ 270(1)—Facts of particular case determine whether contract was rescinded in time.

Whether notice of rescission of contract has been given in time must be determined by particular facts of each case.

11. Exchange of property $\S$ 5—Plaintiff cannot be held not to have rescinded contract after sending rescission notice, introduced at trial without objection, to defendant's place of abode, and filing lis pendens shortly thereafter.

Where notice of rescission of contract to exchange realty for stock in concessions company was delivered into hands of express company to serve on defendant at place where he had been residing, and was produced at trial and received without any objection, and notice of lis pendens was recorded few days after notice of rescission was sent, it could

not be claimed that plaintiff did not rescind at all.

12. Exchange of property $\S$ 5—Plaintiff seeking rescission of contract to exchange realty for stock held relieved from offering to return certificates before suit by defendant's refusal to return land.

In suit to rescind for fraud contract to exchange realty for stock, plaintiff was relieved from necessity of offering to return or cancel stock certificates prior to beginning action, where defendant refused under any circumstances to return title to land conveyed to him.

13. Exchange of property $\S$ 5—Plaintiff seeking rescission of contract to exchange realty for stock was required to restore everything of value, and need not have restored stock found to be worthless.

In action to rescind for fraud contract to exchange realty for stock, duty to restore or offer to restore extends to "everything of value," and hence where stock was found to have been worthless there was nothing which plaintiff was required to restore.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Christian Schlake, Jr., against Emmett W. McConnell. Judgment for plaintiff, and defendant appeals. Affirmed.

Goldman & Altman, of San Francisco, and Wm. S. Wells, of Oakland, for appellant.

W. F. Cowan, of Santa Rosa, and Fry & Wood, of Oakland, for respondent.

STURTEVANT, J. The plaintiff was the owner of two different tracts of land located near Sebastopol in Sonoma county. He executed a contract of exchange whereby he transferred under two separate contracts the said lands to the defendant for shares of stock in the Consolidated Concessions Company, a corporation. Thereafter he discovered certain facts which he believed entitled him to rescind the contracts of exchange by reason of alleged false representations of the defendant and one J. O. Wyatt, the agent of the defendant, and thereupon he gave a notice purporting to rescind the contracts. Thereafter he commenced this action, and he so framed his pleadings that he prayed separately, as to each exchange, that it be (1) rescinded as for fraud; and (2) that his deed be canceled as for a total failure of consideration. The trial court made findings in favor of the plaintiff, and from a judgment entered thereon the defendant has appealed.

Prior to 1913 preparations were made to hold an international exposition at San Francisco in 1915. For the purpose of conducting the enterprise the Panama Pacific Exposition Company was incorporated. That company granted certain concessions. Among them it granted a concession to install and operate the (1) Inside Inn; (2) Scenario of the Crea-

tion of the World; (3) Scenario of the Evolution of the Dreadnaughts of the United States Navy; (4) Cyclorama of the Battle of Gettysburg; and (5) the Palace of Amusement. Each of said concessions was incorporated, and each corporation conveyed to the defendant a block of stock. Thereafter, on July 15, 1913, another corporation was formed, the Consolidated Concessions Company, having \$600,000 preferred stock and \$1,200,000 common stock. It was provided that the preferred stock of the Consolidated Concessions Company should be sold at par \$10 per share, and with each share of preferred stock so sold there would be given as a bonus one share of the common stock. After its organization the defendant conveyed to it his shares of stock in the corporations above mentioned and received in payment the promissory note of the Consolidated Concessions Company and 60,000 shares of the common stock of the Concessions Company. Also, 3,750 shares of its common stock "as collateral security for the payment of the promissory note." The defendant's contract with the Consolidated Concessions Company in the third paragraph thereof contained a covenant that the company would pay the promissory note out of the first moneys which it should receive "from any source whatsoever."

Prior to the initiation of any of these transactions the plaintiff was a farmer at Sebastopol, and so far as the record discloses entirely uninformed regarding corporations, the management thereof, and the methods of ascertaining the value of the securities thereof, and in particular of corporations engaged in the operation of concessions at or in connection with public fairs. Whereas the defendant, according to the prospecti offered in evidence, had "had more than 25 years experience in the handling of international exposition concessions" covering international expositions of the world 1893-1911.

The plaintiff alleged and the trial court found that the defendant's agent, J. O. Wyatt, made the following representations and that each and all were false:

"(A) That the said Consolidated Concessions Company was a solvent corporation and was free from debt and was not indebted in any manner.

"(B) That the said Consolidated Concessions Company, a corporation owned and controlled the following concessions or places of amusement in the Panama Pacific International Exposition, which was to be opened and held in the city and county of San Francisco, in the year 1915, to wit, the Inside Inn; the Narren Palast (Palace of Amusement); the Scenario of the Creation of the World; the Scenario of Evolution of the Dreadnaughts of the United States Navy (Monitor and Merrimac); the Cyclorama of the Battle of Gettysburg.

"(C) That the said Consolidated Concessions Company had paid for all of its buildings and equipments as far as the same had been con-

structed and supplied for said concessions and places of amusement up to said date, and that said corporation would be financially able to fully equip and construct said concessions and places of amusement and would equip and construct the same, and that the same would be fully constructed and equipped at the time of the opening of said Panama Pacific International Exposition, and that the same would be open so as to secure the patronage of the public and would earn large profits which would be paid to the stockholders of said corporation at least twice each month during the continuance of said exposition.

"(D) That owing to the condition of stringency prevailing in financial circles it was deemed advisable to exchange the shares of said capital stock of said Consolidated Concessions Company for real estate in the state of California, and that said corporation had arranged to receive such land and have it held for the use of said corporation, and that money would be borrowed thereon by said corporation to complete the buildings and equipment for said concessions, and that plaintiff's said land would be taken in said defendant's name, in accordance with said arrangement.

"(E) That said Consolidated Concessions Company, a corporation, had an agreement that it was to pay to the Panama Pacific International Exposition 20 per cent, and no more of the gross receipts of said concessions and places of amusement respectively.

"(F) That the preferred capital stock of the Consolidated Concessions Company, a corporation, was then worth the sum of \$10 per share, and that for each share of preferred stock sold a bonus of one share of the common stock of said corporation was given to the purchaser, and that the shares of preferred stock in said company were practically the same as cash at par value, and that if said plaintiff would exchange his said land for said stock, he, the said plaintiff, would be getting substantially cash for his land."

[1] 1. The plaintiff alleged and the trial court found that J. O. Wyatt was the agent of the defendant in the negotiations. The appellant contends that the finding is not supported by the evidence. True it is that the defendant and J. O. Wyatt gave testimony in effect supporting the claim now made by the appellant. However, it is equally clear that the plaintiff testified that the defendant stated to him that J. O. Wyatt was his agent and directed the plaintiff to transact the business with and through Wyatt as such agent.

[2] 2. The appellant also contends that Wyatt's representations were not shown to be within his authority. As we have just stated, there was evidence introduced to the effect that Wyatt was the sales agent of the defendant and as such he presumably had authority to talk. The appellant cites us to no authority, and we know of none, to the effect that in a case of this kind when it transpires that an agent is authorized to transact a line of business which can only be brought about by talking, that then and in that event his principal will be liable for

only such portion of the words of mouth as may be authorized by the undisclosed instructions of the principal.

[3] 3. The appellant contends that there is no evidence that the Consolidated Concessions Company was insolvent or that its stock was worthless. Solvency, as a factor, is a part of finding (A), *supra*. However, it is only a part. If it is stricken out of the finding, the finding is not deprived of all materiality. As so deleted the finding would stand "that the said Consolidated Concessions Company was free from debt and was not indebted in any manner," and, standing alone, this would be a material fact sufficient to support an alleged false representation.

[4, 5] The attack is also, in part, an attack on finding (F), *supra*, in which the trial court found that the shares of stock transferred to the plaintiff were worthless. The appellant contends that there is no evidence to support the finding. However, some of the witnesses testified that the stock had no value when it was delivered to the plaintiff. Furthermore, the uncontradicted facts are that at the time of the first exchange and continuously thereafter, the Consolidated Concessions Company possessed no properties except a block of stock in each of the corporations above named; that it was indebted to McConnell on its promissory note, which was written for the sum of \$500,000. It was also developed in evidence that said note is still outstanding and unpaid, at least in part; that moneys were not subsequently received. All of these facts were properly received in evidence and were doubtlessly considered by the trial court in making its findings. It is patent that the stock had no value until the promissory note was paid. However, the appellant calls attention to the amount of corporate stock in other corporations which this corporation held, and he argues that the respondent's proof did not go far enough. The respondent was in the position of introducing a *prima facie* case to prove the existence of a negative. When such is the burden of a party, slight evidence is sufficient. In view of all the facts of this case, we may not say that respondent's evidence was insufficient to support the finding that the stock was worthless.

[6] Although this point is addressed to the facts found in findings (A) and (F), these findings are only a part of the alleged misrepresentations. There are many others in findings (B), (C), (D), and (E). It was not necessary that the plaintiff prove every alleged false representation. "If the finding is sustained as to one material fraudulent representation, it is enough." *Beeman v. Richardson*, 185 Cal. 280, 282, 196 P. 774, 775.

[7, 8] 4. The appellant asserts that the plaintiff did not rely upon Wyatt's statements. The plaintiff in one place testified

that he would not have made the deeds if he had not believed the statements made by Wyatt and McConnell; that at the time he executed the deeds he had no independent knowledge as to the financial condition of these corporations—only that they were all paid for as far as they had gone; that that was all he knew about it; that Wyatt was the only one who gave him the information. The foregoing testimony squares with the surroundings and the location of the witness at the time the deeds were executed. It may be conceded that in another passage the same witness testified that the only representation which was made to him by Wyatt upon which he relied was that the company was to pay dollar for dollar for his stock. The conflicts in the testimony were addressed to the trial court and do not support a contention in this court that there was no evidence.

[9, 10] 5. The appellant contends that the plaintiff did not rescind promptly. In this connection appellant calls attention to the fact that one of the deeds was made on the 4th day of November, 1914, and one was made on the 12th day of December, 1914. He then calls to our attention the fact that the exposition opened on February 20, 1915. The appellant argues that therefore as early as March 6, 1915, no dividends having been paid, plaintiff knew that at least one representation (finding [C], *supra*), was false, and he further argues that inquiry would have demonstrated that the others were false and therefore the delay is fatal. *Oppenheimer v. Clunie*, 142 Cal. 313, 75 P. 899. The argument is not convincing. The appellant is resting it on the weakest portion of the plaintiff's case, to wit, when a dividend would be paid or the amount thereof. The authority cited is clearly distinguishable in its facts. The respondent contends that he was not bound to give a notice of rescission until he was "aware of his right to rescind." Civ. Code, § 1691. In that connection he points out that on August 13, 1915, in a conversation with Mr. Cappelman, he learned the facts. The record discloses that the next day he served his notice of rescission. Every case must largely depend on its own facts. Considering, as we must, each and all of the facts with reference to each particular point, in so far as any fact throws any light whatever, we think it is patent that the notice of rescission in the instant case was not given at a date too late to be effective as a notice of rescission.

[11] In this same connection the appellant argues that the plaintiff did not rescind at all. Thereupon he cites the record to the effect that the notice of rescission was delivered into the hands of Wells Fargo & Co., with directions to serve it on the defendant at the Inside Inn; that two or three days later the express company returned the docu-

ment with the information that the defendant could not be found, that nobody knew where he had gone, and that it was impossible to have the paper delivered to him. Appellant then quotes the record on several matters which the appellant knew regarding his whereabouts, but there is no showing that the respondent knew any of those facts. In view of the importance of the defendant as the creator of so much of the exposition, as is disclosed in the prospecti, and in view of the fact that during at least a part of the year 1915 the defendant resided at the Inside Inn, it is quite impossible in the absence of fraud to explain how those in authority at the Inside Inn could have truly made such statements as those that were made to Wells Fargo & Co. Furthermore, the notice of rescission was produced at the time of the trial and was offered in evidence. It was received without any objection whatever. Mr. Cowan testified that three or four days after the notice of rescission was sent that the plaintiff's suit in rescission was prepared and filed, and at the same time there was duly recorded a notice of lis pendens. Taking into consideration the entire record in this case, and assuming for the moment that the service of the notice would have been held defective if the attack had been made in time, nevertheless, we are unable to say that the record before us showed error or that the error was prejudicial.

[12, 13] 6. When each exchange was made a certificate of stock was issued in the name of the plaintiff. At the same time other certificates were issued to Wyatt, Sanborn, or Dorwood. The appellant contends that in his notice of rescission the plaintiff did not offer to return the stock so issued to Sanborn, Wyatt, and Dorwood, and therefore the offer to restore was insufficient. To this point there are several sufficient answers. The court found that as to the first exchange Wyatt proposed and the plaintiff consented to exchange certain parcels of land for 2,014 shares, of which 100 shares would be delivered to Sanborn in settlement of a claim for compensation as broker. As to the other parcel the trial court made a similar finding except that 70 shares were delivered to Sanborn. The trial court also made a finding which is very full and complete and finds that the plaintiff offered to restore every-

thing received by him and did restore by depositing the certificates by him received with the clerk of the court for the use of the defendant. The court also found that the certificates delivered to Sanborn were for shares of stock which had no value whatever and that Sanborn destroyed them without the plaintiff's knowledge or consent, but that Sanborn had conveyed his interest to the plaintiff and that such assignment had likewise been deposited in court for the use of the defendant and that the defendant had suffered no loss or damage because the certificates were destroyed. The defendant's answer and the evidence introduced by the defendant and his objections made at the trial were in effect a positive refusal under any circumstances to return the title to the lands which had been conveyed to him, and his positive refusal relieved the plaintiff from the necessity of offering to return or cancel the certificates prior to the beginning of the action. *McDonald v. Pacific Deben-ture Co.*, 146 Cal. 667, 672, 80 P. 1090. Furthermore, in an action of this kind the duty to restore or to offer to restore extends to "everything of value." As stated above, the trial court found that neither the plaintiff nor Sanborn had received anything of value. It follows that there was nothing to be restored. *Nichols v. Michael*, 23 N. Y. 264, 273, 80 Am. Dec. 259; *Martin v. Lawrence*, 156 Cal. 191, 194, 103 P. 913.

7. As stated above, the plaintiff's pleadings placed his case as to each exchange on two different grounds: (1) Rescission; and (2) cancellation. All that has been said regarding the points made by the appellant does not take into consideration the second theory presented by the plaintiff's complaint. The appellant makes no attack thereon except as the same may be found in the attack on the findings (A) and (F), supra. We have shown that those attacks are not well founded. As to the second theory the trial court made findings on all allegations in favor of the plaintiff. Those findings each and all were sustained by the evidence. On that theory alone the judgment should not be disturbed.

We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

83 Cal. App. 604

DELLEPIANE v. HYNES et al. (Civ. 5816.)

District Court of Appeal, First District, Division 2, California. June 6, 1927.

1. Gifts ☞30(3)—Delivery of passbook on savings account with intention of making gift of deposits is sufficient to pass title without written assignment (Civ. Code, §§ 663, 953, 1146, 1147).

Delivery of passbook on savings account, with intention of making gift of deposits represented by it, is sufficient to pass title to deposits without written assignment or order, in view of Civ. Code, § 1146, defining gift, section 663 defining personal property, section 953 defining choses in action, and section 1147 relative to verbal gifts.

2. Gifts ☞28(2)—Delivery of passbook on savings account, containing voucher for safe-keeping of bonds, with intention of making gift of bonds, held sufficient to pass title without written assignment.

Delivery of passbook on savings account, containing voucher for safe-keeping of bonds, with intention of making gift of bonds, is sufficient to pass title without written assignment or order, where bank held bonds under agreement to deliver, on presentation of book, bonds of like amount, and withdrawals were required to be noted in passbook.

3. Appeal and error ☞1177(6)—After reversal cause must be remanded, in absence of findings supporting contrary judgment.

Where judgment must be reversed but there are no findings sufficient to support contrary judgment, cause must be returned for new trial notwithstanding that evidence covers all elements necessary to constitute such contrary judgment.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by George Dellepiane against W. J. Hynes, administrator of the estate of Sophia Reith, deceased, and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Walter S. Brann and Edgar H. Rowe, Jr., both of San Francisco (Brann, Van Duyn, Boekel & Rowe, of San Francisco, of counsel), for appellant.

Cullinan & Hickey, of San Francisco (William T. Sweigert, of San Francisco, of counsel), for respondent Hynes.

T. E. K. Cormac and S. V. Bolles, both of San Francisco, for respondent Lourens.

J. Carfraie Birnie, of San Francisco, *amicus curiae*.

NOURSE, J. Plaintiff sued to quiet title to five United States Liberty bonds valued at \$4,500 held by the Bank of Italy as a depository for safe-keeping. Judgment went for the defendants, and the plaintiff has appealed upon a typewritten record.

The complaint is in the ordinary form in an action to quiet title to personal property. It alleges that on the 6th day of July, 1920, Sophia Reith and the plaintiff opened a joint savings account with the defendant Bank of Italy, numbered 126900, said account being payable to either of said depositors or to the survivor of each; that Sophia Reith died in April, 1924, and at the time of her death there was and still is on deposit in the said account in said bank Liberty bonds of the value of \$4,500 and accrued and accruing interest thereon; said bonds and said interest are and were for some time prior to the death of said Sophia Reith the property of plaintiff. The answer of the Bank of Italy denies that there was at the time of the death of said Sophia Reith on deposit in any account in said Bank of Italy Liberty bonds of the value of \$4,500, or in any amount, but admits that said bonds were deposited by said Sophia Reith and alleged that the deposit was made in her sole name. By way of separate defense it is alleged that there is on deposit with said bank \$4,500 worth of Liberty bonds; that the plaintiff claims said bonds as the survivor of the joint savings account of said parties; and that the defendant Bank of Italy claims no right, title or interest thereto. The public administrator also denies that there is on deposit with the defendant bank to the joint account of plaintiff and Sophia Reith Liberty bonds of any value, and alleges that at the time of the death of said Sophia Reith there were and are now on deposit with said bank Liberty bonds of the value of \$4,500 in an account under the sole name of said Sophia Reith. Trial was had before the court without a jury, and findings of fact and conclusions of law were made from which it appears that the trial court found, in accordance with the denials of the issues raised by the complaint, that no bonds were held by the defendant Bank of Italy in the joint savings account of the plaintiff and Sophia Reith; that the said bank had on deposit \$4,500 in Liberty bonds in the sole account of Sophia Reith; and that plaintiff had no right, title, or interest in or to said bonds or any part thereof.

The facts of the case, which are not disputed, are that on July 5, 1920, Sophia Reith and the plaintiff opened a savings account with the defendant Bank of Italy payable to either or the survivor of them and received from the bank a passbook numbered 126900. Deposits and withdrawals were made from time to time from this account, and no question is now raised as to the right of plaintiff to the balance of said account. At the same time the deceased deposited in a safe deposit box at another branch of the same bank five United States Liberty bonds of the par value of \$4,500. This box was in the joint names of the deceased and the plaintiff and both had access to it. Some 16 months later the

depositors relinquished this box and the deceased deposited the bonds with the defendant Bank in what is termed the "safe-keeping deposit account." This deposit was made in the sole name of the deceased and was designated as "S. K. D. No. 2510 Savings Account No. 126900." At the time of this deposit a printed form of deposit slip or passbook was issued to the deceased and pasted into passbook No. 126900. This was the only form of voucher or passbook issued to cover the deposit of the Liberty bonds. It contains the rules under which the deposit is made, from which it appears that the bank undertakes to safely keep the bonds deposited, to collect the interest coupons when due, and pay the proceeds thereof into the savings account represented by the passbook to which the voucher is attached. The bank assumes no obligation other than of returning upon demand made prior to maturity United States bonds of the same issue and of the same par value as the securities deposited. It agrees, however, to secure payment from the government of the principal of the bonds upon maturity, and of the interest coupons, and to pay the same into the savings account of the depositor. The bank also reserves the right to require three days' notice for the withdrawal of any of the securities and stipulates that such notice must be noted in the passbook. In accordance with these rules the bank regularly collected the proceeds of the interest coupons and deposited these in the joint savings account No. 126900.

Sophia Reith retained possession of the passbooks and made deposits and withdrawals from the joint savings account over a long period of time and gave considerable sums of money so withdrawn to the plaintiff, who during this time was engaged to marry her and was being assisted by her in operating a grocery store. Three days before she died, and while critically ill in a hospital in San Francisco, she called the plaintiff to her bedside and asked him to hand her her purse, from which she removed the passbook covering the joint account of the plaintiff and herself and to which the voucher covering the deposit of the bonds was attached. She then handed this book to the plaintiff and said, "Take this book; it is yours." Immediately following her death demand was made upon the bank in behalf of the plaintiff for delivery of the bonds, but the bank refused to make delivery and now agrees to deliver the bonds in accordance with any final judgment determining the question of their ownership.

As we have said, the evidence is all without contradiction. It is true that the evidence of the manual delivery of the book to the plaintiff is found in the testimony of the plaintiff alone. This delivery took place in the presence of the plaintiff and the donor, no one else being present. His testimony of what occurred is not controverted, however, and is not impeached by any competent or

relevant testimony. The only attack upon this testimony by the respondents is based upon conjectures and unjustifiable innuendoes which are founded upon statements of counsel and are unsupported by any competent testimony. Though the trial court was not called upon to find upon the specific question of the manual delivery of the passbook and the donative words accompanying it, we are satisfied from the review of the entire record that if a finding had been made it would necessarily have been in accordance with the testimony of the plaintiff. We must, however, in view of the record, take it as a fact proved that the passbook was actually delivered to the appellant with the intention on the part of the donor to transmute everything of value that it called for.

[1] The question next arises whether the delivery of the passbook was a sufficient delivery of the right to the bonds on deposit within the terms of section 1147, Civil Code. This section reads:

"A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

In view of the peculiar nature of the deposit it is manifest that the bonds which were deposited by the deceased in November, 1921, were not capable of actual delivery to the appellant in April, 1924. These bonds were held by the bank under a special form of deposit which called for their safe-keeping and the delivery upon demand of bonds of the same issue and par value. It was not a bailment or deposit such as would be made in a safe deposit box where the identical bonds deposited must be returned. It was necessary, therefore, for the appellant to show that by the delivery of the passbook he was given "the means of obtaining the possession and control" of the bonds which the bank held on deposit or of bonds of a similar character and value which the bank had agreed to deliver on demand.

A gift is defined by section 1146, Civil Code, as "a transfer of personal property, made voluntarily, and without consideration." Personal property is defined by section 663 of the same Code as "every kind of property that is not real." Within this definition are included choses in action, which are defined by section 953 of the same Code as "a right to recover money or other personal property by a judicial proceeding." The universal rule is that a chose in action which creates a liability against a third person and which is in writing is the subject of a gift causa mortis by mere delivery. In 28 C. J. p. 699, it is said that this rule has been applied to promissory notes, bonds, bills of exchange, savings bank books, certificates of deposits, or deposit notes and insurance policies. It is also the general rule that where a chose in action is

not evidenced by a note or other instrument in writing which can be delivered, but is merely a claim against a third person which must be established by parol, a written assignment of the demand by the donor is necessary to complete delivery. *Id.*, and see *Adams v. Merced Stone Co.*, 176 Cal. 415, 419, 178 P. 498, 3 A. L. R. 928; *O'Shea v. Sicotte*, 52 Cal. App. 331, 334, 198 P. 812. It is an equally well-settled rule that delivery of a savings bank passbook is a valid gift of the money deposited because such book is the record of the depositor's account and its production authorizes control of the deposit. 28 C. J. 702, and cases cited.

In stating that this rule is well established we should not be understood as implying that it has always been so. In 1819 the Court of King's Bench in the case of *Irons v. Smallpiece*, 2 B. & Ald. 551, 552, said: "In order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee." That case was cited and approved by the Supreme Court of New York in 1858 in the case entitled *Huntington v. Gilmore*, 14 Barb. (N. Y.) 243. In 1806 the question coming before Chancellor Kent as Chief Justice, in the case entitled *Noble v. Smith*, 2 Johns. (N. Y.) 52, 56 (3 Am. Dec. 399), the learned jurist said:

"Here was not even an attempt at a symbolical delivery, and giving the testimony the strongest possible construction, in favor of the defendants, it amounted to nothing more than saying, I give, without any act to enforce it. A mere symbolical delivery would not, I apprehend, have been sufficient. The cases in which the delivery of a symbol has been held sufficient to perfect the gift, were those in which it was considered as equivalent to actual delivery, as the delivery of a key of a trunk, of a room or warehouse, which was the true and effectual way of obtaining the use and command of the subject."

Later Chancellor Kent wrote his *Commentaries*, and in volume 2, p. 439, he cited the *Irons Case* as stating the law. In *Hunter v. Hunter*, 19 Barb. (N. Y.) 631, 635, the court cites with approval from 2 Kent's *Commentaries*, 439. In *Woodruff v. Cook*, 25 Barb. (N. Y.) 505, 512, the court cites with approval the foregoing authorities. In a note to section 1147 of the Civil Code the commissioners stated specifically that they are stating the rule as contained in the foregoing authorities and that they are not stating the rule in some of the later authorities in England. The rule of the *Irons Case* has been criticized by many of the later authorities as being far too broad, particularly as it barred every form of "symbolical" delivery where the "thing" itself was not capable of manual delivery. Though the case was controlling in the common-law states, it cannot be taken as expressing the rule of those code states where symbolical delivery is expressly permitted.

Section 1147 of our Civil Code was enacted

in 1872, based upon Field's Draft of the New York Civil Code, § 501. Our courts have not been called upon to pass on the specific question of the effect of a delivery of a savings account passbook, and our attention has not been directed to any California cases which depart from the rule that, where the chose in action is evidenced by a writing, a delivery, without assignment, is sufficient. Respondents cite *Bryson v. Security Trust, etc., Bank*, 29 Cal. App. 596, 156 P. 987, to the point that great danger might lie to the depositor if the bank should carelessly pay out upon the production of the passbook without first satisfying itself that the holder was legally entitled. The rule of that case was based entirely upon *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653, and though it is not important here, as it does not in any way criticize or depart from the rule for which appellant contends, it is interesting to note that the *Smith Case* does not state the prevailing rule in New York, but that the rule of that jurisdiction is found in the later case of *Ridden v. Thrall*, 125 N. Y. 572, 577, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758. In the latter case the decedent, who was about to enter a hospital for an operation, delivered to the plaintiff a tin box containing 16 passbooks covering deposits in an equal number of savings banks, with no other donative declaration than that he gave him the box and its contents. In holding that a gift was made to the plaintiff of the entire deposits the court said:

"The gift was consummated by the delivery of the books, and no other formality was needed to constitute the actual delivery of the bank deposit needful to vest the possession and title in the donee. In savings banks in this state such deposit books are issued as evidence of the indebtedness of the banks. * * * It answers the same purpose in the case of a savings bank that is answered by a certificate of deposit in the case of other banks."

In *Pierce v. Boston Sav. Bank*, 129 Mass. 425, 432 (37 Am. Rep. 371), it was said that "the book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title." In the same case it was said that the savings bank passbook is the depositor's voucher for the amount held on deposit by the bank and is the only security he has as evidence of the debt. It is upon the theory that the passbook is written evidence of the obligation of the bank that it is placed within the same class as promissory notes, bills of exchange, bonds, mortgages, certificates of deposits and like other written evidences of indebtedness. Thus it is said in *Pomeroy's Equity Jurisprudence*, vol. 3, § 1148, that the rule is well established that choses in action of the character just mentioned, including savings bank, passbooks may pass by delivery and become the subject of a valid gift. *Thornton on Gifts and Advancements*, § 273, says that "any writ-

ten obligation is the subject of gift without indorsement or assignment." The rule stated is in harmony with the provisions of section 1147, Civil Code, which requires in the case of an oral gift that "the means of obtaining possession and control" of the subject of the gift must be given to the donee. It may be stated generally then that the rule is that where a chose in action is not evidenced by a written instrument the only means of obtaining control over it and hence the only means of making a valid gift is by an assignment in writing or some act equivalent thereto. *Adams v. Merced Stone Co.*, supra. But where the chose in action is evidenced by a writing sufficient to represent the indebtedness it may be the subject of a gift without indorsement or assignment.

A case in point is *Snidow v. Brotherton*, 140 Va. 187, 124 S. E. 182, 40 A. L. R. 1246. There a laborer, who was fatally injured in the course of his employment, delivered to the superintendent of the company by which he was employed a key to his trunk, which was located in his room some distance away, with instructions to the superintendent that in his trunk would be found his savings bank book, United States war savings stamps and receipts for Liberty bonds which he wished the superintendent to procure and deliver to Anna Brotherton. He died a few hours later, and upon an examination of his trunk the superintendent found the passbook, showing \$1,372 on deposit in a savings bank, \$240 in United States war savings stamps, and a receipt from the bank for United States Liberty bonds of the value of \$500 held by the bank for safe-keeping. The Virginia court held that the delivery of the savings bank passbook constituted a valid delivery of the money on deposit, and therein drew the distinction between a passbook upon a savings account and a passbook upon a general deposit account. See, also, *Thomas' Administrator v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. As to the war savings stamps, the court held that the validity of the transfer could not be questioned, as all the elements of a gift were present. As to the bonds held by the bank, it was said that the receipt of the bank of its obligation to return a like amount of bonds of the same issue on demand was sufficient evidence of title and that the delivery of the receipt was equivalent to the delivery of the bonds themselves. In an exhaustive note in 40 A. L. R. at page 1249 cases are cited showing the universal rule to be that the delivery of the passbook in a savings account with donative intent is a valid gift of the moneys on deposit. The rule of the cases cited is based upon the theory that the passbook is the written evidence of the chose in action which the depositor holds against the bank for payment of the moneys on deposit. They are all in accord with the general rule that a chose in action evidenced

by a writing may be the subject of an oral gift without assignment or other writing, and that it is only when the chose in action is not in writing, such as an unliquidated account (*Adams v. Merced Stone Co.*, 176 Cal. 415, 178 P. 498, 3 A. L. R. 928), that a written assignment or order is necessary to complete the gift.

These cases are in full accord with *Mellor v. Bank of Willows*, 173 Cal. 454, 160 P. 567. That case involved the validity of a gift of certificates of deposit in a commercial account without the indorsement of the depositor. The Supreme Court there held that the gift was complete notwithstanding the failure to indorse the certificates of deposit, upon the general rule applying to choses in action evidenced by writing to which we have heretofore adverted, and (page 461, 160 P. 570) says:

"In this state it has been well settled that 'negotiable paper payable to order is the subject of a donatio causa mortis, even though it is not indorsed by the payee.' *Edwards v. Wagner*, 121 Cal. 376, 53 P. 821. This rule has been applied to a promissory note (*Druke v. Heiken*, 61 Cal. 346, 44 Am. Rep. 553), United States bonds (*Vandor v. Roach* [73 Cal. 614, 15 P. 354], supra), and bills of exchange (*Edwards v. Wagner*, supra). It applies with equal force to a certificate of deposit, payable to order, when transferred as a gift causa mortis."

The great weight of authority is, therefore, that the delivery of a passbook upon a savings account with the intention of making a gift of the deposits represented by the book is sufficient to pass title to the deposits without a written assignment or order. The authorities are not agreed as to the sufficiency of the transfer where the rules of the bank under which the deposit has been made require a written order upon the bank in addition to the presentation of the passbook. In *Ridden v. Thrall*, 125 N. Y. 572, 578, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758, the New York court held that the rights of the donee were not affected by a by-law of the bank requiring a written order of the depositor when some one other than the depositor seeks to draw the money. It was pointed out that the depositor could draw the money without making an order simply by the presentation of the passbook, and that this right was one which could be transferred to any legal owner of the passbook. The effect of the decision is that the passbook is in itself the evidence of the obligation of the bank and that the question as to the ownership of the book was one to be determined by competent evidence. That the donee of the passbook had the same right to enforce payment as the donee of any nonnegotiable chose in action, certificate of deposit, or unindorsed note. In such a case he may be called upon to prove his ownership, but this goes only to a question

of evidence of title and not to the substantial right of the parties. Putting it in another way, if a party has come into possession of a passbook by purchase or gift a written order or assignment would merely be evidence of the right and not the means of enforcing the right. Such is the rule in New York, but it is not necessary for us to go that far, because the passbook covering the deposit of the bonds in suit did not require a written order or assignment of any character.

[2] While no authorities of this state have been called to our attention relating to a passbook or voucher for the safe-keeping of bonds such as we have here, we can see no distinction between such a book and one issued by a savings bank for the safe-keeping of money. In both cases the bank agrees to pay out or deliver on presentation of the book, not the money or bonds which were deposited, but money and bonds of like amount, and in both cases the rules of the bank provide that withdrawals of either the bonds or the money must be noted in the proper passbook. In the rules of the bank governing the deposit of the bonds the voucher issued to the decedent is treated throughout as a passbook of a character similar to the passbook issued for the savings account. In the savings account passbook, which is included in the record, printed notice is given to the depositor that no money will be paid out from the account without the passbook and that no transfer of the passbook shall be valid until actually made in the books of the bank. In the statement of the terms and conditions governing the savings account no instructions are made as to the transfer of the passbook, but it is provided that all deposits may be withdrawn only as provided in the by-laws of the bank and upon presentation of the passbook. However, in the printed rules covering the deposit of the bonds for safe-keeping no limitation is made upon the transfer of the passbook, and it is not required that written notice for the withdrawal of the bonds must be given to the bank, but merely that the bank reserves the right to require three days' notice of such withdrawal. As between the passbook covering the bonds and the passbook for the savings account, the principal difference is that the bonds will be delivered on presentation of the book alone, while in the savings account a written order by the depositor is required in addition to the passbook when presented by one other than the depositor. A bankbook covering an ordinary commercial account differs from both of these passbooks in that payment is not made on presentation of the book, but is made on a check against the account only. Thus the transfer of a commercial account book does not give any power of possession or control of the money in the general account. On the other hand,

this voucher, or passbook, covering the bond account, contains a receipt on the part of the bank of the bonds therein listed and is accordingly evidence of the obligation of the bank to return bonds of a like issue and amount to the depositor on demand. This obligation of the bank is, therefore, a chose in action running to the depositor evidenced by the writing and as such was the subject of a gift from her to the donee. It is of little importance that before the bank would feel safe in delivering the bonds to the donee it would require proof of the legal ownership of the book by him. As we have said that is merely a matter of evidence and not a matter of right. Thus when the depositor delivered the passbook to the appellant she placed in his hands the means of obtaining the dominion and control of the bonds which she had deposited with the bank or of bonds of like character and amount.

It was not, as argued by respondents, the chose in action between the United States government and the decedent to pay the bonds at their maturity which she attempted to transfer to the appellant, but the chose in action which was transferred by the gift was that represented by the passbook, to-wit, the right of the depositors to demand and receive from the bank bonds of like issue and amount to those deposited. This chose of action was represented in writing by the passbook and the entries therein and, inasmuch as the bonds themselves were not capable of actual delivery, the depositor complied with all the terms of section 1147, Civil Code, when she delivered to the appellant the passbook which was "the means of obtaining possession and control of the thing" given.

We have intentionally refrained from entering into a discussion of the distinctions drawn between a gift *causa mortis* and one *inter vivos*, because to do so would extend the opinion beyond reasonable limits. In view of the serious illness of the donor in this case and her death resulting from that illness within three days thereafter, it may be presumed that the gift was one *causa mortis*. But the question is wholly immaterial, because if the gift was a good one as a *donatio causa mortis* (and as we have seen from the authorities such must be the conclusion), it was certainly good as a gift *inter vivos*.

[3] The evidence covers all the elements necessary to constitute a completed gift of the bonds in suit, and if a finding had been made on that specific issue it would have required a judgment for the appellant, but inasmuch as there are no findings of fact which would support a contrary judgment, the cause must be returned for a new trial.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

83 Cal. App. 771

POETKER v. DYCK. (Civ. 4571.)

District Court of Appeal, Second District, Division 2, California. June 14, 1927.

1. Vendor and purchaser ⇨21—Writings showing intention to have contract prepared in future filed in escrow held not to constitute land sale contract.

In action to recover money paid during negotiations for purchase of land, writings not describing land and showing intention to have contract prepared by bank following indefinite and uncertain suggestions by parties, which was never done, signed by plaintiff and defendant and filed in escrow, held not to constitute contract for sale of land.

2. Appeal and error ⇨1050(1)—In action to recover money paid for land, admitting testimony that plaintiff had received nothing for money and compelling defendant to answer that plaintiff had received nothing held harmless under record.

In action to recover money paid for land where writings filed by party in escrow did not constitute contract, permitting plaintiff to testify over defendant's objection that he received nothing of value for money, and on cross-examination, compelling defendant to answer that plaintiff received nothing, was harmless, since answers only confirmed what was manifest on face of entire record.

3. Evidence ⇨413—Testimony as to agreement that check would be placed with escrow papers held not to vary written instrument.

In action to recover money paid in negotiations for purchase of land, where writings filed in escrow which did not constitute contract failed to disclose what parties intended with regard to such payment, permitting plaintiff to testify that at time check was deposited it was agreed defendant would place it with escrow papers was not error as attempt to vary terms of written instrument by parol.

4. Vendor and purchaser ⇨334(1) — Where purchaser obtained nothing for down money and no land sale contract was made judgment for its return was proper.

In action by purchaser to recover money paid in negotiations for purchase of land, where writings by parties filed in escrow did not constitute contract and plaintiff received no consideration, judgment for its return was proper.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by J. D. Poetker against P. R. Dyck. From a judgment for plaintiff, defendant appeals. Affirmed.

F. E. Borton, of Bakersfield, for appellant.
Mark H. Edwards, of Reedley, and Andrew R. Schottky, of Merced, for respondent.

MURPHEY, Justice pro tem. This is an action to recover the sum of \$1,000 paid by the plaintiff to defendant during the pendency of negotiations for the purchase and sale of a tract of land in Fresno county. Judgment

went for plaintiff in the trial court, and defendant appeals. The record discloses that the title to the tract of land involved in this litigation was vested in one Beshaw, subject to a mortgage of \$7,000; that there was an agreement by Beshaw to convey to one Wickstrom, who in turn had agreed to convey to the defendant; a crop contract with the California Raisin Association and a renewal option, which together covered a period of six years.

[1] The plaintiff, after having been shown the property by a real estate agent, went to the defendant and as a result of their negotiations the following writings were signed:

"Shafter, California, Nov. 12, 20. First National Bank, Reedley, Cal. Gentlemen: Inclosed please find two insurance policies and some temporary escrow instructions by which you may be guided when Mr. Poetker calls at your bank. Thanking you in advance for the courtesy, I remain, Yours very truly, P. R. Dyck."

"Shafter, Nov. 12, 1920. Escrow Instructions. If J. D. Poetker can assume the balance of my equity of \$4,000.00, I will allow accrued interest from Dec. 1st, 1919 to Nov. 12, 1920, which is \$1,064.02, leaving \$2,935.08, amount due me in addition to \$6,000.00, first payment. In this event, Mr. Poetker will assume the contract I made with Radish and Miljarak. P. R. Dyck, J. D. Poetker."

"Escrow Instructions. Purchase Price \$26,000.00—Cash to be paid \$6,000.00—Accept receipt held by J. D. Poetker for \$1,000.00 as part of said \$6,000.00 cash payment. Date of contract November 12th, 1920. Terms: \$3,000.00 including Interest to be paid Nov. 12, 1921, and Nov. 12th, 1922. After that \$3,500.00 per year. Seller pays 1st half of 1920-21 taxes. Prorate insurance. Pay Hagan & Anderson \$1,000.00 commission. Seller pays water tax for 1920. Two horses, harness, harrow, cultivator, 2 plows and 50 sweet boxes and hay in the barn go with the place. Write new contract showing that J. D. Poetker assumes contract dated Dec. 1, 1919, between P. R. Dyck and Radish & Miljarak and that he will make payments direct to said Radish & Miljarak beginning 1921. Payments to be \$2,500.00 to Radish & Miljarak; \$500.00 to P. R. Dyck, \$1,000.00 from 1923. P. R. Dyck, J. D. Poetker."

"Escrow Instructions. 2,600.00 total purchase price. 6,000.00 cash—20,000.00—terms—Pay 2,500.00 less \$6.00 due me from Miljarak, on contract to Radish & Miljarak, show on new contract amount due on former contract and that \$2,500.00 will be paid thereon by Mr. Poetker & 500.00 on my balance for 2 years after that \$1,000.00 per year. Show exact amount due R & M & amount due P. R. Dyck on new contract. Have R & M bring abstract to time of their contract, I will bring same to Nov. 12, 1920—date of this contract. Give possession of farm as soon as papers are signed, and of house as soon as tenant vacates, not later than Dec. 15, 1920. Date new Nov. 12, 1920. Nov. 17, 1920. P. R. Dyck, J. D. Poetker."

On December 6th the defendant wrote to the assistant cashier of the First National

Bank with whom all the papers were deposited as escrowee as follows:

" * * * Would you be so kind and meet me at your house or some place that you choose to designate next Saturday night at 8 p. m. or near that time, where I might also meet J. D. Poetker, in order that I may finish the deal, or rather have the contract started for the deal that was made by us some time ago. I shall surely make it right with you. * * *"

These documents were identified by the assistant cashier above referred to, who testified that he did not receive any other or further communications in this matter prior to May 11, 1921, this being the date upon which the plaintiff demanded the return of the \$1,000 here involved, and that he did not do anything in the matter either as agent of the defendant or the plaintiff and did not have any conversation with the parties when together with reference to the matter. At the time of the signing of the first document above referred to, plaintiff gave to defendant a check for \$1,000, which defendant contends was first payment on the purchase price, but plaintiff claims that the defendant agreed to forthwith deposit this check in the bank in escrow. However, whatever may have been the understanding, the defendant cashed the check and appropriated the money to his own use. It is manifest from the foregoing that there never was and never has been any meeting of the minds or any contract between these parties. Nowhere does there appear any description of the lands to be conveyed. It is apparent throughout the memoranda that it was their purpose and intent to have a contract prepared by the bank following certain indefinite and uncertain suggestions by the parties for the signature of both of the parties to the deal. This was never done. One of the memorandums recites that an abstract is to be prepared and plaintiff let into the possession of the property not later than December 15, 1920. No abstract was ever submitted to him, and he testifies, and there is no contradiction, that he inquired on the 15th day of December of the escrowee with regard to the abstract and was informed that it had not been delivered. The other evidence positively shows that the abstract was mailed on the 18th day of December to the escrowee, but that it was never presented to or called to the attention of the plaintiff. In his brief the defendant admits that the writings are undoubtedly incomplete, in which conclusion we readily concur.

In these writings it is difficult to find where the defendant has expressly agreed to do any single act. The most that can be said of this so-called contract is that it was a fruitless effort of laymen to perform services requiring the exercise of professional skill, with the inevitable result of making business for lawyers, trouble for courts, and burdensome outlays for the parties.

On the 11th of May, 1921, six months after depositing the writings with the bank, the plaintiff, through his attorney, in a letter bristling with criminal charges and closely verging on extortion, demanded a return of the money, which, being refused, this litigation resulted.

[2-4] The errors relied upon for a reversal relate entirely to the admission of certain testimony over the objection of the defendant. The court permitted the plaintiff to testify over the objection of defendant that he had received nothing of value from the defendant for the \$1,000. On cross-examination, under the same conditions, the defendant was compelled to answer that the plaintiff had received nothing. If these questions were objectionable no harm was done, as the answers simply confirmed what was manifest and apparent on the face of the entire record. The court permitted the plaintiff to testify that it was agreed between the parties that at the time the \$1,000 check was deposited, he, the defendant, would immediately place said check with the escrow papers in the bank. It is the defendant's contention that this is an attempt to vary the terms of a written instrument by parol. An examination of the writings fails to disclose just what disposition the parties intended with regard to this payment, and we are satisfied that the circumstances and statements surrounding the transaction were not erroneously admitted. Furthermore under all the circumstances developed in the case, it seems to us that the question as to where the custody of this fund should be or remain was entirely immaterial, the real issue being as to whether there ever was a contract and as to whether there was any consideration running to the plaintiff for the payment of this money. As to both of these issues, the holding of the trial court was adverse to appellant, and this conclusion is in full accord with our views in the matter.

The judgment is affirmed.

We concur: CRAIG, Presiding Justice pro tem.; THOMPSON, J.

83 Cal. App. 648

KOEHLER v. BOARD OF TRUSTEES OF CITY OF CORONADO et al. (Civ. 5504.)

District Court of Appeal, Second District,
Division 2, California. June 7, 1927.

1. Pleading ⚡8(1)—Conclusions of law are disregarded.

Conclusions of law in pleading are disregarded.

2. Appeal and error ⚡761—Special demurrer to petition for mandamus for uncertainties, ambiguities, and unintelligibilities need not be considered, in absence of supporting argument.

Court need not pass on special demurrer attacking petition for writ of mandate for alleged uncertainties, ambiguities, and unintelligibilities, where no argument is presented to support specification, and but one authority, which goes to merits of general demurrer.

3. Municipal corporations ⚡159(1)—Clerk's certificate under recall election laws is not final on fraud in verification, forgery, nor where clerk failed to perform duty (St. 1911, Ex. Sess. p. 128).

Certificate of city clerk under laws relating to recall elections is final as to matters properly comprehended by correct performance of duty, but not final if there has been failure to perform duty, and not final on question of fraud by verification deputy, nor as to forgery, in view of St. 1911, Ex. Sess. p. 128.

4. Municipal corporations ⚡159(1)—Certificate of clerk, comparing names on recall petition with printed indices, instead of original affidavits of registration, held insufficient (Pol. Code, §§ 1083a, 1096, 1115).

In proceeding for recall election, certificate of city clerk, who compared names on petition with printed indices provided for by Pol. Code, § 1115, furnished by county clerk, rather than original affidavits of registration, held ineffective to warrant mandamus to compel calling of election, in view of St. 1913, pp. 1379-1388, and Pol. Code, §§ 1083a, 1096.

Application by H. W. Koehler for a writ of mandate, prayed to be directed to the Board of Trustees of the City of Coronado and others, commanding them to call a special election. Writ denied.

Edward J. Kelly, of San Diego, for petitioner.

J. C. Hizar, of San Diego, for respondents Humphrey J. Stewart, George H. Holmes, and Fellows Jones.

THOMPSON, J. [1, 2] This original proceeding by a qualified elector of the city of Coronado is brought to secure a writ of mandate directed to the trustees of that city, compelling them to call a special election for the purpose of determining whether the following trustees: Humphrey J. Stewart, George Holmes, Fellows Jones, J. E. Alcarez, and Margarethe MacMullen—should be re-

called and their successors elected. Since the filing of the recall petition making these demands, however, J. E. Alcarez has resigned as trustee and one Frank L. Wilson has been appointed in his stead, and George Holmes has died and Captain Wm. M. Crose has been elected in his stead, also the respondent Margarethe MacMullen failed to join with her cotrustees in either the answer, the demurrer, or the motion to strike, filed in response to the petition and the alternative writ. So far as the motion to strike is concerned, it relates to various conclusions of law, and is submitted by respondents with the statement that a reading of the complaint is sufficient to show that they have no place in the complaint. When no more cogent reason is assigned for their detrimental effect, it is enough in a proceeding of this character to say that conclusions of law in a pleading are disregarded. Nor are we called upon to pass upon the special demurrer which attacks the petition for alleged uncertainties, ambiguities, and unintelligibilities. No argument is presented to support the specification, and but one authority, which goes to the merits of the general demurrer.

The answer to the petition having raised issues of fact, a referee was appointed to try the issues and make his findings, from which, together with the pleadings, it appears that on October 18, 1926, a recall petition was first filed in this present situation, but was apparently abandoned. A second petition, the one here involved, was circulated, and filed on October 21, 1926. The city clerk compared the names on the petition with the printed indices furnished by the county clerk and not with the original affidavits of registration and attached to the petition his certificate as follows:

"I, W. Tilden Clark, city clerk of the city of Coronado, state of California, do hereby certify: That I am the regularly elected, duly qualified, and acting city clerk of the said city of Coronado, state of California. That on the 21st day of October, A. D. 1926, there was filed in my office a petition demanding the recall of and election of successors to the following named members of the board of trustees of the city of Coronado, to wit: Humphrey J. Stewart, George Holmes, Fellows Jones, J. E. Alcarez, and Margarethe F. MacMullen. That said petition contains the names of more than 25 per cent. of the entire vote cast at the last preceding municipal elections at which such officers were respectively voted for. That, in ascertaining such percentage, I have counted only the names of duly qualified electors of said city. In witness whereof I have hereunto set my hand and affixed the seal of my office the day and year in this certificate first above written, to wit, the 21st day of October, A. D. 1926. [Seal.] W. Tilden Clark, City Clerk of the City of Coronado, State of California."

[3] The first consideration relates to the matter of the certificate and whether it is

conclusive of the matters therein recited. The petitioner contends that it is final and conclusive. The respondents assert that it may be attacked on the grounds of fraud—which fraud may consist of failure on the part of the clerk to perform his legal duty or of the acts of the verification deputy in certifying that he saw each signature appended when in fact three or four signatures were written out of his presence, or of the forging of some of the names to the petition or of making additions to some of the signatures. It has been held that the duty performed by the city clerk, under the general laws relating to recall elections (Stats. [Ex. Sess.] 1911, p. 128), is not judicial but ministerial. *Ratto v. Board of Supervisors* (Cal. App.) 243 P. 466; *Wright v. Enggram*, 186 Cal. 659, 201 P. 788. Such ruling is not necessarily determinative of the entire question. It is stated in *Ratto v. Board of Supervisors*, supra, that the certificate of the clerk is final, although the duty performed is not judicial, and yet it will be observed that in that opinion the court referred questions to the superior court for findings, the purpose of which could only be to determine the correctness of the clerk's certificate. The trustees are vested with no discretion to review the action of the clerk; their duty being to call the election upon submission to them of the petition in due form with the clerk's certificate. *Ratto v. Board of Supervisors*, supra; *Laam v. McLaren*, 28 Cal. App. 632-639, 153 P. 985. In the sense, then, that the certificate conclusively establishes those things which it is the duty of the clerk to do, the certificate is final and not subject to revision by the trustees. This does not mean, however, that the certificate is final as to those things which it is not the duty of the clerk to do, nor is it final if the clerk has failed to perform his duty. It has been held in a mandamus proceeding that the duty of the trustees does not compel them to call an election where the petition is legally insufficient (*Sidler v. City Council of Bakersfield*, 43 Cal. App. 352, 185 P. 194), and in *Watts v. Superior Court*, 36 Cal. App. 692, 173 P. 183, it is said:

"As to all matters comprehended within the proper scope of the examination thus committed to the clerk, his decision thereon is final."

And, speaking of forgery of signatures and unauthorized additions thereto, the court says:

"They are not matters which could become apparent to the clerk in the course of his inspection of the petition or his examination of the great register, and would not be included in the matters passed upon by him in the determination made by him concerning the sufficiency of the petition."

And, as a further indication that the failure of the clerk to perform his duties or the

misconduct of the clerk might be the proper subject of inquiry, the court says:

"The superior court has not before it in the injunction case any charge of fraud or willful misconduct upon the part of the city clerk of the city of Watts."

We are of the opinion that the certificate of the clerk is final as to all matters properly comprehended by a correct performance of his duties, but that it is not final if there has been a failure on his part to perform his duty nor is it a final determination upon the question of fraud committed by the verification deputies in certifying that signatures were appended in their presence when, in fact, they were not. Nor as to the forgery of names which might not be apparent by an inspection of the records of registration, nor as to additions made to signatures of a descriptive nature which would not be evident by a comparison with the records of registration. The referee has found that the name of Mrs. B. H. Lyons was not signed in the presence of the verification deputy, Jack R. Alcarez, and from what has been said that signature should not be counted with respect to the finding of the referee that there were three names which were duplicated, and at least three names which should be deducted by reason of nonregistration. It is sufficient to say that the city clerk, upon making a proper examination of the records of registration, will undoubtedly not count those who have not registered and those which have been duplicated.

This conclusion brings us to the next subject to inquiry, to wit, whether or not the city clerk has failed to perform the legal duty incumbent upon him. The section of the "act to provide for the recall of elective officers of incorporated cities and towns," supra, defining the duty of the clerk, is as follows:

"Within ten days from the date of filing such petition, the clerk shall examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters, and he shall attach to said petition his certificate showing the result of said examination."

It will be noted that the language here used differs from the words employed in the Direct Primary Law of 1913 (Laws 1913, c. 690, pp. 1379-1388), in this, that the Direct Primary Law requires the sufficiency of nominating petitions to be determined by the county clerk or registrar of voters who "shall examine all nomination papers herein provided for which purport to have been signed by electors of his county or city and county, and shall disregard and mark 'not sufficient' any name appearing on such paper or papers which does not appear in the same handwriting on an *affidavit of registration* (italics ours) in his office" made on or before the date

on which such name was signed. It differs also in the same regard from the provisions of section 1083a of the Political Code, a portion of which reads as follows:

"Wherever, by the Constitution or laws of this state, the county clerk or registrar of voters is required to determine from the records of registration what number of qualified electors have signed such petition or paper, he shall determine that fact with respect to the purported signature of any person from the affidavit of registration, and records relating thereto, current and in effect at the date of such signing of such petition or paper."

[4] It will be further noted that one of the requisites to constitute a person a qualified elector by the provisions of section 1083 of the Political Code is that he shall have conformed to the law governing the registration of voters. And by the provisions of section 1096 of the Political Code the registrant is required to give certain facts of identification, such, for example, as his "place of residence * * * with sufficient particularity to identify the same," his occupation, his height, and his nativity. The printed indices are those indices provided for by section 1115 of the Political Code, in which it is made the duty of the county clerk to prepare an index of each registration book, which index is to contain the names, occupations, and addresses of the registered voters. It is manifest that by the provisions of the law applicable to the nomination of elective officials and the recall of state and county officers, that the county clerk or the registrar should by comparison investigate, identify, and verify the persons and signatures of the purported signers, and that the requirement that signers of petitions should give the information concerning their occupations and addresses was intended as an aid to him in the verification and identification of their persons and signatures. It is said in *Conn v. City Council*, 17 Cal. App. 714, 121 P. 718, with respect to a charter provision of the city of Richmond, as follows:

"The charter provision, requiring the signer to give his residence by street and number manifestly was intended solely for the purpose of facilitating the work of the clerk in investigating, identifying, and verifying the persons and signatures of the purported signers of the recall petitions. * * *"

If this be the manifest intention of the general law, it is impossible to conceive that the Legislature did not intend by their use of the words "records of registration" to impose upon the city clerk under the act here in question the same responsibility and to require him to investigate, identify, and verify the persons and signatures of the signers of the petition. It would be impossible for him to determine a palpable and flagrant forgery from his examination of the printed

indices. It would be impossible for him to verify the signature of a purported signer from the printed index. It will be observed that the law requires him to ascertain whether the petition is signed by the requisite number of qualified voters. If we were to hold that his duty is performed by an examination of the printed indices, the electors of the city would have no assurance of the authenticity of the signatures, and it would be possible for one person to secure a copy of the printed index and write all of the names with their occupations and addresses. It is quite clear, therefore, that the reference to records of registration refers to the affidavits of registration and not to the printed index. From what has been said, the result must be that the clerk has failed to comply with the law, and his certificate is ineffective for any purpose, and the petition for the writ of mandate in this proceeding must be denied.

Exceptions were taken by the respondents to the finding of the referee that the city of Coronado had not used all of the available funds for calling special elections during the year 1926, and to the ruling of the referee which the respondents say prevented them from proving misrepresentation. The view which we entertain renders it unnecessary for us to discuss the matter further, and we cannot see how they might arise again in this proceeding.

Writ denied.

We concur: WORKS, P. J.; JOHNSON, Justice pro tem.

83 Cal. App. 696

BOND INV. CO. v. BLAKELEY. (Civ. 3282.)

District Court of Appeal, Third District, California. June 9, 1927.

1. Fixtures ☞35(2)—Burden is on one seeking removal of property, affixed to another's land, to show permission to remove it (Civ. Code, § 1013).

Under Civ. Code, § 1013, burden is on one seeking removal of property, actually affixed to another's land, to show that it was placed there with permission to remove it, as presumption otherwise would be that it belongs to owner of realty.

2. Fixtures ☞1—Whether buildings were annexed to or imbedded in soil, adapted to intended use of land, and intended to become permanent fixtures, must be considered in determining whether they are permanent fixtures (Civ. Code, § 660).

In determining whether buildings are permanent fixtures on land, within Civ. Code, § 660, it must be considered whether structures were annexed to or imbedded in, soil, adapted to purpose for which property on which located was

intended to be used, and intended to become permanent fixtures when constructed.

3. Fixtures ⚡—Whether buildings are fixtures depends on particular facts of each case.

Whether buildings are permanent fixtures on land must be determined on particular facts of each case.

4. Fixtures ⚡—Manner of construction and character and value of building, its adaptability to uses of land and expressed intent as to permanency, should be considered in determining whether it is "fixture."

In determining whether building is permanent "fixture" on land, entire manner of its construction, its character, value, and adaptability to purposes for which land is used, and expressed intent as to whether or not it was to become permanent, should be considered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fixture.]

5. Fixtures ⚡—Declarations of landowner and constructor of improvements do not necessarily determine whether buildings are fixtures.

Bare declarations of owner of land and constructor of improvements thereon do not necessarily control in determining whether buildings are fixtures, but all facts, circumstances, conditions, and declarations should be considered.

6. Fixtures ⚡—Buildings are not temporary, rather than fixtures, because constructed on mudsills.

Buildings are not merely temporary, because constructed on mudsills; foundations not being conclusive in determining whether they are fixtures or not.

7. Fixtures ⚡—That mudsills or timbers supporting house rest on surface of soil, without disturbing earth, is not conclusive that it is not fixture.

That mudsills or timbers, on which house is constructed, rest on surface of soil without disturbing earth, is not conclusive in determining whether structure is fixture or not.

8. Fixtures ⚡—Whether landowner consented to removal of buildings must be determined from particular facts and circumstances.

Whether consent to removal of buildings was granted by owner of land must be determined from all facts and circumstances of particular case.

9. Appeal and error ⚡—Judgment on findings, supported by substantial evidence, should be affirmed.

Judgment on findings, supported by substantial evidence in record, should be affirmed.

10. Fixtures ⚡—Evidence held to support findings that buildings were affixed to soil, not temporary structures, erected with landowner's consent to remove them at will.

In action to enjoin removal of buildings from land, evidence held sufficient to support trial court's findings that buildings were affixed to, and integral part of, soil, not temporary structures, erected with landowner's consent to remove them at will.

11. Fixtures ⚡—House built on father's land with his permission, by son for latter's use, with expectation of becoming owner of land, becomes irremovable part of realty.

House erected, with landowner's permission, by his son, for latter's own use, with expectation of eventually becoming owner of land, becomes part of realty, and cannot be removed.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by the Bond Investment Company against Floyd F. Blakeley. Judgment for plaintiff, and defendant appeals. Affirmed.

Clark Clement, of Lemoore, for appellant.
John G. Covert, of Hanford, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a decree finding that plaintiff is the owner and entitled to the possession of 650 acres of land in Kings county, together with a certain dwelling house and machine shed, and restraining the removal of said buildings.

Appellant claims that, as a mere licensee, he constructed these buildings in question, with the express consent of the owner of the land for him to remove them at will, and asserts that there is no evidence to support the findings of the trial court to the effect that these buildings were "an integral part of the realty" or permanently resting thereon.

Frank Blakeley, the father of appellant, was the owner of the land in question at and prior to April 5, 1921, upon which date he and his wife, Clara M. Blakeley, executed a deed of trust to the Title Guarantee & Trust Company, as trustee, to secure a loan of \$25,000, borrowed from the Mortgage & Guarantee Company, named in said trust deed as the beneficiary, which mortgage deed was duly recorded May 10, 1921. Subsequently, on October 30, 1922, Frank Blakeley and wife deeded this property to their son Floyd and his brother, which deed was also recorded on November 1, 1922. The appellant was engaged in an extensive enterprise of farming in the vicinity of Tulare Lake, but had no interest or part in farming his father's land, which is involved in this action. The evidence of the appellant and his father was to the effect that about June 1, 1921, express consent of the father was given to the son to remove the buildings "whenever the appellant wanted to." Subsequently appellant constructed on said premises a substantial five-room dwelling house of the value of about \$2,000, and also built a large machine shed some 40x80 feet in dimensions, valued at \$1,000. These structures were built on heavy mudsills without disturbing the surface of the ground to any extent. They were constructed as a part of a camp for the accommodation of appellant's family and as a

convenience in which to store his machinery, while he was farming in the vicinity. Subsequent to the construction of these buildings, the trust deed from Blakeley to the Title Guarantee & Trust Company was duly foreclosed and sold by the trustee to the Mortgage & Guarantee Company on August 9, 1924. On August 30, 1924, said purchaser sold and conveyed this land to Charles Scott, Jr., who, in turn, sold and conveyed it to this plaintiff by deed dated September 2, 1924, and recorded September 12, 1924. On January 7, 1925, this appellant served notice that he claimed the buildings in question and intended to remove them pursuant to the consent of the former owner of the land. Thereupon this action was prosecuted, and the trial court found that the buildings were fixtures, and that the defendant had no right, title, or interest in the buildings, and restrained the removal thereof.

Appellant contends that the evidence is insufficient to sustain findings numbered III, IV, and VI, or either of them. So far as it is necessary to quote these findings, they were in the following language:

"III. It is true that there is now situate on said lands hereinafter described, and firmly fixed thereto, imbedded therein, and an integral part thereof, a certain one-story frame, five-room dwelling house, and a frame harvester shed approximately 40 feet wide by 80 feet long, and said buildings were situate upon said land, affixed thereto and an integral part thereof on the said 2d day of September, 1924, when plaintiff became the owner and possessor in fee of the land * * * and said buildings thereon situate and affixed thereto. It is not true that said dwelling house and said shed, or that either of them was erected on said premises as a temporary structure."

Finding No. IV determined that these buildings in question were of great value to plaintiff and necessary for the accommodation of his farm hands and machinery on said premises. Finding No. VI holds that the defendant has no right, title, or interest in said buildings, or either of them, and that he has and had no right or permission to remove them from said land or to molest, or interfere with plaintiff's ownership and right to the use and enjoyment of the same.

[1] Section 1013 of the Civil Code provides that:

"When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed * * * belongs to the owner of the land, unless he chooses to require the former to remove it."

The only exception to this rule is found in section 1019, Civil Code, and applies only to property affixed by a tenant for trade purposes, etc. Appellant, in the instant case, was not a tenant of the owner of the land in question, and this exception does not apply. It would seem to follow from the foregoing statute, that, when property is actually af-

fixed to the land of another, the burden is upon him who seeks to remove it, to show that it was placed there with permission to remove it, for, in the absence of proof of such permission, the presumption would be that it belongs to the owner of the realty.

[2] The term "fixtures" is defined in section 660 of the Civil Code, as follows:

"A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or *permanently resting upon it*, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

Even with the aid of the foregoing definition of statutory fixtures, it is still necessary to determine whether there is substantial evidence in the record of this case to warrant the finding to the effect that the buildings in question were "permanently resting" on the land in question, or were "permanently attached" to what was in fact a fixture on the land, for this is the effect of the finding that "said buildings were situate upon said land, affixed thereto, and an integral part thereof."

In determining whether these buildings were permanent fixtures on said land, three things are to be considered: (1) Were the structures annexed to or imbedded in the soil? (2) Are the structures adapted to the purpose for which the property upon which they are located is intended to be used? (3) Was it the intention that these buildings should become permanent fixtures, when they were constructed? 11 R. C. L. 1059; Breyfogle v. Tighe, 58 Cal. App. 305, 208 P. 1008; City of Vallejo v. Burrill, 64 Cal. App. 407, 221 P. 676.

In answer to the first question, it must be conceded that the buildings in question were not annexed to or imbedded in the soil. There can scarcely be any dispute as to the second question, for both buildings were typical, appropriate buildings for just such a farm as the one upon which they were constructed; one was a machine shed and the other was a dwelling house, the only dwelling house on the premises. The third question presents the real issue in this case. Were these buildings intended to become permanent fixtures on the land where they were constructed?

[3-5] It becomes quite apparent that there can be no definition of the term "fixtures" which will embrace all conditions under all circumstances. Each case must be determined on its own particular facts. Gosliner v. Briones, 187 Cal. 559, 204 P. 19. For instance, it would be illogical to conclude that, just because a structure was built on a level prairie, and placed upon mudsills without the necessity of disturbing the surface of the soil, therefore it could not become a "fix-

ture" or a permanent building. The entire manner of construction, the character of the building, the value, its adaptability to the purposes for which the land is used, and the expressed intent as to whether it was or was not to become permanent, if any were made, should all be taken into consideration. It therefore naturally follows that the bare declarations of the owner of the land and the constructor of the improvements will not necessarily control. It is apparent that the facts and circumstances surrounding a particular case may completely overwhelm and refute mere declarations of interested parties. All the facts, circumstances, conditions, and declarations should be considered in determining the question of fixtures. With respect to the element of intention, it is said in 11 Ruling Case Law, at page 1062:

"The test of intention is to be given a broad and comprehensive signification. It does not merely imply the secret action of the mind of the owner of the property, nor need it be expressed in words, but is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made; which obviously suggests that the other tests are really part of this comprehensive test of intention, and that they derive their chief value as conspicuous evidence of such intention."

See, also, *Breyfogle v. Tighe*, 58 Cal. App. 305, 208 P. 1008.

In the case of *Miller v. Waddingham*, 91 Cal. 377, 27 P. 750, 13 L. R. A. 680, upon which the appellant relies, in sustaining the findings of the trial court to the effect that certain dwelling houses built upon town lots were not fixtures, the Supreme Court merely said:

"The finding in the present case that 'said houses were built on redwood mudsills of two-inch by six-inch timber, said mudsills resting upon the soil,' and that 'the soil was not disturbed in building or removing said houses,' is consistent with the determination of the court below that the buildings in question were not fixtures; and, for the purpose of upholding its decision, it may be assumed that such determination was made by it. But, without determining whether or not the buildings were fixtures, we are of the opinion that upon other principles applicable to the case the plaintiff is not entitled to the relief sought."

The foregoing language cannot be construed to mean that our Supreme Court determined as a matter of law that any building which was constructed on mudsills, without disturbing the soil upon which it was built, was therefore not a fixture. All that the court there said was that these circumstances were consistent with the trial court's finding that under all the facts of that particular case the buildings in question were not fixtures. All of the facts of that case do not appear, but it does appear that the own-

er of certain lots made an agreement with a contractor that he would pay a specified sum for the houses, and that the houses should belong to the builder until they were paid for. And it further appeared that the owner failed to pay for them as he had agreed to do. Yet the Supreme Court specifically refrains from deciding that those houses were not fixtures. Of course the fact that the houses were constructed on mudsills and that the soil was not disturbed in the process of building, are circumstances to be considered, together with all the other facts, declarations, and conditions surrounding the affair. It cannot be said that, if the trial court, in the *Miller Case* above cited, had found that these same buildings were in fact fixtures and could not be removed, the Supreme Court would have reversed the case on the sole ground that a structure on mudsills built without disturbing the surface of the soil, was necessarily temporary in its nature and not a fixture. The foregoing comments are equally appropriate to the case of *Gosliner v. Briones*, 187 Cal. 559, 204 P. 19, upon which appellant also relies. The finding of the trial court to the effect that the buildings in question were not fixtures was based solely upon a finding that the owner of the land had consented to their removal.

[6, 7] To hold that, because buildings were constructed on mudsills, therefore they are merely temporary, would lead to an absurdity, in view of the fact that in the rural districts of California a large proportion of the more modest dwelling houses, as well as barns, sheds, garages, and outbuildings of various classes, are in fact built upon mudsills. The very evidence in the instant case shows that many other similar buildings in that neighborhood are constructed on mudsills. The mere foundation upon which a house is constructed is not conclusive in determining whether the structure is or is not a fixture; nor is it conclusive merely because the mudsills or timbers upon which a house is constructed rest upon the surface of the soil, without having disturbed the earth in erecting the structure. In the case of *Las Animas Land Co. v. Fatjo*, 9 Cal. App. 320, 99 P. 393, 394, the late Mr. Justice Burnett says:

"The house and barn were buildings, and * * * we must assume, what is usual and a matter of common knowledge, that they were permanently resting upon the soil."

[8] Whether consent to remove the buildings in question was in fact granted by the owner becomes a question which must be determined from all the facts and circumstances of the particular case. In the action at bar the trial court has found, in effect, that no such consent was given, for it specifically determines that the buildings in question are affixed to and an integral part of the soil, that they were not erected as temporary

structures, and that the defendant has no right, title, or interest in the buildings.

[9] If there is substantial evidence in the record to support the findings, then the judgment should be affirmed. 2 Cal. Jur. 921, § 543.

[10, 11] There seems to be a number of substantial circumstances, together with reasonable inferences which the trial court had a right to consider, and which we think are ample to support the judgment. For instance, the relationship of the interested parties was that of father and son. One might legitimately infer that the son was willing to make an investment for his own temporary benefit, with the intent of ultimately contributing the improvements to the betterment of his father's farm. Or one might infer that the son calculated that he would some day become the owner of the ranch and that his temporary investment would then inure to his own profit. Indeed this inference is supported in a measure by the fact that, in October, 1922, a year and a half after the buildings were constructed, the father did, in fact, convey the land to appellant and his brother, and did record the deed. To be sure, both the father and son testify that the appellant had no knowledge of this conveyance, and still it is a circumstance to be considered. Where a son, by permission, builds a house for his own use, upon his father's land, with the expectation of eventually becoming the owner of the estate, the improvements become a part of the realty, and cannot be removed. *Leland v. Gassett*, 17 Vt. 403. The dwelling house in question was a substantial five-room cottage, plastered and shingled, having a brick chimney, and finished in a fairly good and permanent fashion, at a cost of \$2,000. In other words, it had the appearance of being a permanent dwelling structure. The machine shed was built on the side of, and actually attached to a warehouse belonging to the owner of the ranch, which warehouse was a fixture on the premises. The shed was attached to the warehouse by nailing upright timbers to the wall for the adjusting of which holes were cut in the overhanging eaves of the warehouse roof. It was explained that these timbers which attached the shed in question to the warehouse were only toenailed to the outer wall, and that the nails which penetrated the wall of the warehouse were not even clinched on the inside. While this might indicate careless workmanship, it is still a circumstance to be considered. This shed was covered with corrugated iron, and the building was also placed on mudsills, one of which was imbedded four or six inches in the earth. The shed cost \$1,000 or \$1,200. Mr. Silva, the carpenter who built the shed, testified, in response to questions, as follows:

"Q. Did you * * * nail any part of this harvester shed to the warehouse? * * * A.

Just stick a few nails this way to hold it up. Q. And is it still nailed to the wall of the warehouse? A. I believe so. Q. Now would it be possible to move this harvester shed you built without tearing it down, taking it to pieces? * * * A. Well, we have to take him all down—can't move it that way."

At the same time that the appellant built the dwelling house and shed, he also constructed a tankhouse upon a concrete foundation, and a reservoir, connecting them with the dwelling house by a piping system so as to supply the cottage with water for domestic purposes. Appellant admits that he did not expect to remove this tankhouse or water apparatus, but explained that his father told him that, if he would build it in a substantial manner, he would pay him for it. Yet it was not paid for by the father.

It is true that both the father and the son testified that the buildings in question were constructed with the father's permission to remove them at will. This evidence is not corroborated except in a very indefinite manner by the carpenter, Putnam, who, in response to a question as to what instructions Floyd Blakeley gave him regarding the foundation, said:

"Well when I was making the bill for the lumber, as I remember, he suggested using 6x8's or 8x8's, redwood, so if he wanted to move it—He didn't say he intended to move it, but he said, if he did want to move it, he could hook his tractor * * * on there and move it."

Another circumstance occurred at the trial which was in the nature of impeaching testimony. The appellant had testified positively that his father had consented to his removing the buildings. On cross-examination, in response to a question as to whether, at the previous hearing on motion for a temporary restraining order, he had not said he did not recall what his father had said, it appears that he in fact then testified:

"I asked him if I could put up the harvester shed, and he said, 'Yes;' and I asked him where, and he said over at the end of the workhouse was all right. Q. Was there anything said about whether the buildings were to remain there or all become removable? A. Not that I recall in the conversation with him."

In explanation of this inconsistency in his testimony, the appellant said that his memory had been refreshed since the former hearing.

The appellant admitted that he had never made any claim to either the trustee or the beneficiary under the trust deed to the effect that he was the owner of these buildings. The first claim which he ever made to any one was by means of the notice which he served January 7, 1925, some five months after the property had been actually sold on foreclosure of the trust deed.

It is also a circumstance that in a number of conversations with the holders of the

mortgage deed about the prospective foreclosure, the father never mentioned his alleged consent that his son might remove the buildings. On cross-examination, the following occurred:

"Q. Did you have a conversation with any of the officers of the Mortgage Guarantee Company * * * just before the deed was foreclosed? A. Oh, yes; I had several talks with them. I went down there and tried all kinds of deals. Q. At that time, and before the trust deed was foreclosed, did you have any conversation about the buildings that had been put up by Floyd? A. Well, I was pleading with them for more time to give me a chance to get a real loan, told them that the boys had put up buildings on there on the property, that *I didn't want to lose it if I could help it.*"

In view of the foregoing conclusion that the findings of the trial court are amply supported by the evidence, it becomes unnecessary to pass upon the question raised by respondent, as to whether under a trust deed which specifically mortgages the property described, together with the appurtenances, and "all buildings and improvements thereon, or that may be placed thereon," a trustor, without the consent of the trustee or the beneficiary, may consent to a licensee removing from the mortgaged premises improvements constructed by him, which, except for such permission, would become fixtures.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

83 Cal. App. 529

**LOS ANGELES COUNTRY CLUB v. BOARD
OF PUBLIC SERVICE COM'RS OF
CITY OF LOS ANGELES et al. ★
(Civ. 4555.)**

District Court of Appeal, Second District,
Division 2, California. June 2, 1927.

Hearing Denied by Supreme Court Aug. 1, 1927.

Waters and water courses §203(5)—Country club held entitled to water under rate for combined irrigation and domestic service, notwithstanding provision that "irrigation" referred to commercial production.

Under section of ordinance providing one rate for combined irrigation and domestic water service and another rate for intermittent irrigation and providing that "irrigation" should apply only to production of crops for commercial purposes, country club held entitled to water under rate for combined irrigation and domestic service, rather than under another section providing higher rate for commercial or domestic service, since definition of "irrigation" referred only to rate for intermittent irrigation, especially in view of semicolon preceding it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Irrigation.]

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by the Los Angeles Country Club against the Board of Public Service Commissioners of the City of Los Angeles and another, to determine the water rate properly chargeable by the City of Los Angeles for a combined irrigation and domestic service. Judgment for plaintiff, and defendants appeal. Affirmed.

Jess E. Stephens, City Atty., W. B. Mathews and Trent G. Anderson, all of Los Angeles, for appellants.

Fredericks & Hanna, of Los Angeles, for respondent.

JOHNSON, Justice pro tem. This is an appeal by defendants from a judgment in favor of plaintiff after a hearing upon an agreed statement of facts, and involves the determination of the water rate properly chargeable by the city of Los Angeles for a combined irrigating and domestic service under city Ordinance No. 40342, new series, adopted May 28, 1920. By section 3 of the ordinance a rate is named for combined irrigating and domestic service; and plaintiff insists that it is entitled to the benefit of that rate. Defendants contend, on the other hand, that the rates specified in section 3 for water used in irrigating are available only to those consumers who use the water in the production of agricultural, horticultural, or floricultural crops grown for commercial purposes. So construing the section, defendants imposed on plaintiff the rate specified in section 2 of the ordinance, governing what is called commercial or domestic service, which is a higher rate than that fixed in section 3. In opposition to the defendants, plaintiff takes the position, first, that the benefit of the rate for a combined irrigating and domestic service is not dependent on the production of crops for commercial purposes; and, secondly, that, if defendants' construction of section 3 should prevail, an unlawful discrimination would be created between consumers growing crops for commercial purposes and those growing similar crops for noncommercial purposes. Primarily, the controversy is concerned with the proper construction of section 3 of the ordinance.

The system by which water is brought to Los Angeles and supplied to its inhabitants is owned by the city and administered by its board of public service commissioners; the rates being fixed by the commissioners by resolution and approved by ordinance of the city council. The city charter provides that such rates shall be so fixed at least every two years, and that, with certain exceptions not material to this controversy, they "shall be of uniform operation as near as may be, and shall be fair and reasonable, taking into con-

sideration, among other things, the nature of the use, the quantity supplied, and the value of the service."

The plaintiff is a private corporation devoted to social and recreational purposes; and in furtherance of such purposes it acquired and owns a tract of land comprising 400 acres within the city limits. Upon this property plaintiff maintains a clubhouse, with appurtenant buildings, for the use of its members; and upward of 200 acres of the tract are laid out as a golf course and planted with shrubs and lawns, so disposed as to furnish the customary grass greens and fairways.

By the city ordinance adopted May 28, 1920, rates were prescribed varying according to the kind and class of service. A schedule of specific monthly rates for unmeasured service to dwellings, hotels, shops, industrial consumers, and the like is established by section 1. Where service is provided by meters or weirs, the rates are those prescribed by sections 2 and 3. Under section 2, service known as commercial or domestic service, and being meter service other than that provided in section 3, is made subject to a graduated scale of charges, ranging, according to the quantity supplied, from 10 cents per hundred cubic feet for the first 10,000 cubic feet or less, to 5 cents a hundred cubic feet for all in excess of 100,000 cubic feet used in any one month. In addition, there are fixed monthly charges for meters according to their size.

A separate classification is made in section 3, which is the section requiring construction here. That section reads as follows:

"Sec. 3. That the rates to be charged for water for combined irrigating and domestic service, through the same meter, under constant pressure, and at the will of the consumer, upon tracts or parcels of land under a single occupancy, aggregating not less than one acre, shall be 2 cents per 100 cubic feet, in addition thereto, a flat rental for meter, depending upon the size of the meter, effective continuously throughout the year, regardless of the irrigating season, or the amount of water consumed, as follows: 1" meters, \$1.00 per month; 1½" meters, \$2.00 per month; 2" meters, \$3.00 per month.

"For water consumed intermittently for irrigation, for limited periods and under the control of the local water overseer, the charge shall be 1.4 cents per 100 cubic feet, provided that no delivery shall be made, for any period, for a less amount than \$2.00; that the water to be served for such intermittent uses shall be at the convenience of the department with reference to the demand of other consumers, and arrangements for such service must be made in advance; provided that the rates prescribed in this section shall only apply to water furnished by gravity; provided, further, that irrigation shall apply only to the production of agricultural, horticultural, or floricultural crops grown for commercial purposes."

Section 3 thus provides rates for two distinct classes of service: One a rate of 2 cents

per 100 cubic feet for combined irrigating and domestic service at will; the other a rate of 1.4 cents per 100 cubic feet for water consumed intermittently for irrigation.

It was stipulated between the parties, and the court found, that the water taken by plaintiff was for a combined irrigating and domestic service, and was furnished to plaintiff by gravity through the same meter, under constant pressure, at the will of plaintiff for use on plaintiff's land constituting a tract under single occupancy of more than one acre. No crops have been grown, however, on plaintiff's lands for commercial purposes.

From the time of the adoption of the ordinance to the end of the year 1921 the charge made to plaintiff for such combined service was at the rate of 2 cents per 100 cubic feet, with the addition of the monthly meter charge as prescribed by the first paragraph of section 3. On December 2, 1921, however, the following resolution was adopted by the board of public service commissioners:

"Resolved, that the regular schedule of rates for water for commercial or domestic use shall be applied for water furnished to country clubs on all bills for metered service rendered and based on regular meter readings taken on and after January 1, 1922."

Pursuant to this resolution the rate applied to the combined service to plaintiff after January 1, 1922, was the commercial or domestic rate fixed by section 2 of the ordinance. The present action is occasioned by the charge so made from May 24 to June 22, 1922, aggregating the sum of \$1,122.10. The charge for the quantity of water supplied, if made under the first paragraph of section 3 as for combined irrigating and domestic service, would amount to only \$414.04, exclusive of the fixed meter charge. To prevent the water from being shut off, plaintiff paid under protest the sum of \$1,122.10, and then brought this action to recover the difference between that amount and the amount chargeable at the rate of 2 cents per 100 cubic feet for the combined irrigating and domestic service. The court held that the service in question was not governed by section 2, but was properly chargeable at the rate of 2 cents per 100 cubic feet designated in section 3; and gave judgment in favor of plaintiff for \$699.06, with interest and costs.

It will be observed that the change in the method of charging plaintiff was not due to any change in the ordinance itself, but was brought about by a resolution of the board of public service commissioners, whereby they undertook to give to section 3 of the ordinance a construction different from that theretofore followed in practice. The construction thus contended for by the defendants depends upon the application to be given to the concluding proviso of section 3, which reads:

"Provided, further, that irrigation shall apply only to the production of agricultural, horticultural, or floricultural crops grown for commercial purposes."

The commissioners insist that this qualification applies not only to water consumed intermittently for irrigation under the restrictions attached to such service, but also to water for combined irrigating and domestic service at the will of the consumer. The plaintiff urges, on the other hand, that the proviso relates exclusively to restricted intermittent irrigation. Inquiry is thus directed to the intent to be gathered from the language of the section, read in connection with the ordinance as a whole.

The ordinance deals in its first section with flat rates for dwellings and other establishments; and in subdivision 31 it fixes a monthly sprinkling charge of nine-tenths of a cent per front foot for lawns and gardens, where the depth of the lot does not exceed 150 feet, and a proportionate charge for any additional area. Such charge, together with the flat monthly dwelling rate, represents the expense of combined irrigating and domestic service to occupants of residence sites of moderate size. For larger consumers a measured service is provided under section 2, which, read with the other sections, would seem to dictate the rate for irrigation of somewhat extensive grounds, yet of less than an acre. And it seems logically to follow that householders whose grounds embrace an acre or more would be entitled, under section 3, to the combined irrigating and domestic service rate, even though they are not engaged in the production of vegetables, fruit, or flowers for market. It is significant that under the first paragraph of section 3, relating to the combined irrigating and domestic service, the combined service must be through the same meter, and is to be furnished under constant pressure and used at the will of the consumer. When a combined service is furnished through the same meter, there is sound reason for a special rate. *Hohenthal v. Consumers' Electric L. & P. Co.* (Mo. P. S. Com.) P. U. R. 1916D, 673. Again, the meter charge named in the first paragraph is a regular monthly charge, which must be paid throughout the year, regardless of seasons or the quantity of water consumed. The water being taken through the same meter, there is no segregation of the quantity used for irrigating from that use domestically, and the water may be drawn when, and used where, the consumer will. Not so, however, with water consumed solely for irrigation under the second paragraph of section 3. No constant supply is then assured. The offer is merely for limited periods, and for intermittent use under the control of the water overseer. Furthermore, such intermittent use must be at the convenience of the de-

partment, with reference to the demands of other consumers, and special arrangements for the service must be made with the department in advance. This paragraph is evidently conceived with the idea of supplying consumers who have no need of a liberal daily service, usable at will, but who are engaged in enterprises requiring for their fruition considerable quantities of water from time to time, or during the dry season. The section taken as a whole fulfills a double purpose, and offers distinct kinds of service to two separate classes of irrigators—in the first paragraph a steady service at will to those who are able, by surrounding their households with extensive gardens or lawns, to minister to the amenities of urban life; and in the second paragraph an intermittent and restricted service to those who require irrigation only for utilitarian purposes. The word "irrigating," as used in the initial paragraph, is not separable from the word "domestic." The service is a combined service, without discrimination as to the quantity employed for household use and the quantity devoted to sprinkling lawns or flower beds. In its context the phrase "combined irrigating and domestic service" is the direct antithesis of commercial or industrial service. It is with this distinction in mind that the ultimate proviso is to be studied.

The second paragraph of the section contains four provisos. The first two clearly relate to water for intermittent irrigation alone. The third, declaring that "the rates prescribed in this section shall only apply to water furnished by gravity," extends, by its express terms, to both classes of service contemplated by the section. If the concluding proviso were meant to relate likewise to both classes of service, it might more appropriately have been separated merely by a comma from the preceding proviso just quoted. Instead, it is separated by a semicolon, suggestive of an adversative thought, or a change of mental posture; and instead of referring in a definite way to irrigating service in combination with domestic service, it deals solely with utilitarian or commercial irrigation, the language being:

"Provided, further, that irrigation shall apply only to the production of agricultural, horticultural, or floricultural crops grown for commercial purposes."

Since the rate for the combined irrigating and domestic service, available at will, is conditioned on supply through the same meter, and without discrimination between the portions used for one purpose rather than the other, the only reasonable inference is that, if the concluding proviso had been intended to make the rate of 2 cents per 100 cubic feet applicable only when the domestic consumer is raising fruits, flowers, or vegetables for market, language would have been used

which would have left no doubt of such intent. But far from employing any such language, reference is made simply to "irrigation," the term used at the beginning of the second paragraph; and that term, as there used, is quite alien to the term "combined irrigating and domestic service," as used in the first paragraph.

We are of the opinion, therefore, that the commissioners were in error in annexing the final proviso of section 3 to the first paragraph of the section, and making the rate fixed in that paragraph available only to a user of combined irrigating and domestic service who is engaged in the production of agricultural, horticultural, or floricultural crops for commercial purposes. Accordingly, the plaintiff was entitled to a continuance of its combined service at the rate fixed in section 3; and the charge of the commercial or domestic rate under section 2 was without justification.

As has been indicated, there is a further contention on the part of plaintiff that, if the application given to section 3 by the defendants were to prevail, and the rates there prescribed were to be available only to consumers producing crops for commercial purposes, an unlawful discrimination would be made between consumers growing crops for market, and receiving a combined irrigating and domestic service at the rate fixed in the first paragraph of section 3, and other consumers having the same kind of combined service, and using water for agricultural, horticultural, or floricultural purposes, but not sending their produce to market; and plaintiff argues that in such event it would be entitled to the lower rate for its combined service. The conclusion to which we have come regarding the proper construction of the section makes it unnecessary, however, to pursue the argument on the point of unlawful discrimination.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

83 Cal. App. 488

DAVIS v. CALIFORNIA STATE BOARD OF OPTOMETRY et al. (Civ. 5596.) ★

District Court of Appeal, Second District, Division 1, California. June 1, 1927.

Hearing Denied by Supreme Court July 28, 1927.

1. Physicians and surgeons ⇨1(2)—Certificate of registration as optometrist might be suspended, where practitioner put "Dr." before name and "optometrist" after it (Optometry Law, § 11, subd. 7 [St. 1923, p. 387, § 8]).

California state board of optometry was authorized to suspend the certificate of registration of an optometrist who used prefix "Dr."

before his name and the word "optometrist" immediately following his name, regardless of whether such usage tended to defraud or mislead the general public, under Optometry Law, § 11, subd. 7 (St. 1923, p. 387, § 8).

2. Physicians and surgeons ⇨2—Optometry law must be enforced according to its meaning and intent (Optometry Law [St. 1913, p. 1097, as amended by St. 1923, p. 380, and St. 1925, p. 573]).

Courts must enforce Optometry Law (St. 1913, p. 1097, as amended by St. 1923, p. 380, and St. 1925, p. 573), according to its meaning and intent, as properly construed by the judiciary.

3. Physicians and surgeons ⇨2—State board of optometry can adopt no rules and regulations inconsistent with express provisions of statute (Optometry Law, § 4, subd. 10 [St. 1923, p. 380, § 1]).

No power to legislate is vested in California state board of optometry, and it can exercise any powers it may have to adopt rules and regulations only in a manner not inconsistent with the express provisions of Optometry Law, § 4, subd. 10 (St. 1923, p. 380, § 1).

4. Physicians and surgeons ⇨1(2)—Whether rule of state board of optometry discriminated against optometrist whose certificate was suspended for using title "Dr." held immaterial (Optometry Law, § 11, subd. 7 [St. 1923, p. 387, § 8]).

In determining whether suspending certificate of registration of optometrist, because he used title "Dr." as a prefix to his name, was error under Optometry Law, § 11, subd. 7 (St. 1923, p. 387, § 8), providing that use of title "Dr." as a prefix to name shall be cause for suspension of certificate, whether rule of state board of optometry permitting use of title "doctor" or "Dr." as a prefix under certain restrictions was discriminatory held immaterial; board having no power to make rules inconsistent with terms of statute.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action for certiorari to review an order of the California State Board of Optometry suspending a certificate of registration as an optometrist, brought by H. Davis against California State Board of Optometry and others. Demurrer to the writ was sustained, judgment entered for defendants, and plaintiff appeals. Affirmed.

Schweitzer & Hutton, of Los Angeles, for appellant.

W. Maxwell Burke and Burke & Catlin, all of Los Angeles, for respondents.

HOUSER, J. This is an appeal from a judgment following an order by which a demurrer to a writ of review was sustained.

It appears that appellant is an optometrist, duly registered and licensed to practice his profession in the state of California; that,

following an accusation preferred against appellant, and after hearing thereon before the respondent California state board of optometry, the appellant herein was convicted by said board of the offense of unprofessional conduct in using the title of "Dr." (doctor) as a prefix to his name; that thereupon said board pronounced judgment against appellant that his certificate of registration as an optometrist be suspended for the period of one year from and after the date of said judgment; that thereafter, by a writ of review issued by the superior court in and for the county of Los Angeles, appellant sought to have the legality of said judgment determined by said superior court. Respondent demurred generally to the writ, which demurrer having been sustained by the court without leave to amend, judgment was ordered "that petitioner take nothing by his petition, and that his petition for a writ of review be denied." From such judgment appellant prosecutes his appeal to this court.

[1] The Optometry Law (Stats. 1913, p. 1097; 1923, p. 380; 1925, p. 573) declares (subdivision 7 of section 11 of Stats. 1923, p. 380) that the certificate of registration of any person registered as an optometrist may be revoked or suspended by the California state board of optometry for any of the following causes: " * * * When the holder uses the title of 'doctor' or 'Dr.' as a prefix to his name. * * *"

No question is raised by appellant as to the sufficiency of the evidence adduced before the board to justify its judgment against him; his principal point on appeal being specifically that, admitting the use by him of the prefix "Dr." before his name, it also appeared that the word "optometrist" immediately followed his name, and that, unless the use by him of the prefix "Dr." tended to defraud or mislead the general public, no offense of professional misconduct was committed, and consequently that the board acted in excess of its jurisdiction in finding the appellant guilty and pronouncing sentence against him. He argues that, because from his construction of various statutes relating to the practice of several kindred professions, a practitioner in any one of them may be suspended for unprofessional conduct in the use of the prefix "doctor," only where such use "in effect works a fraud upon the public or has a tendency to mislead the public to their injury"—the same construction should be applied to the statute here under consideration. No direct authority is cited by appellant which upholds the construction which he would place either upon the other statutes to which he refers, or on the statute which is the basis for the judgment rendered by the respondent herein. Whatever may be the correct construction or interpretation to be placed upon any other statute (regarding which we express no opinion), the

plain language of the statute here in question is that "when the holder (the registrant) uses the title of 'doctor' or 'Dr.' as a prefix to his name," his certificate of registration may be revoked or suspended. The attention of this court has been directed to no language in the statute which would indicate that the action to be taken by the board in any manner depended upon the effect, fraudulent or otherwise, which the use of said title before the name of any registrant under the statute would have on the general public.

In the case of *State v. Armstrong*, 38 Idaho, 493, 225 P. 491, 33 A. L. R. 835, it was held that, where a woman advertised herself as "Dr. Armstrong, Chiropodist," "the evident intent [of the statute] is to prohibit the use of the word 'doctor' in such a way as to indicate that a person is a licensed practitioner of one of the learned branches of the healing art. No such inference can be reasonably drawn when the qualifying word 'chiropodist' appears in the same advertisement. No one could have been misled."

That case, however, is distinguishable from the instant case in that in the *Armstrong* Case the statute forbade the use of the prefix "'doctor' or * * * 'Dr.'," * * * or * * * any other terms or letters indicating or implying that he [the user of the prefix] is a doctor, physician, and surgeon, or practitioner; * * *" which qualification of the inhibition of the use of the prefix "doctor" left a reasonable leeway for the construction which the Idaho court placed upon the statute. But in the instant case no such qualifying words appear in the statute. The language is simply that, if the holder of a certificate of registration "uses the title of 'doctor' or 'Dr.' as a prefix to his name," the offense is committed, for which the board of optometry is authorized to revoke or suspend the certificate of registration of such person.

In the case of *State v. Yegge*, 19 S. D. 234, 103 N. W. 17, 69 L. R. A. 504, 9 Ann. Cas. 202, the defendant was charged with the offense of practicing medicine without a license. Among other things, it was shown that the defendant had a sign in front of his office with the name "Dr. Yegge" thereon. In addition thereto, a "notice" signed "Dr. M. F. Yegge" was introduced in evidence, from which it appeared that the defendant advertised his business or profession as that of "Ophthalmology," which is defined as the science which treats of the physiology, anatomy, and diseases of the eye. The statute under which the defendant was prosecuted provided that—

"When a person shall append or prefix the letters M. B., or M. D., or the title Dr. or Doctor or any other sign or appellation in a medical sense to his or her name, * * * (he or she) shall be regarded as practicing within the meaning of this act." Laws S. D. 1903, c. 176, § 21.

In affirming the judgment, the court said, in part:

" * * * In carrying into effect this law, it was competent for the Legislature to define, * * * what evidence shall be deemed sufficient to constitute a practitioner within the meaning of the act. * * * And it is not only clear from the language of the advertisement itself, which would be generally understood as an assumption on his part of being a regular physician, or at least a specialist in that branch of medicine treating of ophthalmology, but the Legislature has declared that prefixing the term 'Dr.' to his name shall be so regarded. The law should not be so construed as to deprive the people of the benefits intended by the act, but such a construction should be given it as to carry into effect the evident intention of the Legislature. * * * "

[2] In the instant case, the question of fraud or injury to the public is not in issue. Neither the reason for the passage of the act, nor its possible or probable effect upon either the public at large or upon designated individuals, is involved. The act has become the law of the land, and should be enforced according to its meaning and intent, properly construed by the judicial branch of the government. In the face of the positive declaration of the statute, this court would not be justified in what on its part would amount to attempted legislation to the effect that by the use of the word "optometrist" following the name of any person unauthorized to use the prefix "doctor" or "Dr." before his name, the public would not be defrauded or misled to its injury, and consequently that in such circumstances the apparently plain intent of the statute might be evaded and rendered of no consequence.

[3] Because of the fact that by the provision of the statute the respondent herein was authorized to adopt rules and regulations, and furthermore purporting to act within such power the respondent adopted a rule by which, under certain specified restrictions, a registered optometrist might use the title "doctor" or "Dr." as a prefix to his name, it is contended by appellant that, notwithstanding the fact that the facts in his case did not come within the specifications set forth in the rule adopted by the respondent, the judgment should be reversed for the reason that the rule was discriminatory as against appellant. But it is clear from the wording of the statute that, whatever powers the respondent may have had with reference to the adoption of rules and regulations, such powers could be exercised in such manner only as was not inconsistent with the express provisions of the statute. Subdivision 10 of section 4, Stats. 1913, p. 1097; subdivision 10, § 4, Stats. 1923, p. 380. That the respondent possessed no power to legislate is illustrated and decided in principle in each of the following cases, to wit: Hewitt v. Board of Medical Examiners, 148

Cal. 590, 84 P. 39, 3 L. R. A. (N. S.) 896, 113, Am. St. Rep. 315, 7 Ann. Cas. 750; Van Camp Sea Food Co. v. Newbert (Cal. App.) 244 P. 946.

[4] It follows that, even conceding, without deciding, that the rule to which appellant has referred was discriminatory as against him, the point is not available as affecting the rights of appellant in the premises.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 566

BLODGETT v. TRUMBULL et al.
(Civ. 4545.)

District Court of Appeal, Second District, Division 2, California. June 3, 1927.

1. Damages ⇨157(1)—Complaint failing to demand damages from defendant did not authorize recovery of damages from him.

In action against two defendants where the complaint failed to demand damages from one of the defendants, it was insufficient as to him as concerned the cause of action for damages.

2. Principal and agent ⇨189(1)—Complaint alleging fraudulent promises by owner through agent and breach thereof did not authorize recovery of damages against agent.

Complaint alleging that defendant induced plaintiff to purchase lot by fraudulent promises made by her agent to restrict the use of other property, and thereafter conveyed such property to the agent without restrictions, to plaintiff's damage, held insufficient to state cause of action against the agent for damages.

3. Pleading ⇨64(2)—Complaint alleging that restrictions in deed were inserted through fraud, and seeking damages and removal of restrictions, held not demurrable as joining action for damages with one for reformation.

Complaint alleging plaintiff was induced to purchase lot subject to restrictions through fraudulent promises to restrict use of other property and that vendor broke promises, and seeking damages and to remove the restrictions on plaintiff's lot, held not demurrable as joining an action for damages with one for reformation of the deed, the action seeking to quiet title against the restrictions.

4. Covenants ⇨81—Conveyance, subject to restrictions, imposed no servitude in favor of lots not mentioned.

Where conveyance of lot, subject to certain restrictions which should run with the land, did not mention any other lots to be benefited by the restrictions, no equitable servitude was imposed on the lot benefited in favor of lots conveyed by common grantor to third party, there being neither privity of estate nor privity of contract between the first purchaser and the third party.

5. Quieting title **§34(1)**—Complaint to quiet title against restrictions stated no cause of action against defendant who had no right to restrictions and claimed none.

In action to quiet title against restrictions on land, where defendant's land was not entitled to the benefit of the restrictions and defendant asserted no claim to the benefit of the restrictions, complaint stated no cause of action against him.

6. Parties **§21**—Defendant against whom no cause of action was stated was improperly joined.

Where complaint failed to state cause of action against one of the defendants, he was improperly joined as a defendant.

7. Pleading **§254**—Demurrer admitted allegations of amended petition.

Defendant's demurrer admitted plaintiff's allegations that promises to restrict use of other property were made to induce plaintiff to purchase, and that they were made without intent to perform, constituting fraud, under Civ. Code, § 1572, subd. 4.

8. Fraud **§41**—Complaint, alleging fraudulent promises to restrict use of other property and breach, stated cause of action for damages against vendor (Civ. Code, § 1572, subd. 4).

Complaint alleging that plaintiff purchased lot subject to certain restrictions, that she was induced to purchase by promises of defendant to restrict the use of other lots in the same way and to convey only subject to such restrictions, that such promises were made without intent to perform and with intent to defraud and to induce her to purchase subject to restrictions, and that such promises were not kept held to state cause of action for damages against vendor, under Civ. Code, § 1572, subd. 4, defining fraud.

9. Injunction **§62(1)**—Grantor reserving merely right to remedy breach of restrictions may enforce restrictions while owning property benefited, but not thereafter in equity.

Where deed restricting the use of the land conveyed reserved no reversionary right to grantors, but merely the right to enjoin, abate, or remedy a breach of the restrictions, grantor might enforce restrictions in absence of fraud while owning the property benefited, but after parting with the property benefited grantor might not complain of breach thereof, in equity, at least.

10. Quieting title **§34(1)**—Complaint alleging restrictions were inserted through fraud, and that grantors reserved only right to remedy breach and parted with property benefited, stated cause of action against grantor to quiet title (Civ. Code, § 1572, subd. 4).

Complaint, alleging that lot was conveyed subject to restrictions described as conditions running with the land, that the restrictions did not inure to benefit of other lots, and that deed did not reserve reversionary right but merely provided that breach of restrictions must be remedied by grantors, that purchase was induced through fraudulent promises not to convey other property without imposing the same

restrictions, and that grantors had breached same and had parted with property benefited, stated cause of action against grantor for quieting title against restrictions, under Civ. Code, § 1572, subd. 4, defining fraud.

11. Quieting title **§15**—Where purchaser alleged fraudulent promises to restrict use of other property and sought damages and to quiet title, agreement restricting other property separate from deed thereto was matter of defense.

Where purchaser alleged fraudulent insertion of restrictions in deed under promises to restrict other property in conveying it, and that common grantor conveyed property without restrictions and sought damages and to quiet title against the restrictions, the existence of a restrictive agreement apart from the deed to the other property was a matter to be pleaded in defense.

12. Action **§48(1)**—Action to quiet title against restrictions inserted through fraudulent promises and action to recover damages for breach of promises might be joined as arising out of same transaction and connected with same subject of action (Code Civ. Proc. § 427, subd. 8).

Action seeking to quiet title against certain restrictions alleged to have been inserted in deed under promises to insert restrictions in deeds to other property, which were made without intent to perform and with intent to defraud and to induce purchase, was properly joined with action for damages for breach of the fraudulent promises, under Code Civ. Proc. § 427, subd. 8, both causes of action arising out of the same transaction and being connected with the same subject of action.

13. Action **§48(1)**—Statute permitting joinder of causes arising out of same transaction and connected with same subject of action will be liberally construed (Code Civ. Proc. § 427, subd. 8).

Courts will give a liberal construction to Code Civ. Proc. § 427, subd. 8, permitting the joinder of causes of action when they arise out of the same transaction and are connected with the same subject of action.

14. Action **§48(1)**—If causes of action are connected with same transaction or subject of action, complaint may include causes legal and equitable, ex contractu and ex delicto (Code Civ. Proc. § 427, subd. 8).

One complaint may include causes of action which are legal, causes which are equitable, causes arising ex contractu, and causes arising ex delicto if the causes are all connected with the same transaction or with the subject of the action, under Code Civ. Proc. § 427, subd. 8, permitting joinder in such case.

15. Pleading **§204(4)**—That complaint against vendor and agent to quiet title and to recover damages improperly joined agent was not ground for demurrer by vendor whose interests were unaffected.

In action to quiet title against restrictions, which were inserted in deed through fraudulent promises made by agent to insert restrictions in deeds in conveying other land and for

damages for the breach of the promises by conveying property to the same agent without restrictions, that the complaint stated no cause of action against the agent was not ground for demurrer by vendor; vendor's interests not being affected by the joinder of the agent.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action for damages for failure to impose certain restrictions running with the land and to quiet title against certain restrictions, brought by Ida Blodgett against Grace Sherwood Trumbull and Norman E. McFadden. Demurrer to second amended complaint sustained, judgment entered for defendants, and plaintiff appeals. Reversed as to the first-named defendant, and affirmed as to the second-named defendant.

Ida Blodgett, in pro. per.

Wm. G. Griffith, of Santa Barbara, for respondents.

JOHNSON, Justice pro tem. This is an appeal by plaintiff from a judgment in favor of the defendants, based on an order sustaining their demurrer to plaintiff's second amended complaint.

The complaint is in two counts. In the first count plaintiff alleges that the defendant Grace Sherwood Trumbull was the owner of lots 1 to 7, inclusive, in block 1 of the Casita tract in Santa Barbara, as delineated on a recorded map, and that on May 3, 1922, the said defendant, together with her husband, Charles W. Trumbull, conveyed lot 7 to plaintiff, for a valuable consideration, by a deed of grant, of which a copy is attached to the complaint. The deed recites that the conveyance is subject to certain restrictions, declared therein to be "conditions running with the land." These restrictions continue in force until January 1, 1940, and provide that the premises shall be used only for private residence purposes and shall not be occupied by anyone not of the Caucasian race; also, that the improvements shall cost not less than \$2,500, and shall be set back at least 35 feet from the street line. The restrictions are not made to inure to the benefit of any of the other lots in the block, nor is any right of reentry reserved in case of breach. The deed states merely that any breach "may be enjoined, abated, or remedied by appropriate proceedings had and taken by the grantors, their successors, or assigns." Plaintiff alleges, further, that she was induced to purchase said lot by reason of promises made by the defendant Trumbull, through the defendant McFadden as agent, that defendant Trumbull would restrict in the same way the use of each of said other lots in said block, and would not convey any of them without subjecting the title to the same restrictions to which plaintiff's title was subjected. These promises, plaintiff alleges, were made by the

defendant Trumbull without intent to perform and with intent to defraud plaintiff and induce her to accept title subject to the restrictions set forth. It is then alleged that by deed dated February 7, 1923, of which a copy is likewise annexed to the complaint, the defendant Trumbull and her husband conveyed lots 1 to 6 in said block 1, together with other lots in the Casitas tract, to the defendant McFadden, without any restrictions whatever.

The second count sets forth the same averments, and in addition alleges that by reason of defendant Trumbull's promises plaintiff was induced to and did pay \$500 more for her lot than she would have paid but for the promises made; and, further, that by the conveyance of lots 1 to 6 to McFadden, without restrictions, the value of plaintiff's lots has been injured in the amount of \$500. Plaintiff prays for both actual and exemplary damages against defendant Trumbull, and further prays for a decree that her lot be freed from the restrictions imposed by the terms of her deed.

While defendants Trumbull and McFadden joined in the demurrer, yet they demurred therein separately as well as jointly to the entire complaint and to each separate count. The grounds of demurrer are that in neither count is a cause of action stated against either defendant; that there is a misjoinder of causes, in that a cause of action for damages is joined with a cause of action for reformation of the deed to plaintiff; and that the defendant McFadden is improperly joined as a defendant in the action with the defendant Trumbull.

[1-6] So far as the defendant McFadden is concerned, his general demurrer was well taken. The second count of the complaint seeks damages from the defendant Trumbull, but no damages are demanded of McFadden; nor does the complaint contain any allegations on which to base any claim against him for damages. The first count does not state a case for reformation of the deed, though the demurrer seems so to view that count. It really is aimed at quieting title against the restrictions in plaintiff's deed, but, there being no mention in the deed of any other lots to be benefited by the restrictions, there is neither privity of estate nor privity of contract between plaintiff and the defendant McFadden, and no equitable servitude is in fact imposed on plaintiff's property in favor of any of the other lots in the block. *Werner v. Graham*, 181 Cal. 174, 183 P. 945; *McBride v. Freeman*, 191 Cal. 152, 215 P. 678. As a matter of law, McFadden is a stranger to the restrictions in plaintiff's deed, and there is nothing in the complaint indicating that he has asserted any claim that the restrictions are for the benefit of any of his lots, or that he is in any way interested in their enforcement. Thus no cause of action

was stated in either count against McFadden, and he was improperly joined as a defendant. His demurrer was therefore properly sustained.

[7, 8] It is otherwise, however, as to the defendant Trumbull. Her demurrer admits not only that the promises alleged were made in order to induce plaintiff to buy lot 7, but that they were made without intent to perform; and the deed to McFadden shows that, in conveying to him lots 1 to 6, defendant Trumbull did not keep her promises. Hence the second count does state a cause of action for damages against her.

[9] In the first count it is made to appear that at the time when lot 7 of block 1 was deeded to plaintiff subject to restrictions, defendant Trumbull also owned lots 1 to 6; and while no reversionary right is reserved in the deed to plaintiff, the grantors did reserve for themselves, their successors, or assigns the right to enjoin, abate, or remedy by appropriate proceedings any breach of any of the restrictions. The right so reserved would be enforceable, in the absence of fraud, while the defendant Trumbull remained owner of the adjoining lots; but after she had parted with the property which would derive benefit from a continuance of the restrictions, she would have no standing, in a court of equity at least, to complain of a breach. *Forman v. Sadler's Ex'rs*, 114 Md. 574, 80 A. 298; *Genung v. Harvey*, 79 N. J. Eq. 57, 80 A. 955.

[10] In this case not only is it alleged that the defendant Trumbull has parted with the adjoining lots, but for purposes of demurrer it is admitted that the restrictions were introduced into the deed to plaintiff through fraudulent promises. Section 1572, Civ. Code, subd. 4. In this respect the case differs from *Currie v. Title Insurance & Trust Co.*, 60 Cal. App. 192, 212 P. 409, cited in the respondents' brief. The restrictions are described in the deed as conditions and not as covenants; but whether treated as one or the other, if they were incorporated in the deed through promises made by defendant Trumbull without intent to keep them, they could afford no right of action to her, either in a court of equity or a court of law.

[11] In *Werner v. Graham*, 181 Cal. 174, 183 P. 945, a suit to quiet title against other lot owners in a tract, who had acquired no interest in the restrictions in the plaintiff's deed, was held proper; and in like manner the allegations of the first count of the complaint in the case at bar are sufficient to state le-

gal grounds for relief through quieting plaintiff's title against the defendant Trumbull. It is intimated in the brief of respondents that though McFadden's deed was without restrictions, yet there is nothing in the complaint to negative the possibility that there may have been a separate restrictive agreement between him and the defendant Trumbull. If such should be the case, it would be a matter to be pleaded in defense. The complaint alleges that the lots deeded to McFadden were conveyed without any restrictions as to their use.

[12-14] So far as the joinder of the two causes of action, one to quiet title and the other to recover damages, is concerned, both causes arose out of the same transaction and are connected with the same subject of action. Joinder is therefore permissible, under subdivision 8 of section 427 of the Code of Civil Procedure. It is the disposition of the courts to give this subdivision a liberal construction, to the end that closely related controversies between the same parties may be adjudicated at one time. Provided the causes are all connected with the same transaction or subject of action, the complaint may include causes legal and equitable, *ex contractu* and *ex delicto*. *Macowsky v. Irvine*, 71 Cal. App. 77, 234 P. 839. Other illustrations of the application of the rule are exhibited in *Boulden v. Thompson*, 21 Cal. App. 279, 131 P. 765; *Morris v. Judkins*, 36 Cal. App. 413, 172 P. 163; *Espinosa v. Stuart*, 52 Cal. App. 477, 199 P. 66, and *Barberich v. Pooshichian*, 59 Cal. App. 507, 211 P. 236.

[15] The demurrer on the ground of misjoinder of the defendant McFadden, while available to him, did not furnish the defendant Trumbull with a valid objection to the complaint. The action properly lies against the defendant Trumbull; and her interests not being affected by the joinder of McFadden as a codefendant, it was not open to her to demur for misjoinder of parties. *Gardner v. Samuels*, 116 Cal. 84, 90, 47 P. 935, 58 Am. St. Rep. 135; *Madary v. City of Fresno*, 20 Cal. App. 91, 98, 128 P. 340.

The demurrer of the defendant Trumbull should have been overruled on all the grounds specified.

The judgment in favor of the defendant McFadden is affirmed, but the judgment in favor of the defendant Trumbull is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

83 Cal. App. 764

(257 P.)

ANDREWS v. METZNER et al. (Civ. 5792.)★

District Court of Appeal, First District, Division 2, California. June 14, 1927.

Rehearing Denied July 14, 1927.

1. Appeal and error ⇐916(1)—In support of judgment abating action for partition of real property, appellate court must presume petition was filed after decree of partial distribution was delivered to courtroom clerk in another action (Code Civ. Proc. § 1704, as amended by St. 1921, p. 105).

In support of judgment abating action for partition of real property, appellate court must assume that complaint was filed after entry of decree of partial distribution to courtroom clerk in another action, though such decree was not received at main office of county clerk until later, notwithstanding Code Civ. Proc. § 1704, as amended by St. 1921, p. 105.

2. Records ⇐7—Paper is filed of record, when delivered to proper official with intention that it should become part of official record (Code Civ. Proc. § 1704, as amended by St. 1921, p. 105).

Paper is filed of record, within Code Civ. Proc. § 1704, as amended by St. 1921, p. 105, in contemplation of law, when it is delivered to proper official with intention that it should become part of official record, and filing thus made is not impaired by clerk's failure or refusal, without good cause, to receive and record it as filed in records of office.

3. Counties ⇐82—Authority of deputy county clerk is coextensive with that of principal.

Authority of deputy county clerk is coextensive with that of his principal in performance of his duties.

4. Evidence ⇐83(6)—It is presumed that official duty of county clerk of courts and deputy has been regularly performed (Const. art. 6, § 14; Pol. Code, § 4024; Code Civ. Proc. § 1963, subd. 15).

It is presumed that official duty of clerk of superior court, acting as county clerk of courts, under Const. art. 6, § 14, and of deputy appointed, under Pol. Code, § 4024, has been regularly performed, in view of Code Civ. Proc. § 1963, subd. 15.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Matilda Andrews against Josephine Metzner and others for partition of real property. From a judgment abating the action, plaintiff appeals. Affirmed.

C. W. Durbrow and Frank B. Austin, both of San Francisco, and Eugene S. Selvage, of Eureka, for appellant.

Vogelsang & Brown, Bert Schlesinger and Bradford M. Melvin, all of San Francisco, for respondents.

BARTLETT, Justice pro tem. Plaintiff appeals from a judgment of the superior court of the city and county of San Francisco abat-

ing this action on the ground that when it was commenced there was another action pending in the same jurisdiction, based upon the same cause and contested by the same parties in the trial court; the prior action being numbered 146986, and that under discussion 146989. There is no question that the complaint in action 146986 was filed with the county clerk of the city and county of San Francisco prior to the filing of the complaint in action 146989; both filings being made upon the same day and within a period of time not exceeding one hour of that day.

Both actions are in partition for the purpose of partitioning or selling 17 parcels of land of a value admitted to be in excess of \$1,000,000 situated in several counties of California, which were formerly owned by one James K. Prior, Sr., who died testate on March 22, 1905. On August 3, 1906, the superior court of the city and county of San Francisco distributed the interest of James K. Prior, Sr., in the properties herein involved to the surviving wife of deceased, Mary Prior, and certain sons and daughters of deceased; the proportions in which the properties were distributed being in accordance with an understanding had between the distributees prior to the distribution. Mary Prior died testate on October 14, 1922, and her will was admitted to probate and letters testamentary thereon issued to James K. Prior, Jr., and Toney Prior on November 29, 1922.

After due proceedings had on May 22, 1924, a decree of partial distribution of all the interest of Mary Prior in these 17 parcels of land was made to the devisees of Mary Prior by the superior court of the city and county of San Francisco; the hearings thereon being held, and said decree being made, in department No. 9 of the said superior court.

The plaintiff, Matilda Andrews, in action No. 146989, is a daughter of James K. Prior, Sr., and Mary Prior, and the other defendants are other children and grandchildren of said James K. Prior, Sr., and Mary Prior. In action No. 146986 plaintiffs are four of the children of said James K. Prior, Sr., and Mary Prior, and the defendants are Matilda Andrews (plaintiff in action 146989) and other children and grandchildren of said James K. Prior, Sr., and Mary Prior.

By their amended answer the defendants in action 146989 set up as a special plea and defense to the cause of action set forth in the complaint that, at the time of the filing of the complaint, there was another action pending in the above-entitled court between the same parties to partition the same real property described in the complaint; such action referred to being known and designated as No. 146986 of actions on file and pending in the superior court of the state of California in and for the city and county of San Francisco. Attached to this special plea and defense and made a part thereof was a copy of

the complaint in action No. 146986. It was also alleged in the said special plea and defense that said action is still pending and has not been determined.

As their relief in action 146989 defendants ask judgment that said action be abated. When the action came on for trial in the superior court defendants offered, and there was received in evidence in support of their plea in abatement, the original files and records of the county clerk's office of the city and county of San Francisco, relating to the two actions. These files showed that the complaint in action 146986 was filed on the 22d of May, 1924, and a summons issued on said date, and that the complaint in action 146989 was filed on May 22, 1924, and the summons issued on said date. The complaints in both actions were also introduced and read in evidence, and on this evidence defendants submitted their pleas for abatement of the action.

Thereupon, against the objections of defendants, plaintiff was permitted to introduce verbal evidence of the proceedings which occurred in department No. 9 of the superior court in relation to a decree of partial distribution made in that department of said superior court on the morning of May 22, 1924, in the matter of the estate of Mary Prior, deceased. The purpose of the evidence was declared by counsel for plaintiff to show that the complaint in action 146986 was filed before the signing and filing of the decree for partial distribution in the estate of Mary Prior. Upon the conclusion of the evidence offered the court granted defendants' motion to abate the action and thereafter made the following findings and conclusions of law, to wit:

"(1) That at the time of the filing of the complaint herein and the commencement of this action there was, and still is, another action pending in said court between all of the same parties above named in the title to this action to partition the same real property described in the complaint herein and embracing the same subject-matter set out, contained in, and embraced within the complaint herein, and that the remedies and relief prayed for in both said actions are identical.

"(2) The first-named action, so brought and referred to, was and is known and designated as No. 146986 of actions on file and pending in said superior court; such last-named action is still pending in said court, and has not been determined.

"And as conclusions of law from the foregoing facts, the court finds that said defendants James K. Prior, Jr., Lester F. Prior, Toney Prior, and Josephine Metzner are entitled to judgment that said action numbered 146989 abate. Let judgment be entered accordingly.

"Dated: August 14, 1924."

On these findings judgment was on the same date given "that said action No. 146989 abate and the same is hereby abated."

Appellant claims that the evidence offered in its behalf on the hearing on respondents'

plea of abatement shows that action No. 146986 was commenced prematurely; that it was error to abate action No. 146989; and that the judgment abating said action should be reversed. In support of this contention appellant relies upon the provisions of section 1704 of the Code of Civil Procedure, reading as follows:

"Orders and decrees made by the court or a judge thereof, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered, or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute book of the court, or must be signed by the judge and filed; but decrees of distribution must always be so entered at length." Amendment approved May 16, 1921, Stats. 1921, p. 105.

[1] The evidence taken at the trial and relied upon by appellant is in many respects contradictory and unsatisfactory, but it is apparent therefrom that on the morning of May 22, 1924, department No. 9 of the superior court of the city and county of San Francisco had pending therein for determination by Hon. Frank H. Dunne, the judge thereof, a petition for the partial distribution to the devisees of Mary Prior, deceased, of the interests of said Mary Prior at the time of her death in and to a portion of the properties involved in these actions under consideration; that said matter was heard by the judge of said superior court, evidence being offered in support of the plea for distribution, at the close of which the judge said, "Decree granted"; that thereupon the formal written decree of partial distribution, which had been prepared in advance, and examined and agreed to by all the attorneys for the parties interested in said estate, was presented by one of the attorneys to the courtroom clerk of Judge Dunne's court, who thereupon presented the same to Judge Dunne for his examination and signature; that Judge Dunne thereupon examined and affixed his signature to said partial decree of distribution and delivered the same into the custody of the courtroom clerk of said court. All these proceedings took place and occurred in open court in the courtroom of department No. 9 of the superior court in the city and county of San Francisco at a regular session of the same. As to just what the courtroom clerk did with this document after its delivery to him the record is not clear. Some few minutes thereafter the evidence shows that it was received at the main office of the county clerk of the city and county of San Francisco, and that at this time, and not before, the filing mark showing the day and date of filing was placed upon the document by one of the deputy county clerks in such main office. It cannot be determined from the evidence that at the

time the decree of distribution was delivered by Judge Dunne to the courtroom clerk that the complaint in action 146986 had been filed in the office of the county clerk. In support of the judgment of the trial court, we must assume that it had not been when the record does not speak to the contrary. Adopting that assumption, it follows that the trial court decided correctly in abating action No. 146989.

[2] The construction sought to be placed by the appellants upon the word "filed" as used in section 1704, Code of Civil Procedure, is not justified by the many decisions in relation to the meaning of this word that have been made by the appellate courts of this jurisdiction and of other states.

"A paper in a case is said to be filed when it is delivered to the clerk and received by him, to be kept with the papers in the cause. * * * Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office. Indorsing it at the time of filing is not a necessary part of filing. When filed, it is considered an exhibition of it to the court, and the clerk's office in which it is filed represents the court for that purpose." *Tregambo v. Comanche, M. & M. Co.*, 57 Cal. 501.

"A paper is filed of record, in contemplation of law, when it is delivered to the proper official with the intention that it shall become part of an official record, and the filing thus made is not impaired by the clerk's failure or refusal, without good cause, to receive and record the same as filed in the records of his office." *Estate of Carroll*, 190 Cal. 105, 210 P. 817; *Smith v. Biscailuz*, 83 Cal. 344, 21 P. 15, 23 P. 314; *Howell v. Slauson*, 83 Cal. 539, 23 P. 692; *Rollins v. Wright*, 93 Cal. 395, 29 P. 58; *Edwards v. Grand*, 121 Cal. 254, 53 P. 796; *Thomason v. Carroll*, 132 Cal. 148, 64 P. 262; *Hoyt v. Stark*, 134 Cal. 178, 66 P. 223, 86 Am. St. Rep. 246; *Dillon v. Superior Court*, 24 Cal. App. 760, 142 P. 503; *People v. Marsh*, 30 Cal. App. 424, 159 P. 191; *Keller v. Gerber*, 49 Cal. App. 515, 193 P. 809; *Hart v. Forgeus*, 184 Cal. 327, 193 P. 764; *Reed v. Curry*, 35 Ill. 536; *Grubbs v. Cones*, 57 Mo. 83; *Bensley v. Haeberle*, 20 Mo. App. 648; *Poole v. Poindexter*, 72 Kan. 654, 83 P. 126; *White Co. v. Winton*, 41 Cal. App. 693, 183 P. 277.

In the case of *Keller v. Gerber*, 49 Cal. App. 515, 193 P. 809, in discussing the functions of deputy county clerks, it is said:

"In our opinion each department of the superior court is necessarily a court, and the clerk of each department is the clerk of that court. There is nothing in sections 4178 and 4312 of the Political Code that militates against this conclusion. These sections defining the duties of the county clerk require that he have an office at the county seat and that in such office during the hours from 9 o'clock a. m. until 5 o'clock p. m. of each day in the year, except Sundays and holidays, there shall be present at least one person qualified and prepared to transact the business that may properly come into said office. But neither of said sec-

tions supports the contention of appellant that the main, central office, where the permanent records are kept, is the sole and exclusive office of the county clerk. In our opinion every courtroom in which a deputy county clerk is assigned under the law is as much a part of the county clerk's office as if the partitions were removed and it was in fact a part of one room."

[3, 4] The clerk of the superior court is a constitutional officer made ex officio clerk of the courts of record of his county. Const., art. 6, § 14. He may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Section 4024, Pol. Code. The authority of a deputy county clerk is coextensive with that of his principal in the performance of his duties. *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108. It is presumed that official duty has been regularly performed. Subdivision 15, § 1963, Code Civ. Proc.

In view of the fact that it must be held from the record presented that the action of the trial court in abating action No. 146989 was correct, it becomes unnecessary to discuss the other questions presented by appellant on this appeal.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

WHITWORTH et al. v. FERNANDEZ. ★
(Civ. 4466.)

District Court of Appeal, Second District,
Division 2, California. June 8, 1927.

Hearing Granted by Supreme Court Aug. 5, 1927.

1. Adverse possession §89—Claimant of title by adverse possession as against holder of record title must show payment of taxes for five consecutive years during possession.

In order to establish title by adverse possession of land, record title of which is in another, claimant must prove payment of taxes for a period of at least five consecutive years during possession.

2. Adverse possession §95—Evidence failing to show payment of taxes for five consecutive years held insufficient to show title by adverse possession.

Evidence failing to show payment of taxes for five consecutive years during possession held insufficient to establish title by adverse possession to lands involved as against holder of record title.

3. Deeds §121—That deed is one of quitclaim does not militate against its effectiveness.

The fact that a deed is only one of quitclaim does not militate against its validity or effectiveness.

4. Quieting title §10(2)—Owner of equitable interest cannot maintain suit to quiet title against owner of record title.

The owner of an equitable interest cannot maintain a suit to quiet title against the owner of the record title.

5. Quieting title §10(2)—Plaintiffs, in suit to quiet title, held not entitled to judgment on theory that they had acquired equitable title superior to defendant's legal title by deed from common grantor.

Where plaintiffs in suit to quiet title established that quitclaim deed from common grantor under which defendant claimed was given without consideration and pursuant to an oral agreement that defendant would divide up amount of any settlement which he succeeded in making with plaintiffs, and produced a quitclaim deed from common grantor to them subsequent to defendant's deed, *held* plaintiffs were not entitled to judgment on theory that defendant's deed conveyed legal title only and left equitable title in common grantor to which title plaintiffs had succeeded, in view of rule that holder of equitable title cannot maintain suit to quiet title against holder of record title.

6. Quieting title §52—Plaintiffs failing to establish title by adverse possession held not entitled to judgment on theory that deed was uncertain and that parties had mutually agreed on correct line.

Plaintiffs in suit to quiet title having failed to establish title by adverse possession relied upon *held* not entitled to judgment on theory that deed to them from common grantor was uncertain and that parties had mutually agreed upon the correct line, where description of deed was not on its face ambiguous and where evidence showed that boundary line was free from doubt.

7. Appeal and error §1071(6)—Absence of finding to support judgment is fatal, where evidence is such that finding would likely be adverse.

Lack of any finding to support judgment is fatal, where the evidence is such as to indicate that finding would not support judgment.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Suit by James C. Whitworth and others against Michael M. Fernandez and certain fictitious defendants. From a judgment for plaintiffs, named defendant appeals. Reversed.

J. H. De La Monte and Walter W. Little, both of Los Angeles, for appellant.

C. L. Kilgore, of Los Angeles, for respondents.

CRAIG, J. The plaintiffs and respondents instituted this proceeding against the appellant and several fictitious defendants for the purpose of quieting title to real property situated in the city of Los Angeles and described in the complaint as all of lot 13 of the Whitworth tract, and those portions of

the Preuss road on the west and Pico street on the south within the present fence lines, which lies south of a line described by metes and bounds, and all of lot 13 of said tract and that portion of the Preuss road on the west lying within the present fence lines and such street line. The plaintiffs alleged that they and their predecessors in interest had been in actual, open, notorious, exclusive, and adverse possession of all of said lot 13, including the land embraced within the present fence lines, continuously for a period of 20 years next preceding the commencement of their action, and that they had paid all of the taxes of every kind and nature levied or assessed thereon continuously for a period of 5 years last past immediately preceding the filing of the complaint.

Defendant, Fernandez, by answer and cross-complaint denied the foregoing allegations upon the ground of lack of knowledge or information sufficient to enable him to answer as to ownership of portions of lot 13, and denied the payment of taxes on the whole of said land, or any part of it, for a period of 5 years, or that the plaintiffs or their predecessors in interest had been in actual, open, notorious, exclusive, or adverse possession thereof. The defendant affirmatively alleged that by a good and sufficient deed of conveyance from Christopher Greve and Emily Greve, dated February 15, 1915, he acquired title to, and that he had ever since been the owner and entitled to possession of, lands in the Rancho de las Aguas, consisting (1) of those portions of lot No. 1 lying north of Pico street, not included in tract No. 470, or in that portion of lot No. 1 theretofore deeded by Greve to Joseph Whitworth, defendant's parcel being the easterly 42.1 feet of lot No. 13 described in the complaint; and (2) a parcel consisting of a portion of lot No. 13 described and claimed by the plaintiffs, and commencing at the northeasterly corner thereof, which also was described by metes and bounds. By cross-complaint Fernandez alleged that these two parcels had been owned continuously by Christopher Greve and himself for a period of 35 years, and prayed a decree quieting title thereto. An answer to the cross-complaint was interposed, which, among other things, alleged that the deed of February 15, 1915, was one of quitclaim only, and conveyed no right, title, or interest in the lands therein described to the cross-complainant.

The land in controversy consists of a strip 42.1 feet wide on Pico street, and extending northerly therefrom a distance of 298.32 feet. No evidence appears to have been offered concerning the second parcel described by the defendant, and it therefore should not have been made the subject of a finding on behalf of the plaintiffs.

The case was tried by the court, and findings and judgment were rendered in favor of the plaintiffs. It was found that on the 15th day of February, 1915, Christopher Greve and Emily Greve, his wife, executed to Michael M. Fernandez their quitclaim deed, and that the same was recorded on the 11th day of July, 1916, in the office of the county recorder of Los Angeles county, but that no consideration was received by the Greves for the execution and delivery of the deed, and that it was made pursuant to an oral agreement by the terms of which Fernandez was to endeavor to secure a settlement from the Whitworths without filing an action at law or in equity, and that the Greves were to receive one-half of any sum which might be received by Fernandez in such settlement, and, further, "that by reason of said agreement Fernandez became a trustee for and in favor of Christopher Greve and Emily Greve, his wife." Evidence was received over objections of the defendants tending to show that in 1922 Emily Greve and the heirs of Christopher Greve executed to the respondents a quitclaim deed of the land in question, which the court found to be a fact.

The defendant appeals from the judgment upon the alleged grounds that the uncontradicted evidence shows plaintiffs' land under their purchase from Greve to have been 42.1 feet westerly from the line upon which the judgment awarded them was erroneously based; that defendant's property lay between the "three acres, more or less," belonging to the Whitworths and the westerly line of the lands of Greve, their common grantor; that the plaintiffs had paid no taxes upon appellant's 42.1 feet, except as hereinafter noted; and that the latter's line had never been disputed.

[1, 2] The respondents' first claim to the strip of land in dispute is that of adverse possession. Without stating the evidence in detail it is sufficient to say that the finding of the court to the effect that they had been in actual possession for a period of 20 years has sufficient support in the record to be sustained. The appellant has record title to the same property, and it is essential to the respondents' success in maintaining their claim that they prove payment by them of the taxes for a period of at least five consecutive years during the time that they had possession.

It appears that in 1883 the Greves conveyed to respondents certain lands lying westerly of and adjacent to the westerly line of the 42.1 feet in controversy, but that for a period of about 30 years they occupied and cultivated all of the land lying between their westerly line and the easterly line of said strip. Public records, including the tax assessments, described the respondents' proper-

ty as "three acres," or, at times, "three acres, more or less." In 1910 a map of a new tract embracing Greve's easterly lands, and known as lot A, tract 470, was recorded. The tax records show that all of the lands lying easterly of respondents' "three acres" were assessed to Greve from 1901 to 1911, and that he paid the taxes thereon, and that from 1911 to the date of the filing of this suit the strip of 42.1 feet lying between said "three acres, more or less," and tract 470 was assessed to, and the taxes thereon were paid by, Christopher Greve or his surviving widow. We are unable to find in the record evidence tending to show that the respondents paid taxes upon the strip of land in controversy, except during the years 1916, 1917, and 1918, when they had also been theretofore paid by the Greves. Therefore respondents failed to sustain their allegations of adverse possession, and the findings of the court in that behalf are unsupported by the evidence. They contend that appellant's quitclaim deed of 1915 was without consideration, and conveyed no right, title, or interest in the property therein described.

[3-5] That the deed was only one of quitclaim does not militate against the validity. "A quitclaim deed is as efficient to transfer title as a grant, bargain and sale deed. *Graff v. Middleton*, 43 Cal. 341, 344; *Myers v. City of Oceanside*, 7 Cal. App. 87, 93 P. 686." *Biaggi v. Ramont*, 189 Cal. 675, 209 P. 892. But it is argued that the plaintiffs were entitled to the decree sought upon another theory. If the deed to Fernandez in 1915 was intended by the parties to convey only the legal title, reserving, by reason of the terms of an oral agreement, the equitable ownership in the Greves and thus creating a trust in their favor, by which Fernandez became the trustee, it is insisted that the Greves could have maintained this action, and that the quitclaim deed of Emily Greve and the heirs of Christopher Greve to the Whitworths executed May 27, 1922, served to transfer all of the interest of the grantors to the grantees; hence, that through the last-named deed respondents became the owners of the property in question, even though they had not acquired title to it through adverse possession. This claim is squarely condemned by numerous decisions in this state, which have definitely established the rule to be that the owner of an equitable interest cannot maintain a suit to quiet title against the owner of the record title. *Aalwyn's Law Inst. v. Martin*, 173 Cal. 21, 159 P. 158; *Buchner v. Malloy*, 155 Cal. 253, 100 P. 687; *Robinson v. Muir*, 151 Cal. 118, 90 P. 521; *Chase v. Cameron*, 133 Cal. 281, 65 P. 460 (declaring that the rule above stated is elementary); *McDonald v. McCoy*, 121 Cal. 55, 53 P. 421; *Burris v. Adams*, 96 Cal. 664, 31 P. 565; *Tuf-free v. Polhemus*, 108 Cal. 670, 41 P. 806;

Harrigan v. Mowry, 84 Cal. 456, 22 P. 658, 24 P. 48; Von Drachenfels v. Doolittle, 77 Cal. 295, 19 P. 518; Castro v. Barry, 79 Cal. 443, 21 P. 946; Spottswood v. Spottswood, 4 Cal. App. 711, 89 P. 362; De Leonis v. Hammel, 1 Cal. App. 390, 82 P. 349.

In *Harrigan v. Mowry*, supra, it was held that an action to quiet title will not lie in favor of the owner of the equitable interest for whom the legal title is held in trust, because the legal title of the trustee is not adverse to the equitable title of the beneficiary. It was further said that if the holder of the equitable interest "was entitled to a conveyance of the legal title, and that defendant wrongfully refused to convey it," a suit to quiet title under section 738 of the Code of Civil Procedure is not proper nor even permissible. We cannot hold the instant case to be within the exception to the rule upheld in *De Leonis v. Hammel*, supra, and *Cummings v. Cummings*, 55 Cal. App. 433, 203 P. 452, which permits an action to quiet title to be maintained by the holder of the equitable title against the legal title owner where the complaint alleges facts on which a plaintiff's equitable claim is based and where general relief is demanded; for the record before us shows that neither in the complaint nor in the answer to the cross-complaint was any attempt made to state the existence of an oral agreement accompanying the execution of the quitclaim deed to Fernandez, which alone provided a foundation for the court's finding that the last-named deed conveyed no legal title, and that Fernandez became a trustee for Christopher and Emily Greve. The objections which were made to the introduction of testimony concerning this oral agreement should have been sustained, since under the pleadings that evidence was irrelevant. In cases of this nature our decisions have consistently adhered to the rule that an action to quiet title is not the proper remedy, but that such equities as the plaintiff may possess are properly protected and enforced in an action for the declaration of a trust and to compel a conveyance.

[6] Respondents most earnestly urge that the judgment of the trial court should be sustained upon the theory that the original deed from the Greves to the Whitworths in 1883 was uncertain; that there was an uncertainty as to the easterly boundary line of the land granted; and that the parties mutually agreed upon the fence as the correct line. There are several reasons why the respondents cannot prevail through this course of reasoning. There is no allegation in the complaint nor in the answer to the cross-complaint of uncertainty as to the boundary line or that the parties, because of such uncertainty or otherwise, agreed upon this particular fence as the correct line. Even assuming that in a suit to quiet title the relief

sought might properly be granted without pleading the facts constituting the true source of title, where its origin is otherwise alleged, respondents' case on appeal upon this theory is fatally defective for the reason that the facts relied upon are not found by the trial court. According to the findings, respondents' title is based upon the deed of 1883, followed by adverse possession and the payment of taxes. There is no finding of uncertainty as to the boundary line, and nothing to the effect that the parties recognized such uncertainty or believed that it existed, and consequently came together and stipulated to an acceptance of a boundary line. If the findings that respondents derived their title from the Greves through the deed of 1883 and through subsequent adverse possession be discarded as unsupported by the evidence, which they must be, and if the findings concerning the respondents having received title through the quitclaim deed of 1922 be also disregarded because the grantors had no title to convey, having previously granted their legal interest to Fernandez, and that a suit to quiet title cannot be maintained by the owner of the equitable title against the holder of the legal title, there remains no finding upon which judgment for the respondents can be predicated. We then have a judgment without a finding to support it.

The proposition that respondents are the owners of this land because of an agreement as to the boundary line made to settle an uncertainty existing as to its true location involves different facts than those otherwise found by the court. It reveals a source of title wholly distinguishable from adverse possession and the payment of taxes, for the latter presupposes a grant to the present owner or his predecessors, while the former results from the application of the doctrine of estoppel. *Clapp v. Churchill*, 164 Cal. 741, 130 P. 1061.

[7] In deciding this phase of the case, the judgment cannot be upheld upon the principle that, although no finding is made supporting the judgment, if the evidence was such that had a finding been made it must have supplied that support, the judgment will not be reversed, for here there is such evidence to indicate that the description contained in the deed was definite and certain, and but little tending to the conclusion that any uncertainty exists in it. Under such circumstances the lack of any finding is fatal. The description in the deed in question reads:

"All that certain lot and parcel of land, situate, lying and being in the Rodeo de las Aguas, county of Los Angeles, state of California, and bounded and particular described as follows, to wit: Beginning at the southwest corner of the land now owned by Jas. A. Whitworth and being one of the corners of lot number two (2) of the Rancho de las Aguas as recorded on page

572 book one (1) of the Miscellaneous Records of Los Angeles county; thence following the north line of lot number two (2) east 6.76 chains; thence south 4.52 chains to the north side of county road; thence north 76° 54' W. along north side of county road 7.94 chains to a stake, thence N. 2° 21' east 4.48 chains to the place of beginning, containing three (3) acres of land more or less."

Considering this language alone, we find no ambiguity. However, respondents insist that the point of beginning is uncertain. In his brief their counsel has expressly stated that "the only question and uncertainty in the deed therefore is as to the easterly boundary line," but during the trial he stipulated that the easterly boundary line as described in the deed is 42 feet westerly from the fence and row of trees alleged by respondents to indicate the true line. This stipulation, regarded in connection with the definiteness of the other three lines, would seem without further inquiry to preclude the claim as to uncertainty in the easterly boundary line. The witness Wheeler, as surveyor, called by the defendant, testified that he located the point of beginning as designated in the deed. To do so he used the county surveyor's official map, as well as the description in the deed, and also the notes in the county surveyor's office. From the latter he found a reference to a certain stone in Pico street, which he located, and, using it as a basis of calculation, was enabled to arrive at the southwest corner of the Whitworth land. From there on the witness apparently found no difficulty in measuring according to the deed and in establishing all the boundary lines of the property conveyed. This witness' testimony, if true, would be sufficient to establish the fact that the boundary line in question was free from doubt. *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175. There was other evidence tending to the same conclusion. Upon the question as to whether or not Christopher Greve and the respondents' predecessor agreed upon the fence and row of trees as the true boundary line between their properties, there is also some conflict, although one witness testified directly that Greve told him that such an agreement had been made. But since a clear conflict exists in the evidence as to whether or not there was in fact any uncertainty in the line in question, as to whether the parties actually entered into an agreement as to such line, and, also, if they did, as to whether or not they made the agreement arbitrarily or because they believed that there was a doubt on the subject (and upon the latter point the evidence is most meager), without a finding upon these facts the judgment cannot be sustained upon the doctrine of an agreed boundary line based upon actual or supposed doubt as to its location.

We conclude that the findings and judgment below are not supported by the evidence. As to the strip of 42.1 feet, the judgment should have been for the defendant. As to the other portion, no evidence having been introduced, neither party was entitled to judgment.

The judgment is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

33 Cal. App. 679

LOST BURROS GOLD MINING CO. v. INYO COUNTY BANK. (Civ. 5214.)

District Court of Appeal, First District, Division 1, California. June 9, 1927.

1. Execution ☞283—Evidence held to sustain finding that debtor corporation was owner through sale of plaintiff corporation's assets, in action to quiet title against purchaser at execution sale.

In action by corporation to quiet title to property taken by defendant under attachment and purchased by it on execution under judgment against another corporation, evidence held sufficient to sustain finding that other corporation was, in fact, owner by reason of sale to it of all of stock and property of plaintiff.

2. Execution ☞283—Defense that transfer of corporation's property was not formally assented to held not available, in transferor's action against purchaser at execution sale (Civ. Code, § 361a).

In action by corporation to quiet title to property sold defendant on execution, under judgment against another corporation, fact that property involved was never legally transferred by plaintiff to the other corporation because of failure to attach written consent of stockholders or to hold stockholders' meeting, under Civ. Code, § 361a, was not available, where sale was in effect consented to by officers and stockholders and no creditor is involved.

3. Corporations ☞182—Only stockholders and creditors of selling corporation can object to mode of transfer of corporation's property (Civ. Code, § 361a).

Civ. Code, § 361a, requiring written consent of stockholders or vote at stockholders' meeting in connection with transfer or conveyance of corporation's property or business as a whole, was enacted for benefit of stockholders and creditors of selling corporation, and they alone have right to object to mode of transfer.

4. Execution ☞283—Corporation which sold property and was controlled by transferee could not complain of mode of transfer, in action against purchaser at execution sale (Civ. Code, § 361a).

Corporation, all of whose property had been sold, could not complain that manner and mode in which its property was taken did not comply with Civ. Code, § 361a, in action by it, at instigation of transferee corporation, to quiet title

to such property against purchaser at execution sale, under judgment against transferee.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Action by the Lost Burros Gold Mining Company against the Inyo County Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank C. Scherrer, of Riverside, and Hugh Henry Brown, of San Francisco, for appellant.

Richard S. Miner, of Independence, for respondent.

TYLER, P. J. Action to quiet title. The property involved consists of a group of quartz mining locations in Inyo county, this state, together with a milling and reduction plant situate thereon. The sole question at issue in the court below was whether the mine and mill were the corporate assets and property of plaintiff, Lost Burros Gold Mining Company, or whether the same belonged to the Montana-Tonopah Mines Company, at the time defendant acquired the property under an execution sale. The trial court found, in effect, that the property was vested in the Montana company, and it is here claimed that the findings are not supported by the evidence.

[1] The record is somewhat voluminous. Briefly summarized, it shows that the Montana company negotiated with one Frank Campbell, of Inyo county, for the purchase of an auto truck to be used in handling supplies for the Lost Burros mill at an agreed price. The sale was completed and Campbell drew two bills of exchange on the Montana company for the purchase price, payable to the Inyo County Bank. On December 30, 1916, the Montana company indorsed its acceptance on the bills, payable 90 days from date. The Inyo Bank discounted the paper. Subsequently the Montana company refused to pay. Suit was thereupon brought against it in Inyo county. A writ of attachment was served on the Lost Burros property on the theory that it was owned by the Montana company. Judgment went in favor of plaintiff bank. Execution issued, and the attached property was sold to the bank, and a sheriff's deed issued to it. Thereupon Lost Burros Mining Company, claiming to be the sole owner of the property, brought this present action against the bank to quiet title to the same. The question presented on appeal is whether the findings of the trial court, to the effect that the Montana company was the owner, are supported by the evidence. There is evidence to show that the Lost Burros Gold Mining Company was incorporated by one W. D. Blackmer and others under the laws of the state of California in May, 1914. The amount of its authorized capital stock was \$50,000, and

the number of shares into which it was divided was 50,000, of the par value of \$1 each. In July, 1916, the outstanding stock of the company consisted of 40,000 shares, which were owned by one Blackmer and others. One Badgett began negotiations with Blackmer and the other stockholders for options to purchase their holdings in the company. The rights acquired by Badgett and his associates were assigned to the Montana-Tonopah Mines Company, it being the intention of the latter company to acquire the property in dispute herein, either through the purchase of stock or by purchase of the lands, and it entered into certain contractual relations with both of these ends in view. It succeeded in acquiring all of the stock in the Lost Burros Company, and the company executed a deed conveying its real estate to a Mr. Knox, who was president of the Montana company, presumably for the benefit of such company. This deed was never recorded. There was also evidence to show that the Montana company paid \$40,000 in cash for the stock and property thus acquired, and that it took possession of such stock and all of the property of the corporation in the year 1918, and subsequently paid the taxes thereon. At the time of the attachment, the property was in the possession of and was being operated by the Montana company, which had expended some \$103,000 in the development thereof. Other evidence shows that the Lost Burros Company, ever since the acquisition of its property by the Montana company, was simply an instrumentality, conduit, and adjunct of the latter corporation. We do not consider a further recital of the facts necessary.

[2, 3] We have read the record carefully and the evidence upon this subject, together with the reasonable inferences to be drawn therefrom, fully support the findings of the trial court that the property of the Lost Burros Company was, by reason of its sale, completely vested in the Montana company. Appellant makes the further contention that, even conceding this to be true, the Lost Burros Company never legally transferred its property to the purchasing corporation for the reason that none of the documents purporting to convey the title of the property complied with section 361a of the Civil Code. This legislative restriction provides, in substance, that no sale, lease, assignment, transfer, or conveyance of the business, franchise, and property, as a whole, of any corporation shall be valid without the consent of stockholders thereof, holding of record at least two-thirds of the issued capital stock of such corporation; such consent to be either expressed in (1) writing, executed and acknowledged by such stockholders and attached to such sale, lease, assignment, transfer or conveyance, or (2) by a vote at a stockholders' meeting of such corporation called for that purpose; but with such assent, so

expressed, such sale shall be valid. Here there was no consent of any kind attached to the conveyance, the provision being ignored when the sale was made. We are of the opinion that, notwithstanding that the parties failed to follow the formal method of alienation directed by the statute, that plaintiff is in no position to raise this question.

Here it affirmatively appears that all of its officers and stockholders and every one concerned in the transfer agreed to the sale, and no question of the rights of any creditor is here involved. No one having any connection with the Lost Burros Company at the time of the sale being injuriously affected, an observance of the section in question was not imperative. The legislative restriction in question was enacted for the benefit of stockholders and creditors of a selling corporation, and they alone have a right to object to the mode of transfer. *South Pasadena v. Pasadena Land, etc., Co.*, 152 Cal. 579-584, 93 P. 490.

[4] It is clearly apparent from the record that this action was instituted for the benefit of the Montana corporation in an effort by it to repossess itself of property which it owned and which had been sold for the payment of its debt, and to carry out this purpose it was using, as an instrumentality, a practically defunct corporation which it owned and controlled, and which it maintained as a separate entity as a mere adjunct or instrumentality for purposes of its own. Under these circumstances, the purchased company is a mere empty shell which has no distinct corporate existence in contemplation of law, and it is therefore in no position to complain of the manner and mode in which it has been stripped of its property. 6 Cal. Jur. p. 591; *Hunter v. Baker Motor Vehicle Co.* (D. C.) 225 F. 1015. We are of the opinion, therefore, that the evidence fully supports the finding of the trial court that the Montana company was the owner of the land in question at the time of the sale, and that respondent acquired title thereto under its execution against said company. Any other conclusion would result in the perpetration of a fraud upon defendant.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

83 Cal. App. 689

INNER SHOE TIRE CO. v. TONDRO.
(Civ. 4750.)

District Court of Appeal, Second District, Division 1, California. June 9, 1927.

1. Evidence ⇨397(1)—Written contract cannot be modified or added to by extrinsic evidence.

Terms of written contract cannot be modified or added to by evidence extrinsic of writing.

2. Trial ⇨75—Permitting proof by incompetent evidence, without objection, waives question of admissibility.

Party, who permits fact to be proved by incompetent evidence, without objection thereto, waives all question of admissibility.

3. Appeal and error ⇨204(3)—Plaintiff, not objecting to admission of parol evidence varying written instrument, waived objection, and cannot raise question for first time on appeal.

Where plaintiff, suing for goods sold, permitted parol evidence tending to vary written contract to be admitted, without objection, he waived objection to its admissibility, and cannot raise question for first time on appeal.

4. Evidence ⇨460(11)—Representations contained in literature inducing purchase held properly admitted, where written order did not contain detailed description of goods sold.

Where written order of goods sold did not contain detailed description of goods, it was proper to show that buyer was induced to enter into agreement by representations contained in placards and literature shown by seller through its agent to buyer.

5. Sales ⇨426—Whether purchaser is barred from other relief by privilege of returning goods on breach of warranty depends on whether contract makes privilege exclusive remedy.

Whether privilege granted by contract of sale of returning goods on breach of warranty bars purchaser from other relief for breach depends on terms of contract which may make privilege exclusive and in lieu of all other remedies, or as additional to other remedies of purchaser.

6. Sales ⇨426—Privilege of returning goods on breach of warranty will be construed as alternative remedy, unless contract clearly indicates contrary intention.

Privilege given purchaser of returning goods on breach of warranty will be construed as an alternative remedy, unless contrary intention clearly appears from contract, since purchaser would otherwise be deprived of undisputed legal rights.

7. Sales ⇨426—Purchaser may return goods or claim damages for breach of warranty, where right to return is not expressly or by necessary construction exclusive remedy.

Where right to return goods on breach of warranty is not in terms or necessarily by construction exclusive of all other remedies, purchaser can elect between that relief and claim for damages; right of returning goods being merely a cumulative remedy.

8. Sales ⇨426—Purchaser held not confined exclusively to remedy of returning goods for breach of warranty under guaranty certificate providing that, if goods failed to give results represented, seller would furnish new goods free.

Under guaranty, providing that, if "Inner-shu" tire should fail to give results represented, seller agrees to furnish new one free of charge on receipt of old one prepaid with certificate of guaranty, purchaser was not obligated

to return goods and was not confined exclusively to such remedy in case of breach of warranty.

9. Sales ⚡426—Contract will be construed most strongly against person furnishing guaranty, in case of doubt whether privilege of returning goods provided for in guaranty was intended as exclusive remedy.

Where there is doubt whether certificate of guaranty should be construed as confining purchaser exclusively to remedy of returning goods on breach of warranty provided for in guaranty certificate, contract will be construed most strongly against person furnishing guaranty certificate.

10. Sales ⚡266, 272—Manufacturer warranting goods to be perfect in material and workmanship held to have also impliedly warranted goods were free from undisclosed latent defects, and sound and merchantable (Civ. Code §§ 1769, 1771).

In sale by manufacturer to dealer of "Innershu" for tires expressly warranted to be perfect in material and workmanship and guaranteed to be blow-out proof, there was an implied warranty by manufacturer that goods were free from any latent defects not disclosed to buyer arising from process of manufacture, and that merchandise was sound and merchantable, as provided for under Civ. Code §§ 1769, 1771, in addition to express warranty which was not inconsistent with implied warranty.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Inner Shoe Tire Company against W. A. Tondro, doing business as the Valley Auto Supply Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Jas. W. Glassford, of El Centro, for appellant.

Dorsey Whitelaw, of El Centro, for respondent.

McLUCAS, Justice pro tem. Plaintiff brought suit for the value of goods, wares, and merchandise sold to the defendant, and appeals from a judgment rendered for the defendant.

There is substantially no difference in the contentions of the parties as to the actual facts in the case. Without objection on the part of plaintiff, defendant offered evidence tending to prove an oral contract of warranty. This testimony was uncontradicted by plaintiff. It appears from the evidence that on the 6th day of February, 1922, a salesman for the Inner Shoe Tire Company called upon the defendant. They discussed certain tire reinforcements, which were denominated "Red Innershus." The quality and salability of these Innershus were discussed between them, and among other things the fact that respondent was engaged in the business of retailing automobile supplies, accessories, and equipment, and had acquired therein a good will and a reputation among

the purchasers of such articles for furnishing his customers with reliable and trustworthy goods, and that respondent desired to purchase only what is known in trade parlance as "quality goods," to be offered and sold to his customers, and in this connection a general advertising scheme was to be undertaken whereby these goods were to be offered to such customers and prospective purchasers under certain representations to be made by means of large placards, circulars, and otherwise, including, among others, the representations that when said Innershus were cemented into new casings they would prevent punctures and all blow-outs, and would last until the casings should be entirely worn out, even though such casings should travel a distance of 21,000 miles; that said Red Innershu would never fail in a new tire, and would give added strength to worn tires; that said Red Innershu was blow-out proof. It was further represented by said salesman to respondent that the foregoing representations could be made to respondent's customers truthfully and without harm to respondent's said reputation, and that said Innershus would be accompanied by certificates of guaranty. These certificates of guaranty contained the following language:

"Certificate of Guaranty.

"This is to certify this (that) this Red 'Innershu' is warranted to be perfect in material and workmanship, is guaranteed absolutely blow-out proof. Will prevent 90 per cent. of all punctures and will double tire mileage when installed in new tires according to our printed directions on the back hereof.

"Should this Red 'Innershu' fail to give you these results we hereby agree to furnish you with a new one free of charge upon receipt of the old 'Innershu' prepaid to us with this certificate of guaranty."

Respondent gave his order for eight dozen of said Red Innershus, aggregating the total price of \$511.20. The order slip signed by the respondent contained a printed statement as follows:

"No agreements or conditions, verbal or otherwise, other than herewith mentioned, will be recognized."

The order slip did not contain any memorandum, nor mention of any representation or guaranty. Thereafter the goods were received by respondent, but sales of some of the Innershus, together with further examination, proved them to be defective; blow-outs occurring immediately upon their being used. Respondent attempted to dispose of the Innershus upon the market, but failed, and respondent returned the whole consignment, with the exception of those which had been sold by him and not replaced. Appellant refused to accept the returned Innershus, and brought action for the full pur-

chase price, except the price of one of the returned Innershus for which respondent was given credit.

[1, 2] Appellant contends that the written contract of guaranty contained in the certificate, as hereinbefore quoted, was the sole and exclusive remedy of the purchaser, and that all evidence which contradicts it or shows a different or other guaranty is not admissible. Accordingly, appellant insists that respondent's only remedy was to return any defective Innershus, with the demand that appellant furnish new ones therefor. It is elementary that the terms of a written contract cannot be modified or added to by evidence extrinsic of the writing. If this rule were held applicable to the instant case, not even the certificate upon which plaintiff relies would be admissible in evidence, for the reason that the certificate is no part of the written order or contract signed by the respondent. A party who permits a fact to be proved by incompetent evidence, without objection, waives all question of admissibility. 2 Cal. Jur. p. 267, § 84. In the application of the rule requiring one to object to the introduction of evidence, it has been held that a failure to object that parol evidence to vary the terms of a written instrument was admitted waives the objection, and the question cannot be raised for the first time on appeal. *Tebbs v. Weatherwax*, 23 Cal. 58. In *McComish v. Kaufman*, 43 Cal. App. 507, 510, 185 P. 476, 477, it is said:

"Parties who permit a fact to be proved by incompetent evidence, without objection, waive all question of inadmissibility. This is true even of the statute of frauds and as to witnesses 'incompetent to testify.'" *Walberg v. Underwood*, 39 Cal. App. 748, 180 P. 55."

[3-6] So in the present case plaintiff waived his objection to the admissibility of parol evidence tending to vary a written instrument and will not be permitted to raise the question for the first time on appeal. Where the written order does not contain a detailed description of the goods bargained for in the first instance, it is proper to show that the defendant was induced to enter into the agreement by the representations contained in placards and literature shown by plaintiff through its agent. *Ventura Mfg., etc., Co. v. Warfield*, 37 Cal. App. 147, 163, 174 P. 382; *Luitweiler v. Ukiah, etc., Co.*, 16 Cal. App. 198, 210, 116 P. 707, 712. The cases of *Inner Shoe Co. v. Treadway (C. C. A.)* 286 F. 838, *Inner Shoe Co. v. Williamson (Tex. Civ. App.)* 240 S. W. 330, and *Scott v. Vulcan Iron Works*, 31 Okl. 334, 122 P. 186, are to be distinguished from the instant case in this respect: In each of those cases objection was made to the introduction of parol evidence to vary the terms of a written instrument, and it was held that such testimony was inadmissible and that the buyer was bound by the remedy provided in the

written order. This remedy was held exclusive. Here no objection was made to the introduction of such parol evidence. Other cases cited by appellant are to the effect that the remedy provided in the written contract is exclusive of any other remedy. Whether a privilege granted by a contract of sale of returning the goods on a breach of warranty bars the purchaser from other relief for the breach depends entirely on the terms of the contract, which may make the privilege exclusive and in lieu of all other remedies, or granted as additional to the other remedies to which the purchaser is entitled by law. Since a different construction would deprive the purchaser of undisputed legal rights, the courts will hold the privilege given him of returning the goods to be an alternative remedy, unless a contrary intention clearly appears from the contract. In *Nave v. Powell*, 52 Ind. App. 496, 96 N. E. 395, it is said:

"Contracts, therefore, which contain a provision for the return of the property and a rescission of the contract, or for the substitution of other property for that which fails to comply with the warranty, are not treated as exclusive in the remedy provided, unless such intention is clearly expressed by the language and terms of the warranty."

[7-9] Where the right to return is not in terms, or necessarily by construction, exclusive, the purchaser can elect between that relief and a claim for damages; the right of returning the goods being merely a cumulative remedy. *Ann. Cas. 1915D, 1160*, note, and cases cited. In the case at bar the guaranty contained in the certificate is absolute and complete in itself, closing with a full stop. The provision for the return of the goods is contained in a separate paragraph and does not in terms make it obligatory upon the purchaser to return the goods. It only says that, should the Innershu fail to give the results stated in the previous paragraph, the seller agrees to furnish a new Innershu free of charge upon receipt of the old, prepaid, with the certificate of guaranty. It is only by construction that any obligation can be put upon the purchaser to return the goods. It would have been easy, by the change of a few words, to have placed the obligation upon the purchaser in express terms, as is now sought to be put upon him by construction. Under these circumstances it would seem proper to apply the rule that is sometimes applied, that when there is doubt about the proper construction, to construe the contract most strongly against the person furnishing the printed blank containing the provision in question. *Eyers v. Hadden (C. C.)* 70 F. 648. Considering all the facts in this case, we do not think the remedy provided in the certificate of guaranty is exclusive.

[10] Under the circumstances in the case at bar, there was an implied warranty by

the manufacturer that the goods were free from any latent defect not disclosed to the buyer arising from the process of manufacture and that the merchandise was sound and merchantable, as well as an expressed warranty. The expressed warranty here is not inconsistent with the warranty implied in sections 1769 and 1771 of the Civil Code. In *North Alaska, etc., Co. v. Hobbs, Wall & Co.*, 159 Cal. 380, 113 P. 870, 120 P. 27, 35 L. R. A. (N. S.) 501, it was held that an implied and an expressed warranty could both exist, where the warranty so implied is not only not inconsistent with the expressed warranty, but is entirely in harmony therewith.

For the reasons stated, it is ordered that the judgment be affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

ARMSTRONG v. LASSEN LUMBER & BOX CO. (Civ. 5795.)★

District Court of Appeal, First District, Division 2, California. June 11, 1927.

Rehearing Granted July 11, 1927.

1. Appeal and error $\S$ 1041(4)—Error in permitting amendment after judgment to conform to proof held harmless under evidence.

In action for damages arising out of a sale by defendant to plaintiff of a used steam boiler which was found to be of no value after resale by plaintiff, error, if any, in permitting amendment to plaintiff's second amended complaint after judgment, so as to set forth facts concerning plaintiff's installation of another boiler for person to whom sale was made in conformity with evidence admitted, held harmless under evidence.

2. Sales $\S$ 261(4)—Description of used steam boiler in bill of sale constituted warranty that boiler was in good condition and capable of being used with safety.

Description in bill of sale of steam boiler, describing property as "one butt-strap boiler, 60 inches in diameter by 16 feet long, for 140 pounds' working pressure, with breeching, stock, half arch front, and safety valve," held to constitute warranty that boiler sold was in good condition and capable of being used with safety under steam pressure of 140 pounds.

3. Fraud $\S$ 13(1)—Seller's representing used boiler as in good condition, if with intent to induce purchase, is actual fraud justifying damages.

Seller's statement, representing used steam boiler to be in good condition, if made with intent to induce buyer to enter into contract of purchase, would be an actual fraud, and would justify recovery of damages therefor.

4. Sales $\S$ 442(6, 7)—Seller of defective used steam boiler cannot complain of cost of boiler installed by buyer at less cost.

Where buyer of used steam boiler for purpose of resale found after delivery that boiler

was of no value and installed another boiler at a cost less than that of boiler having specifications agreed to in contract for sale, seller is in no position to complain of cost of such boiler.

5. Sales $\S$ 442(6, 7)—Seller of defective used steam boiler is liable for cost of buyer's attempt to repair boiler.

Where used steam boiler, purchased for purpose of resale, was defective and of no value, seller is liable for damages arising from buyer's attempt to repair boiler, after being notified of defects therein.

6. Sales $\S$ 442(10)—Interest held not recoverable by buyer of defective used steam boiler from date of payment (Civ. Code, $\S$ 3287).

Where buyer of used steam boiler, for purpose of resale, made payment therefor and subsequently discovered boiler was of no value, interest was not recoverable on sum paid therefor in subsequent action against seller for damages arising out of transaction, since, under Civ. Code, $\S$ 3287, interest may be recovered only on damages certain or capable of being made certain by calculation.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by L. D. Armstrong, doing business under the name and style of the L. D. Armstrong Company, against the Lassen Lumber & Box Company. From a judgment for plaintiff and an order made after trial and entry of judgment allowing plaintiff to amend its second amended complaint, defendant appeals. Modified and affirmed.

Cushing & Cushing and Walter Slack, all of San Francisco, for appellant.

Horace M. Street, of San Francisco, for respondent.

BARTLETT, Justice pro tem. Defendant appeals from a judgment against it for \$2,113.29 and interest on \$800 of this amount from March 24, 1922, and from an order allowing plaintiff to amend its second amended complaint, made after trial of the action and entry of judgment.

The action arises out of a sale of a used 80 horse power return tubular boiler and certain fittings thereof, claimed to have been made to plaintiff by defendant on March 24, 1922. The material facts in the case are: During the times involved in the action and prior thereto, plaintiff was engaged in the business of buying and selling steam boilers at San Francisco, Cal., and defendant was operating a sawmill and box factory at Susanville, Cal. At the beginning of 1922 plaintiff ascertained that the Leal & Sons Lumber Company, who were conducting a sawmill business at Brownsville, Cal., desired to purchase an 80 horse power return tubular boiler, good for 140 pounds per square inch pressure and in good condition, and requested an employee, one S. W. Smith, to find and

secure such boiler. Smith at this time, having a memorandum in his office showing that defendant had some boilers for sale, visited Mr. R. D. Baker, president of defendant, and told him he was seeking an 80 horse power return tubular boiler good for 140 pounds' pressure; that he wanted the boiler for resale purposes; that he would pay cash; and that his purchaser would buy on time. Baker showed Smith a list that had on it two boilers for sale described on the list thus: "2-60"x16' boilers, 140-pound pressure, including breeching, stack, front, water column, each \$900." Baker told Smith other parties had an option for these boilers, and that, if this was not exercised, he would be glad to negotiate with Smith. After the option expired, further verbal negotiations were had between Smith and Baker, resulting in an offer from Baker to sell one of the boilers for \$800 cash. In these conversations no mention was made by Smith that the boiler was being purchased for either the L. D. Armstrong Company or the Leal & Sons Lumber Company. This fact was first brought to defendant's notice in a letter left at defendant's office of March 22, 1922, addressed to defendant, which stated:

"Pursuant to your offer for the sale of one boiler 60"x16', good for 140 lbs. working pressure, and including breeching, stack, front, grates, and fittings, all in good order, f. o. b. cars Susanville, Cal., I have this day delivered at your office in the Monadnock Building, San Francisco, Cal., a check for the agreed price of eight hundred (\$800.00) dollars, signed by L. D. Armstrong Co. together with a bill of sale to be signed by your company in favor of the said L. D. Armstrong Co.

"To avoid any further delay I wish you would make immediate shipment of the above as follows, viz.:

"From—L. D. Armstrong Co.

"To—Leal and Sons Lumber Co., Oroville, Cal.

"Via Southern Pacific Co.—as carload shipment. Please mail the B/L to me as soon as possible and oblige.

"Very truly yours, S. W. Smith."

The descriptive part of the bill of sale referred to in this letter is as follows:

"One butt-strap boiler 60" in diameter by 16' long for 140 pounds' working pressure, complete with breechings, stack, front, grates, and full complement of fittings.

"Boiler now located at our plant at Susanville, California. Above consideration includes delivery of boiler on cars in good condition at Susanville."

Inclosed with this letter was plaintiff's check, made payable to defendant's order in the sum of \$800. To this defendant replied with a letter addressed to S. W. Smith stating:

"We have your letter 22d, and, as arranged with you this morning, we have telegraphed our people at Susanville to make shipment of the boiler and parts quick as possible, shipping

same as from L. D. Armstrong Co. to Leal & Sons Lumber Co., Oroville, Cal., via Southern Pacific as a carload shipment, and on receipt of the bill of lading will forward same to you without delay.

"As explained and arranged, this boiler includes breeching, stack, half arch front, water column, and safety valve, but no grate bars or other fitting, and we have issued a bill of sale accordingly to L. D. Armstrong Co., and we wish to acknowledge receipt also of their check for \$800 in payment of same f. o. b. cars Susanville."

Inclosed with the same was a bill of sale reading as follows:

"For value received, we hereby sell, assign, and transfer to the L. D. Armstrong Co. the following described personal property viz.:

"One butt-strap boiler 60" in diameter by 16' long for 140 pounds' working pressure with breeching, stack, half arch front, and safety valve.

"This equipment is now located at our plant at Susanville, California. Above consideration includes delivery on car in good condition at Susanville.

"In witness whereof, we have hereunto set our hand this 24th day of March, A. D. 1922.

"[Corporate Seal.]

"Lassen Lumber & Box Co.,

"R. D. Baker, President.

"Witness: L. Johnson."

Defendant then loaded the boiler on a freight car at Susanville and caused the same to be shipped to Leal & Sons Lumber Company consigned to Oroville, Cal. There being no railroad from Oroville to Brownsville, Leal & Sons Lumber Company had the same diverted from Oroville to Honcut, and from there it was hauled to their plant at Brownsville with trucks, a distance of some 20 miles. There the Leal & Sons Lumber Company examined the boiler for the first time, and, finding a number of defects, notified plaintiff of the same and demanded another boiler from plaintiff. Plaintiff sent a boiler maker and helper, a boiler inspector of one of the companies that insure boilers, and one of the members of the State Industrial Accident Commission to inspect the boiler. The boiler workers were attempting to repair the boiler when the inspectors came and stopped work because of the defects found; there being what is termed a bag in the boiler, a lamination in one of its plates, some burnt-off rivets, and injured left-hand sheet. It is not claimed that the defect styled a "lamination" was known to the defendant prior to the sale of the boiler, but it is urged that the other defects, the bag in its bottom, twelve burnt-off rivets at its rear seam, and supporting lugs driven into its left-hand sheet, were known to defendant prior to its making the sale, and justified the refusal of the Leal & Sons Lumber Company to accept the boiler shipped it by defendant. Plaintiff expended \$180.11 in attempting to repair the boiler sold by defendant. On dis-

covering that further efforts in that line would be futile, it searched available markets for a suitable return tubular boiler to deliver under its contract, but without success. It then induced Leal & Sons Lumber Company to accept a boiler of different type, styled a water tube boiler. This necessitated the erection of the boiler by plaintiff; such work requiring experienced hands, which is not necessary for installing a return tubular boiler. The cost of the water tube boiler and its erection was \$1,933.18. The cheapest secondhand return tubular boiler plaintiff could discover with which to supply the Leal & Sons Lumber Company, after it declined that shipped them by defendant, was at a price of \$2,100. The evidence shows that a new return tubular boiler of the class sold by defendant would have cost, at San Francisco, in April, 1922, from \$2,300 to \$2,400. The price which Leal & Sons Lumber Company agreed to pay plaintiff for the boiler procured from defendant was \$1,575. The trial court found that the boiler furnished by defendant was of no value, fixed the damages at \$2,113.29, being \$1,933.18 costs of the water tube boiler and its erection and \$180.11 for plaintiff's expense in endeavoring to repair defendant's boiler at Brownsville. The judgment also awarded plaintiff interest at 7 per cent. per annum on \$800 from March 24, 1922, and costs, and ordered and adjudged that upon payment of the judgment defendant might retake his boiler.

During the trial, plaintiff asked leave to amend his second amended complaint to conform to the evidence, and permission to so amend was granted, but through neglect and inadvertence the formal amendment was not engrossed and made part of the record in the case until after this appeal was taken. This was done under an order of the trial court on motion of plaintiff and after a hearing thereon, and defendant has appealed from this order, which appeal has been heard with the appeal from the judgment.

The amendment allowed to plaintiff's second amended complaint and filed after the judgment was appealed from sets forth the facts concerning the installation of the used water tube boiler for the Leal & Sons Lumber Company in place of the defendant's return tubular boiler, the reasons for this action, the costs of doing the same, and is in conformity with the evidence admitted at the trial.

Appellant does not question the right of amending pleadings to conform to the proofs in proper cases but contends that the only time this can be done is prior to judgment. The precise point presented by this case does not appear to have been heretofore passed upon by the appellate courts of this state. A liberal allowance of amendments by trial courts, in order that pleadings should conform to the proofs, has been generally sus-

tained on appeals from such orders. In *Koch v. Wilcoxon*, 30 Cal. App. 517, 158 P. 1048, it is said: "An amendment to conform to the proof may always be made, provided the cause of action is not thereby changed." *Hancock v. Board of Education*, 140 Cal. 554, 74 P. 44, *Henry v. Phillips*, 163 Cal. 135, 124 P. 837, Ann. Cas. 1914A, 39, and *Wardrobe v. Miller*, 53 Cal. App. 370, 200 P. 77, are to the same effect. The trial court in this case has done on motion an act similar to that which the Supreme Court directed the trial court to do in the case of *Alameda County v. Crocker*, 125 Cal. 101, 57 P. 766, where the court below was ordered to amend the complaint as of a date prior to the judgment, by inserting the true names of defendants sued under fictitious names. The decision of the United States Supreme Court in the case of *Norton v. Larney*, 266 U. S. 511, 45 S. Ct. 145, 69 L. Ed. 413, is an interesting one regarding allowing of necessary amendments in trial courts, where it is said:

"Where the amendment must necessarily be allowed by the trial court, it would be mere ceremony to reverse the decree and remit the purely formal making of the amendment to the lower court. We shall therefore consider the bill as amended to conform to the facts of record."

[1] Under all the circumstances, if any error was committed by the trial court in allowing the filing of the amendment in question after appeal, so as to make the pleadings conform to the proof, it must be held an error that has not resulted in a miscarriage of justice after an examination of the entire case and the evidence.

The second amended complaint, on which the action was tried, is in two counts; the first being based on deceit, and the second on breach of warranty. The trial court found that plaintiff bought the defendant's boiler in reliance on defendant's representation that the boiler was in good condition and good for 140 pounds' pressure; that plaintiff entered into his contract with Leal & Sons Lumber Company in reliance on defendant's representations; that on the arrival of the boiler at Brownsville plaintiff in good faith made an effort to repair the boiler with competent workmen; that the boiler was not in good condition; that defendant knew this when it sold the boiler to plaintiff; and that the boiler was of no value either when placed on the cars at Susanville or at any time thereafter. These findings have ample support in the evidence introduced, and the only substantial question to determine is whether or not the trial court has correctly determined the amount of damage recoverable by plaintiff. At the inception of the transaction, defendant was informed that the boiler was being purchased for purposes of resale and that the boiler required was one of 80 horse

power in good condition and good for 140 pounds' working pressure.

[2] The description in its bill of sale of March 24, 1922, describing the property sold as "one butt-strap boiler 60" in diameter by 16' long for 140 pounds' working pressure, with breeching, stock, half arch front, and safety valve," and stating that this equipment was located at defendant's plant at Susanville, and that the consideration received included delivery on car in good condition at Susanville, cannot be construed as other than a warranty on defendant's part that the boiler sold was in good condition and capable of being used with safety under a steam pressure of 140 pounds.

That the boiler was bagged and a number of its rivets burnt out when it was placed on the car at Susanville is shown by the evidence, and that because of these defects it was not at that time good for 140 pounds' pressure cannot be questioned. That the boiler was bagged and had a defective rear seam had been called to the attention of defendant in a report of the Hartford Steam Boiler Inspection Company on an inspection made on the 16th and 17th of April, 1920.

[3] Defendant, when it represented the boiler to be in good condition, made a positive assertion not warranted by its information of that which was not true, even though it may have believed it to be true. Such statement, if made by defendant with intent to induce plaintiff to enter into the contract of purchase, would be an actual fraud on plaintiff, and would justify a recovery of damages for such fraud. Subdivision 2, § 1572, Civ. Code.

[4, 5] Summarizing what has been said regarding the issues, it may be stated in general language that in its first count the respondent pleaded a cause of action based on fraudulent representations, and, affirming the contract, asked for damages. In its second count it pleaded a breach of warranty. The trial court made findings in favor of the plaintiff on the allegations contained in both counts. The damages for a breach of a warranty of quality of personal property is stated in section 3313 of the Civil Code to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time. Defendant's boiler was of no value either at Susanville or when it arrived at Brownsville. Plaintiff, in reliance on defendant's statements as to quality and its warranty of qual-

ity, had obligated itself to furnish Leal & Sons Lumber Company, with an 80 horse power tubular boiler, designed and built for 140 pounds' working pressure, and its inability to furnish this boiler made it liable for damages to Leal & Sons Lumber Company when it became apparent that defendant's boiler was valueless. A search of available markets disclosed that a return 80 horse power tubular boiler of 140 pounds' pressure capacity could not be secured for less than \$2,100. In an endeavor to mitigate the damages consequent on the boiler being found defective, plaintiff attempted to repair it, expending \$180.11 therefor. When plaintiff learned that, after all possible repairs were made, the state inspector would not allow it to be operated under 140 pounds' pressure, it induced Leal & Sons Lumber Company to accept a different type of boiler for the purchase and installation of which plaintiff expended the sum of \$1,933.18. Defendant is not in a position to complain of the cost of the boiler which was installed, as it cost less than would have been the cost of a boiler having the specifications agreed to by the appellant. Neither should defendant be freed from liability for the cost of the attempt to repair the boiler sold by it. The amount of damages awarded by the judgment, \$2,113.39, was not in excess of the amount to which the respondent was entitled.

[6] It cannot be held that defendant is liable for interest on the \$800 paid it for the boiler sold plaintiff. Under section 3287 of the Civil Code every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. The amount of plaintiff's damage here could only be made certain on a determination of the amount of the same from evidence introduced on the trial of an action therefor, and this is the only relief sought by plaintiff in this action. That interest is not recoverable in cases such as this until the damages are liquidated is clearly held in the case of *Krasilnikoff v. Dundon*, 8 Cal. App. 406, 97 P. 172.

The allowance in the judgment of interest on the sum of \$800 from March 24, 1922, is stricken out. As so modified, the judgment is affirmed, each party to pay its costs on this appeal.

We concur: KOFORD, P. J.; STURTEVANT, J.

83 Cal. App. 745

In re STEVENS. (Civ. 4733.)

District Court of Appeal, Second District, Division 2. California. June 13, 1927.

1. **Attorney and client** ☞61—Specific designation of issues on reference, in proceedings for readmission to bar, limited powers of referees to make findings.

Where the court specifically designated the issues on which referees, in proceedings for readmission to the bar, were to make findings, the powers of the referees to make findings were limited thereby, and finding as to matters not specifically designated was no finding of fact.

2. **Attorney and client** ☞61—Where but one of three referees in proceedings for readmission to bar heard petitioner's testimony, court will disregard rule that he who hears and observes witness is best judge of weight of testimony.

Where only one of three referees, in proceedings for readmission to the bar, heard the petitioner's testimony, court will review record on its face untrammelled by the rule that he who hears a witness testify and observes his demeanor while doing so is the best judge of the effect to be accorded his testimony.

3. **Attorney and client** ☞61—Reference in proceeding for readmission to bar having been special with leave to except to findings, preponderance of evidence held controlling in reviewing findings.

Where the reference in proceedings for readmission to the bar after disbarment was special, with leave to except to the findings which should be made, the rule that on appeal a finding must be upheld, if there is substantial conflict in evidence, held inapplicable, and the preponderance of the evidence determinative of whether findings were supported by evidence.

4. **Attorney and client** ☞61—Petitioner held to possess moral qualifications for reinstatement after disbarment.

In proceedings for reinstatement to the bar after disbarment, evidence held to show that petitioner was not evasive in his testimony; that he was not unduly defensive in his attitude; that his denials did not reflect on his moral character; that he did not offensively criticize the courts or its officers, or challenge their integrity; that the impression left on his memory by the occurrences preceding disbarment was not censurable; that his forgetfulness of the occurrences was not censurable; and that petitioner possessed moral qualifications for reinstatement.

In the matter of the application of Walter H. Stevens for readmission to the bar after disbarment. Petitioner found possessed of moral qualifications and permitted to make proof of mental qualifications.

James D. Randles, of Los Angeles, for petitioner.

Oscar Lawler, of Los Angeles, for respondent Los Angeles Bar Association.

WORKS, P. J. This matter, pursuant to procedure laid down by us in the opinion in

Re Cate, 247 P. 231, was sent to referees, with directions to take evidence and to present findings of fact based thereon. The referees have completed their labors and have returned their findings, together with a record of the evidence submitted to them. The matter is now before us upon exceptions to some of the findings, and for a determination as to what step shall next be taken leading to a final disposition of the proceeding on the merits.

[1] The referees have stated the following as one of their findings:

"Petitioner's present state of mind respecting the facts which led up to his disbarment is one of evasiveness, self-defense, denial of and reluctance to admit material facts, a criticism of, and a challenge to the integrity of the courts of this state, and of its officers. It is also a fact that petitioner's lamentable experience has not made a lasting impression on his memory, and the record of his testimony shows much forgetfulness on his part of material facts in connection with which he was an active participant, and which led up to his disbarment."

In effect, the matter thus set forth is not a finding of fact, for it is without the terms of the reference. By the order of the court defining their powers and prescribing their duties the referees were directed to report the evidence taken by them, together with their "findings upon each and every one of these issues, except that a finding may be omitted upon the third if the finding upon the second is in the negative: (1) Whether or not the applicant is possessed of such moral qualifications as to entitle him to a reinstatement. (2) Whether or not there is such doubt as to the mental qualifications of the applicant that an examination is necessary to test them. (3) The character and extent of the examination to which the applicant should be subjected." In re Cate, supra. The specific designation of the issues upon which the referees were to find operated as a limitation upon their powers in that regard. Notwithstanding this conclusion, the matter above quoted from their report will be referred to hereafter as finding IV, as the referees so term it.

[2] Upon one of the issues submitted to them the referees found:

"V. Petitioner is not possessed of such moral qualifications as to entitle him to be reinstated as an attorney and counselor at law with the right to practice before any of the courts of the state of California."

This finding henceforth will be designated by the number thus assigned to it.

Exception is taken to finding V on the ground that it is not supported by the evidence. In disposing of this contention, we shall consider the matters set out in finding IV, treating them as arguments or reasons intended by the referees to uphold finding V.

Such, doubtless, was the purpose of the referees in framing finding IV. That finding opens with a reference to the facts which led up to petitioner's disbarment. Those facts need not be stated here, as they are set forth fully in the opinion in *Re Stevens*, 59 Cal. App. 251, 210 P. 442. Petitioner was a witness before the referees, and he was cross-examined minutely concerning the delinquencies which had caused his downfall; the main purpose of the cross-examination being to ascertain the present attitude of petitioner toward those occurrences of the past. It is evident from finding IV that the referees concluded that the purpose was accomplished, and to the detriment of the petitioner. We have read carefully the testimony of petitioner with a view to a consideration of the conclusions set forth in finding IV for the purpose of passing upon the sufficiency of the evidence to support finding V. In solving the problem thus presented, we must take the record upon its face untrammelled by the rule that he who hears a witness testify and who observes his demeanor while doing so is the best judge as to the effect to be accorded his testimony. One only of the three referees, all of whom have signed the referees' report, heard petitioner's testimony. The majority of the referees, then, made the findings from the typewritten page. We therefore follow the law when we scan the findings from the same standpoint.

[3] Nor are we, in considering the sufficiency of the evidence to support the findings, concerned with the rule that on an appeal a finding must be upheld, if there is a substantial conflict in the evidence directed to the issue found upon. The reference having been special, with leave to except to the findings made (*In re Cate*, supra), we are to ascertain where lies the preponderance of the evidence and to decide accordingly (*Cappe v. Brizzolara*, 19 Cal. 607; *Clark v. Millsap*, 197 Cal. 765, 242 P. 918).

[4] Let us first consider that part of finding IV which relates to petitioner's evasiveness, his inclination toward self-defense, and his denial of and reluctance to admit material facts bearing upon the cause of his disbarment, while he was a witness before the referee who heard his testimony. Petitioner was a very poor witness. It was difficult for him to answer questions directly. His answers were often unresponsive to questions, and the cross-examiner, because of petitioner's peculiar method of testifying, was compelled, often, to retrace ground that had already been gone over, in order to get proper responses. All this does not mean that petitioner was evasive or that he was reluctant to admit material facts. His testimony is consistent with the idea that his is the turn of mind which is frequently met with on the witness stand. A witness may be thoroughly honest without the ability clearly

to tell his story in response to questions. He may be possessed of a fervent desire to unbosom himself, but may not know how to do it. As we read the record of petitioner's testimony, he appears to be one of these unfortunates.

As the outcome of this proceeding is of great moment to petitioner, as it and other proceedings like it concern vitally the public welfare, we find it necessary to quote somewhat fully from petitioner's testimony, in order properly to present on paper what we see in it.

In our opinion in a former proceeding in which petitioner sought to be readmitted to the bar (*In re Stevens*, supra), we said, after reciting the principal part of the facts which caused his disbarment:

"There is yet another chapter in the story of petitioner's misdeeds. Not content with his piratical raid upon the purse of the individual through whose fears he had procured the payment of the sum of \$2,500, he reported to his clients that the sum paid to him was \$1,000. The truth as to this matter was not ascertained by them until long afterward."

An inquiry into this matter was one of the prominent features of petitioner's cross-examination before the referee. The record shows:

"Q. Do you recall also in the course of these proceedings it developed that you had received \$2,500? A. I believe that is what Mr. M. gave.

"Q. Don't you remember also that you turned over \$1,000 of that money to the mother of the Levy woman? A. I think they were both there.

"Q. Well, you turned it over to both of them and you retained the balance of \$1,500? A. There was a certain amount paid at one time.

"Q. And it developed, proofs developed, and it was a fact that you never did report to the girls that you had received the \$2,500 until after that developed in the trial [of a man who was indicted by the grand jury because of alleged unnatural practices with the women referred to in our former opinion as the 'Jonquil girls,' which trial will be referred to hereafter as the B— trial]? A. No; I don't believe you will find that the records bear that out."

The cross-examiner then read to petitioner the matter above quoted from our former opinion, and the record proceeds:

"A. That was contradicted by the testimony in the court.

"Q. Well, I don't remember exactly as to the testimony of those persons themselves—you do remember that you were confronted yourself with the checks bearing your indorsement? A. Oh, yes; I deposited the money in the bank—everything was—everything was in check form.
* * *

"Q. Did it not occur to you in the course of your pursuits of these matters that it was a mere scheme on the part of these women to extort money from these men? A. No; that never entered my mind—it never entered my mind at all—I have the letters—special delivery letters that were sent to my office demanding that these actions be dismissed.

"Q. Who demanded that they be dismissed? A. Marie Levy—I have her mother's letter.

"Q. That was no doubt after the trial of the B— case when it developed, at least the testimony developed, that you had received \$2,500 from Mr. M. and turned over \$1,000 to the Levy woman? A. I don't think that had anything to do with it—they were friendly—I meet them now—the daughter is married and living in Fresno—if they thought I was a robber, they would not meet me and appear so friendly, and they have a dozen times.

"Q. After the B— trial—after the testimony you will recall that Mrs. Lacy and her daughter did testify that they had gotten only \$1,000. A. They testified they did get something; yes.

"Q. And you remember at that time they created a good deal of excitement as far as they were concerned? A. I don't remember it did.

"Q. Don't you remember that you gave them your note for \$500 of the money? A. What date was that?

"Q. This was anywhere in October. A. The trial was in September, 1913.

"Q. And after the trial was had you gave them your note for \$500? A. It was not given them for that purpose.

"Q. What other reasons did you have? A. There was some—there is another—I want to explain the note now—it is an absolute surprise to me.

"Q. * * * You do recall as I stated that considerable excitement was created through the development or testimony of Mrs. Lacy and her daughter, Miss Levy, that they had received \$1,000 from you—and the testimony that developed in the course of the trial by the production of the checks in the course of your testimony that you had received \$2,500? Was it not a fact that the mother paid for the trial of these other cases that grew out of the first case—is that not the testimony? A. I accepted the general facts, I think.

"Q. I think she paid for the other cases brought here out of the first trial? A. I don't know whether she did or not—I believe the mother knew all the while what the money was—I believe she testified the mother received the money at one time and the girl at another.

"Q. Well, you have no present recollections why you gave her your note after the B— case was concluded? A. No; I do not think the excitement was at the trial in the federal court—was not that testified to in the federal court?

"Q. Yes; it was testified to there, too. A. You see I was not in the courtroom at the B— trial.

"Q. You remember it was something that attracted some newspaper attention—Mrs. Lacy and her daughter testified that they had received \$1,000, suppose— A. Now, I tell you, * * * I did not take any money that was wrong.

"Q. I want to get the fact correctly stated in the record—you recall that Mrs. Lacy and her daughter testified that they had received from you on account of moneys collected from Mr. M.— A. I won't say that that was the amount they got, but the amount is in the evidence.

"Q. You gave them an amount very much less than \$2,500? A. Yes; they got less than that—we got attorney's fees—I don't think that was attorney's fees; it was other work we had been doing for them.

"Q. Then after the case was over, you recall that Mrs. Lacy accosted you in the hall of the

Hall of Records, if I remember correctly, and there charged that you had only told her you had received \$1,000, and demanded that you make restitution in reference to the cases that had not been reported; and as a result of that you thereafter gave to her this note dated October 14, 1914? A. No; I don't—I don't remember giving her the note.

"Q. It is a fact, Mr. Stevens, that these matters in which you were involved were not sufficiently impressive— A. They were impressive—but I was—but if a person takes them with him, he gets off all right—a man is charged with fraud—those girls were turned absolutely against him—but in the other suit they were not—I was up in the air—I had never been on trial before and I had lived a straight, upright life—there is not a man in this city who has a straighter record than I have."

These extracts from the record appear to show the portions of the testimony of petitioner which will most nearly justify the part of finding IV which is now under scrutiny, and which will show, as well, the peculiar manner of petitioner as a witness, although there is much more in the record, at different points, to the latter purpose.

It is said in finding IV that the present state of mind of petitioner respecting the facts which led to his disbarment is one of "criticism of, and a challenge to, the integrity of the courts of this state, and of its officers." We shall state such portions of the testimony of petitioner—and there is no other evidence touching the subject—as seem to bear upon the conclusion thus expressed. At the opening of the cross-examination of petitioner he was asked if he questioned the statement of facts contained in our former opinion. He responded:

"I have never questioned the decision of any of the justices—I have not been in a frame of mind to question their decisions."

This last word probably was put in the plural for the reason that division 1 of this court also once denied an application for petitioner's readmission to the bar. In re Stevens, 63 Cal. App. 682, 219 P. 1014. During petitioner's cross-examination the following occurred:

"Q. You did, of course, learn through your knowledge of the trial of the B— case, and the notoriety which these cases received that these women were common prostitutes, did you not? A. I would not say for certain—it is hard thing to say—they were both married, I am glad to say; they are living the way they are—they are getting along very fine.

"Q. Well, now, after learning, notwithstanding your attention being called to the facts through the testimony or records of the B— case you still continued this litigation on the records and did not dismiss it—dismiss the suits until you received orders from them to do so some months afterwards? A. I told you * * * I have always believed that transcript of the grand jury in writing—the grand jury believed it, then why should not I? Their testimony was taken before the grand jury—those

girls told me—what other reason had I to believe such things? In the first place, it was a very unfortunate circumstance that I should be singled out by a judge of the superior court for such a thing as that—and brought around as it was, it seemed something wrong."

The record of the cross-examination also shows this:

"Q. Now you realized, did you not, that upon its very face, this proceeding bore indications or at least would justify the inference upon the part of any one outside, at least, that it savored very much of blackmail? A. No, sir; that is the last thing I had in mind; if I had, I never would have touched it. I tell you the first thing that came up when that thing came up of blackmail, it hurt me very much for the simple reason just to think that a rich man could get away with anything, and then they would charge a person with going after him with blackmail. That is the way it hit me then. If you didn't have money, the case would have been tried, and nothing would be said, but, as long as a man has got money, it is blackmail."

The referees have said in finding IV that:

"Petitioner's lamentable experience has not made a lasting impression on his memory, and the record of his testimony shows much forgetfulness on his part of material facts in connection with which he was an active participant, and which led up to his disbarment."

It is true that petitioner had forgotten many of the specific facts which led to his disbarment, but we think that circumstance is neither strange nor reprehensible. Naturally, he might have forgotten many of the details of his experience because of the mere lapse of time. The lamentable occurrences of the past happened 13 years before his appearance at the hearings which the referees conducted, and he continually refers to that fact in his examination as a reason for his inability to answer some of the questions put to him. Then, too, it is quite likely that petitioner must have endeavored to lay aside a recollection of events which, if kept in mind, must have been a continual nightmare to him. The human thinking mechanism has the switches and controls wherewith to throw off the recollection of those troubles with which, according to Job, we are all full. The human being who does not employ them is no philosopher and will be carried to an early grave because of his wisdom.

The record shows, beyond a doubt, that petitioner has kept in mind the main features of his unfortunate experience. His present state of mind, which, after all, is the thing to be ascertained here, may be exhibited by extracts from his testimony. On his direct examination he was asked: "Are you a member of any fraternities?" To this interrogation he made an answer which is characteristically unresponsive in part:

"Yes, of the Odd Fellows and Masons. I took one degree in the Masonic lodge when this mat-

ter came up, and I refused to take any more until my name was cleared—I was not requested by any one—I told them I did not care to go any further until I could clear my name."

On his cross-examination this occurred:

"Q. Do you now regard these suits [figuring in his disbarment proceedings] and the activities in connection therewith in the light of ordinary damage suits? A. No; if I was at the present time made guardian ad litem in a case as I was then—upon the ground that I did not want to handle that kind of case at all—nevertheless, they made me guardian—a man may take a young girl and treat her as he sees fit and it is dangerous for a young attorney to attempt by civil action to gain anything—the criminal courts are the only courts for that kind of work."

The cross-examination also shows this:

"Q. * * * Isn't it a fact that you know and realize that whenever a suit is brought by a woman of loose morals against a man of standing and character and of means, for any alleged improper relations, that the natural and ordinary inference is that the suit is one that savors of blackmail? A. Why, yes; I will say that to some extent it does, but it didn't enter my mind at that time for one instant.

"Q. Now, realizing that that was the natural inference— A. I wouldn't say that I knew it then; I will say I do now; yes."

This also appears in the cross-examination:

"Q. * * * Now at the present time does it not seem to you as a lawyer that to file suits on behalf of women who were of * * * loose character * * * against any man, and particularly against men of apparent means and standing, justified the application thereto of the term blackmail? A. Well, I didn't think that. It hurt me very much at that time to have it brought out that way, but I understood from different things that that was the cause it was brought out for; that people thought they were trying to get money by blackmail means. If I had thought that, then they would never have gotten to my office. If the girls had asked me to bring suit, I never would have brought it.

"Q. That is the best answer you can give to the question? A. You mean at the present time?

"Q. Yes. A. No; at the present time I wouldn't take one of those cases for any amount of money. If I was practicing law now, they wouldn't get that sort of stuff over with me. I wouldn't bring an action for any one on a charge of that kind until, by Jove, I was ready and willing and able to know that the facts were there and I could convict if there was ever a trial."

This, also, the cross-examination shows:

"Q. Well, what is your theory now? A. Well, I wouldn't take a case of this kind.

"Q. I didn't ask you that. What is your theory now, your legal theory as to how any such action as the actions like these could be maintained? A. I wouldn't attempt to maintain them. If I made an investigation and found out that they were loose women and that they were not chaste women prior to the time of this thing—I wouldn't bring it any-

way—but if the investigation was brought in in that way, I absolutely would throw it down.”

Traversing the conclusions stated in finding IV, as a support for finding V, we think petitioner, in his testimony, was not evasive; that he was not unduly self-defensive in his attitude; that his denials, few of which we have found it necessary to set out above, were not such as to reflect upon his moral character; that he did not offensively criticize or challenge the integrity of the courts or of their officers; that the impression left upon his memory by the occurrences which preceded his disbarment is not of such a character as to reflect upon his morals; and that his forgetfulness of facts included in those occurrences is neither unnatural nor censurable.

We turn now to other evidence bearing upon the issue passed upon in finding V. Since his disbarment petitioner has been in the employ, continuously, of the Los Angeles Railway Company. He testified:

“I first went to work on the cars as a conductor, and then from the cars I was made inspector, promoted to inspector, and then from inspector I was promoted to supervisor, and from supervisor I went into the manager of transportation’s office, was assisting him in some respects, and I have been there ever since.”

A part of petitioner’s duties as an assistant to the manager of transportation was stated by petitioner thus:

“Mr. Anderson, the manager of transportation, would send lots of the boys, trainmen I would say, who would come to Mr. Anderson quite frequently and ask him for information concerning one thing or another, employment or road trouble, or maybe family trouble, not legally, nothing of a legal nature, and Mr. Anderson refers them to my office, and, if it was of a legal nature, I would tell them they would have to get some attorney, and, if not, the other work I could attend to in the company, employment work or anything of that sort.”

The extent to which petitioner is trusted by his superior officers, in the performance of the duties above mentioned, and others, is shown by testimony contained in the record. George Baker Anderson, the manager of transportation, testified:

“I am very familiar with his life; extremely familiar with his life during the hours of daylight, practically all the hours of daylight. I see him every day intimately. * * * Mr. Stevens is occupying a confidential position of some importance in my office, my department of the Los Angeles Railway. * * * He has charge of research work and investigations, and also looks after the requirements of many of the men in the employ of the company when they are in trouble and need advice, consultation, and consideration. * * * I receive every month from Mr. Stevens a report of the employees who have been in trouble of various kinds and have needed to have help of that nature. * * * They are conductors and motormen in my department. I have charge of the conductors and motormen and those who operate the system, operating

the cars. Some of them are supervisors and some in some other departments, and they are all men of that type. * * * Sometimes a man would have his wages garnisheed. He would have a suit against him for rent maybe or trouble in relation to his household affairs or things of that kind, a variety of things of that kind. Sometimes these men would come to me and I would refer them to Mr. Stevens and it is generally understood in our department that Mr. Stevens was in a position where he could look things up and could tell them how to proceed, and frequently they would have to leave his office and go to some other legal authority. * * * His classification is that of an assistant to me and he has several classes of duties. One is to gather information of value to the community at large and to the railway in regard to transportation and means of transportation, property locations, manufacturers and industries, and the number of people employed, and the needs of the various manufacturers for transportation. Another duty is this work to * * * which I have just referred, giving advice and conferring with people who are in trouble. * * *

“Q. What time would you say that he spent in this matter that you have referred to, giving advice to employees? * * * A. I should just judge offhand without being able to state positively, I suppose that in the course of a month the suits would average—and I have in mind the last few reports that I have seen there—an average of 40 or 50 or 60 in the course of a month; sometimes 3 or 4 or 5 in a day.

“Q. Does he on those reports give you a brief statement? A. Yes, sir; the names of the people he has seen and the cause of it, the cause of their troubles—what the trouble is.

“Q. And then a report as to what he has done in connection with it? A. Not a full report. * * * I ceased to ask for that some time since, because I found out generally that everything had gone so well with him, and the employees were so satisfied with the treatment that they had had that I figured I would leave him alone when he fulfilled his duties just the same as the heads of other departments. * * *

“Q. Was this position which he occupies now considered in the line of a promotion from the services he was performing before? A. Oh, yes, indeed. I consider it a very important position, and I put him there because I learned to trust him, his discretion and his honesty in dealing with men. * * * As a matter of fact, * * * he is the only man I know of around the office that is in any way available that I would have on the job.”

Mr. Anderson also testified to the morality and good citizenship of petitioner, and other witnesses testified to the same effect and to his fidelity to duty. Testimony was also heard by the referee, showing the satisfactory conditions which exist in the home of petitioner, who is married and has a daughter of the age of 19 years. No evidence was offered for the purpose of showing that petitioner is deficient in morals.

We find that the great preponderance of the evidence is against finding V of the referees, and that the finding should not be adopted as the finding of the court.

Finding VI of the referees reads:

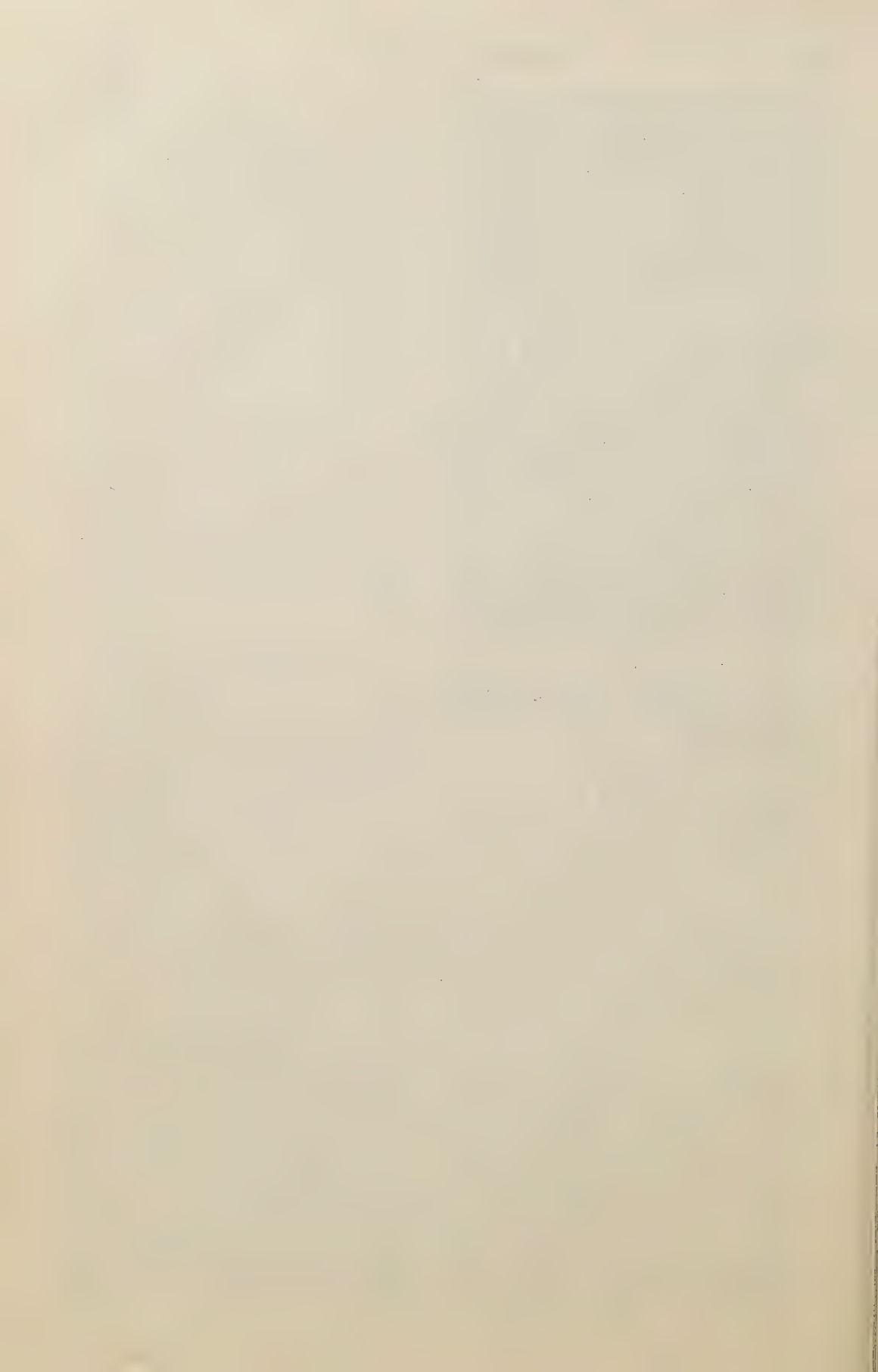
"If the applicant did possess the necessary moral qualifications to entitle him to be reinstated as an attorney and counselor at law, with the right to practice before all courts of the state of California, such doubt exists as to his mental qualifications that an examination will be necessary to test his mental qualifications. The extent and character of such examination should be the same to which other applicants for admission to practice law in the state of California, after examination, are subjected."

Without a discussion of the evidence, we think this finding is amply supported by it, and should be adopted as the finding of the court.

We find that petitioner is possessed of the moral qualifications necessary to entitle him to readmission to the bar and the finding of the referees to the contrary is set aside. The finding of the referees as to mental qualifications, and as to the necessity for an examination to test them, is adopted as the finding of the court, petitioner to submit himself for examination at the next session of the state board of bar examiners in Los Angeles, or at the session in that city early in 1928, as he may elect. The time for such examination may be further extended by the order of the court upon good cause shown therefor.

I concur: CRAIG, J.

Justice THOMPSON, deeming himself disqualified, does not participate in the foregoing decision.



201 Cal. 360

Ex parte SICHOFSKY. (Cr. 2982.)

Supreme Court of California. June 10, 1927.

1. Criminal law — 1210—Statutes providing for consecutive sentences held to apply only to offenses cognizable under state law (Pen. Code, §§ 105, 669).

Pen. Code, §§ 105, 669, providing for consecutive sentences in case of escape and where person is convicted of two or more crimes before sentence has been pronounced for either, held to apply only to offenses cognizable and punishable as crimes or misdemeanors under laws of California.

2. Criminal law — 1216(1)—Term of imprisonment, imposed by state court on one convicted and sentenced in federal court, commenced only on actual delivery of defendant to, and incarceration in, state prison (Pen. Code, §§ 105, 489, 669, 670, 1168).

Where defendant, sentenced in federal court, was, on suspension of sentence and while subject to federal court's jurisdiction, convicted in state court without being delivered into custody of sheriff, sentences for violation of state and federal laws were not concurrent, under Pen. Code, §§ 105, 669, 670, and term of imprisonment under sentence of state court commenced to run only on actual delivery of defendant to, and incarceration in, state prison, after completing federal prison term, especially where length of sentence under state court judgment was fixed under indeterminate sentence law (sections 489, 1168).

3. Evidence — 83(1)—State board of prison directors is presumed to regularly perform official duty in fixing indeterminate sentences (Pen. Code, § 1168; Code Civ. Proc. § 1963, subd. 15).

It must be presumed that state board of prison directors, in fixing sentence under indeterminate sentence law (Pen. Code, § 1168), regularly performs its official duty, in view of Code Civ. Proc. § 1963, subd. 15.

Preston, J., dissenting in part.

In Bank.

Application by Albert Sichofsky for writ of habeas corpus, prayed to be directed to the Warden of the Folsom State Prison, to secure petitioner's release from custody on the ground of unlawful imprisonment. Writ discharged, and petitioner remanded.

J. H. Sapiro and E. V. McKenzie, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

RICHARDS, J. The petitioner herein applied for a writ of habeas corpus, alleging that he was unlawfully imprisoned, confined, and restrained of his liberty by the warden of Folsom State Prison. The facts out of which such alleged illegal confinement and detention arose are the following:

In the early part of the year 1921 the peti-

tioner was indicted by a federal grand jury in and for the Southern district of California upon the charge of having unlawfully entered the United States from Mexico without a passport, which offense was made a crime under the federal laws and regulations then in force. He pleaded guilty to such charge before the federal court having jurisdiction of said offense, and was, on March 22, 1921, by said court, sentenced to a term of three years' imprisonment in the federal penitentiary at McNeil's Island, Wash. Shortly thereafter and while the petitioner was in the custody of the United States marshal under commitment upon such sentence, the district attorney of Los Angeles county, Cal., represented to the aforesaid federal court that said petitioner was under indictment issued out of the superior court of the state of California in and for the county of Los Angeles upon charges of grand larceny and embezzlement, and requested his presence in said court for the purpose of proceedings upon said indictment. Thereupon the federal court made an order staying the execution of its said sentence for the period of 15 days, and directing that "the United States marshal take the above-named defendant to the hall of justice, to the courtroom thereof, in the city of Los Angeles, county of Los Angeles, state of California, at such times as his presence in the proceedings there pending against him under said indictment in the superior court of the state of California in and for the county of Los Angeles, shall be required"; and further directing that the marshal "keep the said defendant in his custody for the purposes herein stated." The petitioner was thereupon taken to said superior court, where he was put upon trial before a jury under said indictment for the crimes set forth therein and was upon his said trial found guilty upon two separate counts of grand larceny, and was on or about April 21, 1921, sentenced by said court to be punished by imprisonment in the state prison for the term prescribed by law for each of said crimes. Upon said judgment and sentence a commitment was issued by said court to the sheriff of said county in due form.

The petitioner, however, was not delivered into the custody of said sheriff pursuant to said commitment, for the reason that his custody had remained with the United States marshal, who, after his aforesaid conviction and sentence in the state court, returned the petitioner to the federal court for the execution of the sentence therein imposed upon him, whereupon the petitioner made application for a writ of habeas corpus to said federal court, urging that he was entitled to release upon several grounds among which was his contention that the federal court and its officials had lost jurisdiction over the petitioner by virtue of its order permitting the

petitioner, while in custody of the United States marshal, to be put upon trial in the state court for the crime of grand larceny. The federal court refused to sustain said contention, holding that it had at all of said times retained jurisdiction over the petitioner; and it thereupon discharged said writ and remanded the petitioner to the custody of the United States marshal to abide the judgment of the court for the remainder of his term in the federal penitentiary. The petitioner was thereupon taken to McNeil's Island, Wash., where he was confined under his said sentence imposed by said court, and from which prison he was discharged on August 9, 1923, having served his said term. Thereupon, and immediately upon his discharge, he was rearrested by the officials of the federal government upon the charge of being unlawfully within the United States and subject to deportation. While out upon bail upon this latter charge, the petitioner was taken into custody for the first time by the sheriff of the county of Los Angeles, acting under the commitment which had been issued to him by the superior court, and was immediately thereafter taken and transferred to the state prison at San Quentin, Cal., where he was received by the warden of said prison on or about November 16, 1923. Shortly thereafter he was regularly removed to the state prison at Folsom, Cal., where he is still imprisoned and confined. Subsequent to the date of his confinement in said state prison, the state board of prison directors, having the authority so to do, fixed the period of his confinement in said prison under his convictions of grand larceny in said superior court at the terms of five and two years, respectively, said terms to run consecutively. The petitioner is still confined under said order of said board, and it is from such confinement that he seeks release by this writ. The petitioner did not assert in the superior court, nor does he contend here, that the superior court did not have jurisdiction to try, condemn, and sentence him for the crimes for which he was tried therein; nor does he here assert that his conviction and sentence therein were not in all respects regular. He did, however, upon his appeal to the appellate court from said judgment, contend that the superior court did not have jurisdiction of his person, for the reason that the United States marshal had at all times the custody of the defendant's person during his trial in said court. The appellate court ruled against this contention (*People v. Sichofsky*, 58 Cal. App. 257, 261, 208 P. 340); and this court denied a petition for rehearing based upon that ground. The petitioner bases his contention that he is entitled to his release upon his interpretation of the Penal Code of California relating to the limit of imprisonment for one who has been convicted of two or more separate crimes. He directs our at-

tention, first, to the language of section 669 of the Penal Code, which reads as follows:

"When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be."

[1, 2] The petitioner does not contend that he comes within the terms of this section of the Penal Code, but his insistence is that said section, and also section 105 thereof, constitute a limitation upon the power of the courts of California to impose consecutive sentences otherwise than as therein provided, and argues that in all other cases than those referred to in said sections the sentences of persons convicted of two or more crimes must run concurrently, and he therefore urges that, during the time of his confinement in the federal prison for the crime which he committed against the federal laws, he was also serving that portion of his sentence under the state laws which would be embraced within the former term. There are several difficulties in the way of upholding this contention. The provisions of the Penal Code of the state of California must be held, except as otherwise expressly therein provided, to have reference and application to those offenses which are recognizable and punishable as crimes or misdemeanors against the peace and dignity of the state of California, and cannot be held to contemplate in the fixation or duration of their punishments acts or offenses which are not crimes under its laws, though these may be designated and punished as crimes under the laws of other jurisdictions. To hold otherwise would lead to certain absurd conclusions; such as that a criminal who had been tried and sentenced for some serious crime against some other jurisdiction, but who had escaped and come into the jurisdiction of California and while here had committed a crime against its laws, would be practically immune from punishment for such latter crime; for, if captured and committed to prison in the jurisdiction of his first offense he would be also serving sentence for his subsequent California crime, and in such event this state would be powerless to try, convict, or punish such an offender against its laws. An equally absurd situation would arise in a case where a criminal, who had been tried and convicted for an offense against our state laws, but who had escaped before his actual incarceration in our state prison and while thus a fugitive from justice had committed a crime against the laws of another jurisdiction and had been there arrested, indicted, convicted, and sentenced to prison in that jurisdiction, would

be also serving time there for the crime for which he was convicted and sentenced here, but for which, by reason of his escape, his actual commitment in the state prison had been rendered for the time being impossible. In our opinion, therefore, sections 669 and 105 of the Penal Code and all other sections therein which have reference to concurrent and consecutive sentences have in contemplation only those crimes and their punishments which are cognizable under the laws of California.

This court has already decided that the consequences above referred to do not follow, in the case of *In re Tanner*, 178 Cal. 792, 175 P. 81, which presents practically an identical situation, and wherein it was held that during the time such a prisoner was serving in an Ohio state prison he was not being imprisoned in execution of a California judgment and could not be credited with any portion of such time. The petitioner refers to certain other cases decided by this court as seeming to uphold his contention in the foregoing regard. One of these is *Ex parte Cohen*, 198 Cal. 221, 244 P. 359. An examination of this case shows that the petitioner is not entitled to derive any comfort from it, since this court did not therein hold that section 669 of the Penal Code could be said to have application to cases where one judgment had been rendered by a state court and the other by a federal court, but, on the contrary, expressly refrained from deciding that question, holding that the writ sought in that case must be discharged for other reasons. Neither can the petitioner derive any comfort from the case of *Ex parte McGuire*, 135 Cal. 339, 67 P. 327, 87 Am. St. Rep. 105, since in that case both convictions were had in the California courts. In that case, however, this court did make certain rulings pertinent to another phase of this proceeding to come presently under discussion. It is true that in that case, and also in the case of *Ex parte Casey*, 160 Cal. 357, 116 P. 1104, and in certain other cases cited by the petitioner, this court has held that, in cases where both trials and convictions have occurred in our state courts, the sentences should run concurrently, except in the instances provided for under sections 669 and 105 of the Penal Code; but this principle has, as we have already shown, no application to cases of conviction of separate crimes under separate jurisdictions; nor do we find that the cases cited by the petitioner from other jurisdictions can have any applicability to the instant case for a like reason, with the single exception of the case of *Ex parte Lawson*, 98 Tex. Cr. R. 544, 266 S. W. 1101, upon which the petitioner confidently relies as dealing with an identical situation. The distinction between that case and the instant case consists in the fact that under the Texas criminal statutes the term of a convicted felon commenced

from the time of his sentence (article 882, Tex. Code Civ. Proc.); while under section 670 of our Penal Code "the term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment." The Texas statutes and cases are, however, in accord with those of California in one respect germane to the instant case, and that is in the view that the officers of each state, charged with the execution of criminal judgments, have no right or power to suspend by either their affirmative or negligent action the operation of commitments placed in their hands.

This brings us to a reconsideration of the case of *Ex parte McGuire*, *supra*, and of the language and action of this court therein. In that case the defendant had been convicted of a misdemeanor in the police court of San Francisco and sentenced to imprisonment in the county jail for a term of six months. After his term there had commenced, he was arraigned in the superior court upon a charge of burglary, to which he pleaded guilty, whereupon he was sentenced to be imprisoned in the state prison at Folsom for a term of years. He took no appeal from this latter judgment, and no stay of proceedings was ordered or requested. A commitment thereon was accordingly issued and delivered to the sheriff of said city and county of San Francisco, who, however, acting upon the theory that the term of the prisoner in the county jail must first be served, returned him thereto and detained him therein in his character as *ex officio* jailer of said city and county. The prisoner thereupon applied to this court for a writ of *habeas corpus*, seeking his release from such custody. Upon hearing, this court decided that the custody of the applicant under his county jail sentence was unlawful, for the reason that it was the duty of the sheriff, upon receiving the commitment from the superior court, to forthwith execute the same by taking and delivering the prisoner to the warden of the state prison, and, while in so holding, it also held that the two sentences ran concurrently. The court also expressly held that the term of the applicant's imprisonment in the state prison did not commence to run, under the terms of section 670 of the Penal Code, until the date of his actual delivery there.

It is impossible to distinguish between that case and the case at bar in so far as the application of the provisions of section 670 of the Penal Code is concerned, and, if there be any distinction, it must operate in favor of the even more exact and complete application of said section of the Penal Code to the facts of the instant case, for the very cogent reason that in the case at bar the sheriff of the county of Los Angeles had no power to execute the commitment which

had been delivered to him by the clerk of the superior court until after the petitioner had fully served his term in the federal penitentiary and been released by the federal authorities upon a date just prior to his incarceration in the state prison at San Quentin. In the foregoing regard there exists a strong analogy between the situation of the sheriff in the instant case and the situation he would have been in had the petitioner herein escaped from custody after his conviction in the state court and prior to his incarceration in the state prison. It seems clear to us that in either event section 670 of the Penal Code should be given full application, and hence that in this case the term of imprisonment of the petitioner herein in the state prison of this state did not commence to run until November 16, 1923, the date of his actual delivery to and incarceration therein. In the case of *In re Fritz*, 179 Cal. 416, 177 P. 157, it was held that the fact that a convicted person had been subjected to confinement under a prior judgment which was void did not furnish a reason why the later imposition of a valid judgment, fixing a new term of imprisonment, should not as to its operation commence to run upon the actual delivery of the defendant at the place of imprisonment under the express terms of section 670 of the Penal Code.

[3] We are thus brought to another consideration which would seem to fully and finally dispose of the petitioner's contention that he is entitled to a discharge from the custody of the respondent warden. The petitioner, upon his conviction in the superior court, was sentenced under the indeterminate sentence law of California for the period prescribed by law. Section 489 of the Penal Code provides that—

"Grand larceny is punishable by imprisonment in the state prison for not less than one nor more than ten years."

The so-called "indeterminate sentence law" (Penal Code, section 1168), provides that in such a case—

"the governing authority of the reformatory or prison in which such person may be confined, * * * shall determine after the expiration of the minimum term of imprisonment has expired, what length of time, if any, such person shall be confined."

And further provides that—

"Any convicted person undergoing sentence in either of the state prisons of this state, not sooner released under the provisions of this act, shall, in accordance with the provisions of existing law, be discharged from custody on serving the maximum punishment provided by law for the offense of which such person was convicted."

Upon the actual delivery of the petitioner herein to the state prison on November 16, 1923, and at a time thereafter when his mini-

mum term had expired under the provisions of section 489 of the Penal Code, the board of prison directors who, under the said indeterminate sentence law, were charged with that duty, at a meeting of said board held on December 12, 1924, as the return to this writ shows, "determined the length of confinement that the said Albert Sichofsky should serve" at five years for the crime of grand larceny of which he had been convicted under the first count in his indictment in the superior court, and two years for the separate crime of grand larceny of which he had been convicted under the second count of said indictment, said terms "to run consecutively." It further appears from said return that, allowing the petitioner all possible credits for good conduct during such terms, he would be entitled to be discharged from custody on May 17, 1929.

If we were to assume, upon this proceeding, that the petitioner was correct in his interpretation of our Penal Code to the effect that his sentences at the hands of the federal court and of the state court should run concurrently, then it would follow necessarily that, if such be the law, the state board of prison directors in their aforesaid action upon the petitioner's case so considered it, since it would be their official duty so to do, and we must presume that such official duty was regularly performed. Code Civ. Proc. § 1963, subd. 15. It follows that we must assume that the board of prison directors, in fixing the length of time the petitioner "shall be confined" within the limit of the maximum period of ten years for which he was sentenced under each of his said convictions of grand larceny, took into account the fact, if it is assumed to be the fact, that his term of three years' service in the federal prison was to be credited as against the maximum term for which he had been sentenced under the indeterminate sentence law as construed in *Ex parte Lee*, 177 Cal. 690, 171 P. 958, and *In re Fritz*, 179 Cal. 415, 177 P. 157, and, after deducting the federal term from the maximum term under each of his said convictions, fixed the length of his actual confinement in the state prison at five and two years, respectively, "to run consecutively." Such would seem to be the only reasonable interpretation to be given to the language of the indeterminate sentence law, even upon the assumption that the petitioner's contention as to the concurrent operation of his imprisonment under the two jurisdictions is correct; and, whether or not this be so, it would seem to be the only reasonable interpretation of the indeterminate sentence law that it was intended to commit the entire subject of the length of a convicted prisoner's detention in the state prison to the discretion of the board of prison directors within his maximum term as prescribed by the Penal Code. This would seem to be an irresistible conclusion when the purposes for which the

indeterminate sentence law, as expounded by this court in the Lee Case, supra, are considered, and also when the further provisions of section 1168 of the Penal Code, which embodies that law, are taken into consideration, wherein it is provided that the said board is to be furnished by the judge and other officers of the court wherein the prisoner was convicted of a varied amount of information regarding his career, habits, occupation, and character upon the basis of which, as well as upon the observation of the prison officials during the passage of his minimum term, the board of prison directors are to determine how far the maximum term of his imprisonment is to be mitigated by their fixation of the actual length of his confinement. From any of the foregoing points of view, therefore, it would seem to follow necessarily that the petitioner here is not entitled to release upon his present application.

The writ is discharged, and the petitioner remanded.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.

PRESTON, J. I find myself unable to concur in so much of the opinion of Mr. Justice RICHARDS as denies to the petitioner credit upon the state term of imprisonment for the period of time spent by him in the federal penitentiary. The opinion seems to me to have for its foundation a misunderstanding of the relationship between the United States and the state of California with reference to the prisoner. The universal principle of law applicable is as follows:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Taylor v. Carryl*, 20 How. 584, 15 L. Ed. 1028; *Troutman's Case*, 24 N. J. Law (4 Zab.) 634; *Ex parte Jenkins & Crosson*, Fed. Cas. No. 7,259, 2 Am. Law Reg. (O. S.) 144. It is indeed a principle of universal jurisprudence that, where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function." *Taylor v. Taintor*, 16 Wall. (83 U. S.) 366, 370 (21 L. Ed. 287).

With this principle in mind, it must be held to be a fact that the United States government had complete control of the person of the defendant and was not forced to surrender said possession until after its own judgment against him had been satisfied. But it must not be overlooked that at the same time it was within the power of the government of the United States to surrender to the state of California, for the purpose of its criminal proceedings, the person of the defendant. This must be held to have been done when the

federal court stayed the proceedings in its own court and ordered that the person of the defendant be taken to the state court for trial. The United States marshal, from the time jurisdiction of the state court attached, could be none other than an agent of the state of California.

In other words, when the state of California acquired jurisdiction to try, convict, and impose judgment upon the defendant, it had the authority to immediately cause the person of the prisoner to be subjected to the mandates of the judgment.

The question in its last analysis is this: Where the state court has jurisdiction of the person of a defendant and such defendant is tried, convicted, and sentenced in such court, will the judgment so pronounced begin operation at once, if the defendant does everything in his power to facilitate the expiation of said sentence without delay or dilatory tactics of any kind or character on his part?

It seems too clear for controversy that the judge of the state court acted with full knowledge of the status of the prisoner and with full knowledge that he was present in his court in the custody of the marshal, and, had the court desired that the operation of said judgment be suspended, it could and should have used appropriate words to that effect, but this was not done. The commitment issued was for forthwith delivery to the prison. In this connection it must be said that section 670 of the Penal Code, to the effect that sentence of a prisoner does not begin to run until the actual delivery of the defendant at the place of imprisonment, has reference only to cases where the prisoner by his voluntary conduct or consent has prevented the immediate expiation of his sentence, and said section 670 has no reference whatever to a case where a defendant himself has acted in co-operation with the authorities of the state to hasten the commencement of service of the sentence imposed.

In this case the sheriff never assumed to take possession, nor did the court order possession from the deputy marshal, nor did the court order the deputy marshal to deliver said prisoner to the place of imprisonment of the state, but, on the contrary, the United States government was permitted to retain or resume jurisdiction of the person of the defendant, all over the protest and against the will of the prisoner himself. Indeed, the prisoner, immediately upon his incarceration in the federal penal institution, sought by habeas corpus to have himself transferred to the proper place of imprisonment. *Ex parte Sichofsky* (D. C.) 273 F. 694. Failing in this, he conducted an appeal from the judgment in the state court and tendered the issue as to whether or not the state had in fact acquired jurisdiction of his person. It was accordingly held by the decision that such jurisdiction had been obtained. *People v. Sichofsky*, 58

Cal. App. 257, 208 P. 340. hearing in this court denied. Thus we say that this court has solemnly declared that the defendant was in the jurisdiction of the state court, and, having so declared, the conclusion is inescapable that the superior court had the power to immediately incarcerate the prisoner in the penal institution of the state. Indeed, the judge of the court purported to do this, but, by reason of the circumstances above detailed, this did not take place. Shall this prisoner be charged with dereliction concerning a matter over which he did not have and could not secure any control whatsoever?

"It is a familiar practice that, wherever the court imposing several sentences desires to have one begin on the expiration of another, that fact is expressly stated in the sentence; and whenever the court inadvertently fails to have the sentence recorded in that form, or from leniency intentionally admits to add such a provision, and the defendant is committed in pursuance of such sentences, he is either voluntarily released by the jailer, or discharged on habeas corpus at the expiration of the longest term named in either of the sentences. No presumption will be indulged in favor of sustaining the sentence as cumulative. Accordingly the rule is that, where the defendant is already in execution on a former sentence, and the second sentence does not state that the term is to begin at the expiration of the former, the second will run concurrently with the first, in the absence of a statute providing a different rule; but, when the different sentences are imposed by different courts, it seems that it is not necessary that the sentence should state that the second term is to begin at the expiration of the first." 8 R. C. L. § 242, p. 242.

It will be noted from the above excerpt that it is suggested that, if the sentences are from different courts instead of the same courts, it might not be necessary for the judgment to recite the fact that it is to begin to run at the expiration of the first term of service, but this portion of the text is supported by only one state—the state of Georgia. See *Hightower v. Hollis*, 121 Ga. 159, 48 S. E. 969; also *Sullivan v. Clark*, 156 Ga. 706, 119 S. E. 913. It is readily demonstrable that these cases are opposed to the great weight of authority upon this subject. Cases directly opposed to such holding are as follows: *Zerbst v. Lyman* (C. C. A.) 255 F. 609, 610 (5 A. L. R. 377) where the court said:

"It is argued that it was manifest that the California court intended that the punishment should begin after the expiration of the term imposed by the New York court. This nowhere appears. It is true that, if the original order of imprisonment in the state penitentiary at San Quentin had not been changed, the imprisonment could not have begun until the prisoner had been released from the Atlanta Penitentiary. But there is nothing to indicate that the court intended to do anything other than that which was done.

"It could well be assumed that the court intended, if it can be assumed that it had knowledge of the pendency of another sentence, that

the ordinary effect should follow. Ordinarily, two or more sentences run concurrently, in the absence of specific provisions in the judgment to the contrary. *United States v. Patterson* (C. C.) 29 F. 775; *In re Breton*, 93 Me. 39, 44 A. 125, 74 Am. St. Rep. 335; 1 Bishop, *Crim. Procedure*, 1327, 1310. This rule seems to apply where the conviction is had in different courts. *Ex parte Green*, 86 Cal. 427, 25 P. 21; *Ex parte Black*, 162 N. C. 457, 78 S. E. 273; *Ex parte Gafford*, 25 Nev. 101, 57 P. 484, 83 Am. St. Rep. 568. The case cited by appellant of *Hightower v. Hollis*, 121 Ga. 160, 48 S. E. 969, if not distinguishable by reason of the nature of the punishment, is apparently in conflict with the weight of authority."

See note to the same case in 5 A. L. R. 380; also *Dickerson v. Perkins*, 182 Iowa, 871, 166 N. W. 293, 5 A. L. R. 374, where the case of *Hightower v. Hollis*, supra, is discussed, and it is said:

"The warden therefore acquired no authority under the mittimus which did not appear in the judgment. It is contended in argument by the state that the implication of concurrent terms is applicable only when the two or more sentences are imposed by the same court. In support of this argument the case of *Hightower v. Hollis*, 121 Ga. 159, 48 S. E. 969, is cited. The case is not wholly in point, and, if it were, it does not meet the provisions of our statute."

The court refused to follow the *Hightower* Case, and held that under the statute of the state of Iowa, which is no different from our own, it makes no difference whether the judgment was by the same court or not.

Indeed, the above decision is in line with our own *Ex parte Green*, 86 Cal. 427, 25 P. 21, where the same conclusion is announced. In this connection, see, also, the case of *Ex parte Gafford*, 25 Nev. 101, 57 P. 484, 83 Am. St. Rep. 568, where it is said:

"Where the defendant is already in execution on a former sentence, and the second sentence does not state that the term is to begin at the expiration of the former, the second will run concurrently with the first, in the absence of a statute providing a different rule. 21 Am. & Eng. Enc. Law, 1075, note 4."

To this should also be added 16 C. J. 1372, § 3228, as follows:

"When not otherwise directed by statute, or by the sentence of the court, as a general rule the term of imprisonment for which defendant is sentenced begins with the first day of actual incarceration in the prison, unless actual imprisonment is prevented by some cause other than the fault or wrong of defendant. In some jurisdictions, however, it is held that the term of imprisonment shall date from the time sentence is pronounced, unless the convict by his own wrong has prevented it, while in others it begins to operate from the date of entry in the judgment."

The above quotation is also authority for the proposition that, where the defendant is without fault on his own part, the sentence begins to run during the period following the pronouncement of judgment, unless the judg-

ment otherwise directs. Certainly within a reasonable time, which in this case would not exceed a few days, it would be the duty of the court to deliver the defendant, who is consenting thereto, to the place for imprisonment. "In the absence of a statute to the contrary, if it is not stated in either of two or more sentences imposed at the same time that the imprisonment under any one of them shall take effect at the expiration of the others, the periods of time named will run concurrently, and the punishments will be executed simultaneously. The fact that the terms of imprisonment are to be successive must be clearly and expressly stated." 16 C. J. 1374. § 3237.

The case relied upon by petitioner of Ex parte Lawson, 98 Tex. Cr. R. 544, 266 S. W. 1101, is exactly in point and on all fours with the case before us; the only difference at all being that the statute of Texas makes the term of imprisonment start from the day of pronouncing the judgment, but that provision of the statute does not render the case inapplicable. The fact is conceded in the case at bar that the prisoner was doing everything he could to be properly incarcerated in the proper prison and was responsible on his own account for no delay whatsoever in the premises. Indeed, the state of California by its own statute is in reality one step ahead of the states from which the other cases were taken because of the provisions of section 669 of the Penal Code which specify the only case in which consecutive sentences may be imposed.

The only distinction between the additional line of authorities above relied upon and the case before us, is that in the cases above noted the other courts were courts of the same state whereas in the case at bar one was a United States court and the other a state court. But there can be no reason for a distinction or elimination of those authorities upon that ground, for in 8 R. C. L. § 243, p. 242, it is said:

"Jurisdiction to inflict cumulative punishment is dependent, not on the accident that the offender has been convicted twice or oftener before the same tribunal, but on the fact that distinct violations of the law have been committed by one individual whose malefactions merit separate and, therefore, cumulative penalties."

See *Rigor v. State*, 101 Md. 465, 61 A. 631, 4 Ann. Cas. 719. In other words, the basis of distinction is not that one court is different from another court, but that the character of the crimes is such that in some cases penalties should be made cumulative and in other cases they should not be so.

The conclusion may be summed up in a word. If this defendant is not to receive credit for the three years spent by him in the federal penitentiary, then it must be held to be within the discretion of a judge of the

superior court of the state of California to impose a sentence upon a defendant and defer the taking effect of such sentence for the period of three, or any other given number of years. The very statement of this proposition shows forth its impossibility. I therefore conclude that so much of the opinion in the case at bar as denies to petitioner credit for the time spent by him in the federal penitentiary under protest is erroneous.

83 Cal. App. 742

Ex parte TIPTON. (Cr. 1510.)

District Court of Appeal, Second District, Division 1, California June 13, 1927.

1. Habeas corpus $\S$ 53—Court will rule on defective application for habeas corpus presented by one without assistance of counsel.

Application in nature of application for writ of habeas corpus presented by one without assistance of counsel, though defective in form, will be ruled on by court.

2. Habeas corpus $\S$ 57—Petition for habeas corpus must be verified by oath or affirmation taken by officer authorized to administer oaths (Pen. Code, § 1474).

Petition for writ of habeas corpus may be denied, if not verified by oath or affirmation of party making application, as required by Pen. Code, § 1474, and such oath must be certified by officer authorized to administer oaths.

3. Criminal law $\S$ 144(1/2)—Where conviction was reversed, with directions to set aside indictment, trial court is presumed to have set it aside in connection with resubmission of case to grand jury (Pen. Code, §§ 997, 998).

Where conviction was reversed, with directions to set aside indictment, and trial court ordered resubmission of case to grand jury, under Pen. Code, § 997, and that defendants be remanded to custody of sheriff, under section 998, appellate court will presume that trial court set aside indictment.

4. Habeas corpus $\S$ 3—Defendant, remanded to sheriff's custody after reversal of conviction, cannot secure release by habeas corpus without first applying for admission to bail (Pen. Code, §§ 997, 998).

Where, after reversal of conviction, case was resubmitted to grand jury under Pen. Code, § 997, and defendant remanded to sheriff's custody under section 998, habeas corpus will not lie to secure release, in absence of application for admission to bail, since it will be assumed that on such application court would make appropriate order for admission to bail.

Application by John H. Tipton for writ of habeas corpus prayed to be directed to the Sheriff of Kings County, to secure the release of petitioner from custody, awaiting action of the grand jury. Proceeding dismissed.

CONREY, P. J. [1] The petitioner, who is in jail in the custody of the sheriff of the county of Kings, appears to be without the assistance of counsel, and has sent to this court by mail an application in the nature of an application for a writ of habeas corpus. As might naturally be expected under such circumstances, the petition is very defective in form. Nevertheless, the court will rule upon the points which appear to be most essential, in order to dispose of the matter.

[2] It is provided by Penal Code, § 1474, that an application for a writ of habeas corpus must be verified by the oath or affirmation of the party making the application. Being ignorant of the fact that such oath or affirmation must be certified by an officer authorized to administer oaths, the petitioner has indorsed upon the petition, at the top of the last page thereof, the following:

"I hereby certify that this habeas corpus is the truth, the whole truth, and nothing but the truth. So help me God. John H. Tipton."

We might dispose of the matter by denying the petition on the ground that it is not verified as required by law. If this were the only defect, we would cause the petition to be returned for verification; but, in order to further assist the petitioner, we will examine the petition further at this time.

[3, 4] It appears that, in an action entitled "The People v. Jennie L. Brown, John H. Tipton, and Fred Mills," the defendants were convicted of murder in the second degree. They appealed from the judgment. The matter came on for hearing before the Second District Court of Appeal, Division 2, and in that court, on the 7th day of February, 1927, the judgment was reversed, "with directions to the trial court to set aside the indictment." This was done because, as set forth in the opinion of the court, the grand jury violated some of the provisions of law governing the manner in which they are permitted to hold their sessions and receive evidence. *People v. Brown et al.* (Cal. App.) 253 P. 735.

The petitioner herein states that, after the remittitur had been sent down to the superior court of Kings county, he was arraigned before that court, and the superior court then ordered "that the case be resubmitted to the

grand jury, and that the defendants be remanded into the custody of the sheriff." The petition does not show that the superior court, before making that order, first made an order setting aside the indictment. We shall assume, however, that in that respect the court adopted the appropriate procedure and did set aside the indictment, preliminary to and in connection with the order of resubmission of the case to the grand jury. The petition states that the grand jury, after an investigation, adjourned on May 12, 1927, subject to the call of the foreman.

Petitioner says that a motion made for his release has been denied by the court, and that a motion for his release on his own recognizance has been denied by the court. He does not allege that he has applied for admission to bail, or that the court has refused to admit him to bail, or to fix the amount of bail to be given by him. Therefore it should be assumed that, upon application therefor, the court would make an appropriate order for petitioner's admission to bail.

The Penal Code provides in substance that, when a motion to set aside an indictment has been granted, the court may direct that the case be resubmitted "to the same or another grand jury." Pen. Code, § 997. Section 998 of the Penal Code provides that, if the court directs the case to be resubmitted, "the defendant, if already in custody, must so remain, unless he is admitted to bail."

While we are of the opinion that, upon the facts stated in the petition, the petitioner is not entitled to his discharge, we prefer to dismiss the proceeding upon the ground that the petition is not verified, and to make the order without prejudice to the right of the applicant to file an appropriate and duly verified petition, if there be facts entitling him to the writ. It appears from the report and decision in the principal case that the petitioner was represented by counsel. The absence of similar assistance in this proceeding has resulted in the presentation of a long petition, filled with statements not appropriate to a habeas corpus petition.

The proceeding is dismissed.

We concur: HOUSER, J.; YORK, J.

84 Cal. App. 110

RIFFEE v. GRAY TOP CAB CO. et al.
(Civ. 5827.)

District Court of Appeal, First District, Division 2, California. June 21, 1927.

Appeal and error $\S$ 757(1)—Appellate court on appeal on typewritten transcript need not search through record to determine error (Code Civ. Proc. $\S$ 953a, 953c).

Where appellant on appeal on a typewritten transcript, under Code Civ. Proc. $\S$ 953a, fails to follow procedure outlined in section 953c, it is not incumbent on appellate courts to search through typewritten record to determine whether there might be error.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Clarence W. Riffée against the Gray Top Cab Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Cooley & Gallagher, of San Francisco, for appellants.

Henry B. Lister, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to recover damages for injuries suffered in a collision with an automobile operated by an agent of the defendant Gray Top Cab Company. The cause was tried before the court sitting without a jury and resulted in a judgment for the plaintiff in the sum of \$1,500. The defendants appealed on a typewritten transcript under section 953a, Code of Civil Procedure.

Three grounds of appeal are noted in the appellants' brief—insufficiency of the evidence, errors in law, and "plaintiff's negligence proximately contributed to the accident." The first and third grounds are supported by brief excerpts from the testimony favorable to the appellants' side of the case, but neither the evidence in conflict with this nor the findings of the trial court are printed as required by section 953c, Code of Civil Procedure. The respondent has not come to the aid of appellants in this respect, but has merely filed a brief in the nature of a motion to affirm because of appellants' failure to comply with the Code requirements.

The errors of law assigned have been presented in the same manner. It is argued that the trial court erred in overruling the demurrer to the complaint, but the appellants have not printed the complaint or the demurrer. It is also claimed that there is a hopeless conflict in the findings of fact, but neither the findings nor the evidence upon which they were based has been printed, and we are unable to determine whether error exists.

The statute plainly demands that an appellant follow the procedure outlined, and, when this has not been done, it is not incumbent upon the appellate courts to search through the typewritten record in order to determine whether there might be some error. *Pearson v. Parsons*, 173 Cal. 336, 340, 159 P. 1173; *Estate of Berry*, 195 Cal. 354, 358, 233 P. 330; *Jeffords v. Young*, 197 Cal. 224, 229, 239 P. 1054; 2 Cal. Jur. 643, 652.

Judgment affirmed.

We concur: **KOFORD, P. J.**; **STURTEVANT, J.**

83 Cal. App. 655

TRUITNER et ux. v. KNIGHT et al.
(Civ. 5665.)

District Court of Appeal, First District, Division 1, California. June 8, 1927.

1. Negligence $\S$ 61(2)—Automobile driver, guilty of negligence proximately contributing to occupant's injury, is liable, regardless of negligence of another driver.

If an automobile driver was guilty of negligence which proximately contributed to the accident resulting in occupant's injury, he is liable, regardless of whether another automobile driver was also negligent.

2. Trial $\S$ 140(1)—Credibility of witnesses is for jury, where testimony is in substantial conflict.

It is the province of the jury to determine the credibility of witnesses, where there is substantial conflict in the testimony.

3. Trial $\S$ 143—Weight of testimony is for jury, where testimony is in substantial conflict.

It is the province of the jury to determine the weight, effect, and probative force of testimony, where there is substantial conflict in the testimony.

4. Appeal and error $\S$ 930(1)—Appellate court must accept evidence supporting verdict, unless inherently incredible, and reject conflicting evidence.

The appellate court must construe the evidence so as to support the verdict, if it can be done reasonably; that is to say, it must accept as true such evidence as tends to sustain the verdict, unless it is inherently incredible, and reject as untrue such evidence as conflicts therewith.

5. Negligence $\S$ 134(4)—Finding that driver of automobile carrying passenger injured in collision at intersection was negligent held sustained by evidence showing illegal speed (Motor Vehicle Act, $\S$ 113[b], subd. 2).

In action for personal injuries sustained by occupant of automobile in collision with another automobile at highway intersection, evidence showing that driver approached and attempted to cross the intersection at a speed in excess of that allowed by Motor Vehicle Act, $\S$

113(b), subd. 2 (St. 1923, p. 553) *held* sufficient to sustain jury's finding that he was negligent.

6. Negligence ⚡136(18)—**Negligent speed of automobile carrying passenger injured in collision at intersection held for jury, though speed was within statutory limit (Motor Vehicle Act, § 113[a], [b], subd. 2).**

In action for personal injuries sustained by occupant of automobile in collision with another automobile at highway intersection, negligence of driver, whose view was obstructed, in failing to drive at a careful and prudent speed, not greater than reasonable and proper, having due regard for the traffic, surface, and width of the highway, and at such speed as not to endanger the life, limb, or property of any person, as required by Motor Vehicle Act, § 113, subd. a (St. 1923, p. 553), *held* for jury, even though he was not exceeding the rate of speed permitted by section 113(b), subd. 2.

7. Highways ⚡177—**Automobile driver having obstructed view at intersection may be negligent, though he does not exceed statutory speed limit (Motor Vehicle Act, § 113[a], [b], subd. 2).**

If the driver of an automobile attempting to cross a highway intersection, when his view is obstructed, fails, under the circumstances, to drive at careful and prudent speed, not greater than is reasonable and proper, having due regard for the traffic, surface, and width of the highway, and at such speed as not to endanger the life, limb, or property of any person, as is required by Motor Vehicle Act, § 113 subd. a (St. 1923, p. 553), he is guilty of negligence, though he does not exceed the rate of speed permitted by section 113(b), subd. 2.

8. Negligence ⚡134(4)—**Finding driver of automobile carrying passenger injured in collision at intersection was negligent held sustained by evidence showing failure to keep lookout (Motor Vehicle Act, § 113[a], [b], subd. 2).**

In action for personal injuries sustained by occupant of automobile in collision with another automobile at highway intersection, evidence that the driver of one automobile failed to keep a lookout for passing automobiles at the intersection, as required by Motor Vehicle Act, § 113, subd. a (St. 1923, p. 553), *held* to sustain jury's finding that he was guilty of negligence, even though he did not exceed speed permitted by section 113(b), subd. 2.

9. Appeal and error ⚡926(5)—**Appellate court must assume jury was aided by blackboard diagrams and drawings used by witnesses and not part of record.**

It must be assumed by the appellate court that the jury was aided in arriving at its conclusion that an automobile driver was negligent by blackboard diagrams and drawings which were used by witnesses in illustrating their testimony before the jury, and which could not be made a part of the record.

10. Highways ⚡175(1)—**Right of way statute applies only to vehicle traveling at lawful speed (Motor Vehicle Act, § 131).**

Motor Vehicle Act, § 131 (St. 1923, p. 560), providing that a vehicle entering an intersection

of public highways at a lawful speed shall have the right of way over a vehicle approaching from its left, unless the latter first enters the intersection, by its terms, applies only to a vehicle traveling at a lawful rate of speed.

11. Negligence ⚡221/2—**Reliance on care of another approaching intersection held not to relieve negligent automobile driver from liability for injuries to occupant.**

An automobilist who himself is negligent as to occupant of automobile may not escape liability for collision at highway intersection on the ground that he relied on the presumption that the other automobilist who was approaching the intersection from his left would exercise due care in doing so.

12. Trial ⚡143(2)—**Relationship and motives in testifying were exclusively for jury in passing on credibility and veracity.**

It was the exclusive province of the jury to consider the family relationship of the parties to the action and their motives in giving the testimony which they gave in passing on their credibility and veracity.

13. Negligence ⚡56(3)—**Violation of statute does not impose liability, unless proximate cause of accident.**

In order for the violation of a statutory regulation constituting negligence in itself to impose liability, such violation must be the proximate cause of the accident.

14. Negligence ⚡134(11)—**Finding negligence of automobile driver concurring with negligence of another approaching intersection was proximate cause of occupant's injury held sustained.**

In action for personal injuries sustained by occupant of automobile in collision with another automobile at highway intersection evidence *held* to sustain jury's finding that the negligence of an automobile driver in approaching and attempting to cross the intersection at an excessive rate of speed without looking either way for vehicles traveling along the intersecting highway, concurring with the negligence of the driver of the automobile approaching on the intersecting highway, was the proximate cause of the collision.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action for personal injuries brought by J. L. Truitner and wife against Charles M. Knight, Clifford Truitner, and another. From a judgment against the named defendants, defendant Clifford Truitner appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, and Carling & Cummings, of Fresno, for appellant.

G. L. Aynesworth, of Fresno, for respondent.

Knight, J. About 5:30 o'clock on the afternoon of September 20, 1925, two automobiles driven respectively by the defendants Clifford Truitner and Charles M. Knight col-

lided at the intersection of Clovis and Adams avenues in the county of Fresno, resulting in personal injuries to three of the occupants of Truitner's automobile, one of whom was his mother, Alice Truitner, who later brought this action for damages, being joined therein by her husband. The drivers of said automobiles and H. K. Mahakian, the owner of the one Knight was driving, were made parties defendant, but as to Mahakian, who was not present at the time of the collision, the action was subsequently dismissed. The trial was had before a jury, and a verdict rendered against the remaining defendants Truitner and Knight in the sum of \$4,000. From the judgment entered upon said verdict the defendant Truitner alone has appealed.

[1] The single ground urged for reversal is insufficiency of the evidence to sustain the verdict against appellant; it being contended with reference thereto that, taken as a whole, the evidence proves that the collision resulted from the sole negligence of the defendant Knight, and on the other hand shows that appellant, while operating his car, exercised due care. The jury having found a concurrence of negligence on the part of both drivers, it will be necessary only, so far as the determination of this appeal is concerned, to ascertain whether the evidence is sufficient to support the finding of the jury that appellant was guilty of such negligence as proximately contributed to the accident, for, if there is, he is liable, regardless of what the evidence may show as to the conduct of his codefendant, Knight.

[2, 3] Adams and Clovis avenues are about 60 feet wide, and intersect at right angles. In the center of each there is a strip of oiled road 10 or 12 feet in width. Knight, in approaching said intersection, was driving westward along the oiled portion of Adams avenue, accompanied by a man named Aharonian. Truitner was traveling toward said intersection in a southerly direction on Clovis avenue, the occupants of his automobile being a young lady friend, who sat beside him on the front seat, his mother, the plaintiff Alice Truitner, and his two sisters, Rose and Ethel Truitner, the three last named being seated on the rear seat. The land lying between the lines of the right angle defining the boundaries of the two avenues along which Truitner and Knight were traveling was planted to vineyard, the vines at the time being five or six feet high, and more or less obstructing the view from one avenue to the other, although in driving along one avenue and looking across the vines it was possible to see the top of an automobile traveling along the other. The testimony given by Knight and Aharonian was to the effect that, when they reached a point somewhere between 50 and 150 feet eastward of the intersection, at which time they were traveling between 20 and 25 miles an hour, they looked across the vine-

yard and saw the top of the Truitner automobile, which was then 150 or 200 feet northerly of the intersection, traveling toward the intersection at a speed of 25 or 30 miles an hour; that, as they neared the corner, they saw Truitner's automobile coming on toward the intersection with undiminished speed, and thereupon Knight sounded his horn, applied the brakes, and stopped his automobile at the intersection of the oiled portion of the avenues, but that Truitner, not observing their automobile until it was too late to avoid a collision by stopping, endeavored to pass in front of them, with the result that the side of Truitner's machine, close to the rear end, collided with the front end of the Knight machine, turning the latter machine around, and smashing the left rear end of Truitner's automobile. Truitner testified that as he neared the intersection he slowed down to a speed of between 15 and 20 miles an hour, but, being engaged in conversation with his young lady companion, did not look for approaching vehicles on Adams avenue, and that, when the front wheel of his automobile reached the oiled portion of the intersection, he observed for the first time the Knight machine, which was then some 20 or 25 feet distant, traveling, as he estimated, at a speed of 30 or 40 miles an hour; that thereupon, in order to get out of the way, he "put on the gas," but was unable to avoid being struck by the Knight machine. The impact hurled Truitner's sisters from the machine to the ground, a distance of some 5 or 10 feet, both sustaining injuries. Mrs. Truitner, appellant's mother, although not thrown from the machine, was severely injured, having suffered two fractures of the pelvis and severe contusions of the lumbar regions of the back, and also bruises about the body, confining her in bed for a period of about 8 weeks, and preventing her thereafter from operating a grocery store which she had previously conducted.

[4-7] Subdivision 2 of section 113 (b) of the Motor Vehicle Act (Stats. 1923, p. 517) provides in effect that it shall be unlawful for a driver of an automobile to drive the same at a speed exceeding "fifteen miles an hour in traversing an intersection of highways, when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of two hundred feet from such intersection." It is apparent from the evidence hereinabove set forth that a substantial conflict exists between the testimony of appellant and that of the occupants of the Knight car as to the rate of speed appellant approached and attempted to cross said intersection. Where such conflict exists it is for the jury to judge the credibility of the wit-

nesses, and the weight, effect, and probative force to be given their testimony (*Hanton v. Pacific Electric Ry. Co.*, 178 Cal. 616, 174 P. 61), the duty of the reviewing court on appeal being to construe the evidence so as to support the verdict, if it may be done so reasonably; that is to say, to accept as true such evidence as tending to sustain the verdict, unless it be inherently incredible, and to reject as untrue those portions which conflict therewith (*Nehrer v. Kauffman*, 197 Cal. 674, 242 P. 713). Applying the foregoing rules to the evidence before us, it is evident that the testimony given by the occupants of the Knight car is legally sufficient to support the conclusion reached by the jury that appellant was negligent, for it shows that appellant approached and attempted to cross said intersection at an undiminished rate of speed exceeding that allowed by the provisions of said Motor Vehicle Act hereinabove cited. Assuming, however, as appellant claims, that he was driving approximately within the speed limit when he attempted to cross said intersection, it was still a question of fact for the jury to determine whether under all of the circumstances present he was at that time driving his automobile, as is required by the provisions of section 113(a) of said Motor Vehicle Act, at a careful and prudent speed not greater than was reasonable and proper, having due regard for the traffic, surface, and width of the highway, and at such a speed as not to endanger the life, limb, or property of any person; for, if he was not, he was guilty of negligence, even though he was not exceeding the statutory limit of 15 miles an hour. *Garns v. Halpern*, 193 Cal. 193, 223 P. 545. *Cook v. Miller*, 175 Cal. 497, 166 P. 316.

[8] Regarding the provision of the Motor Vehicle Act just referred to, it was said in *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125:

"This is but a reiteration of the rule, in statutory form, which has always been in force without regard to a statutory promulgation to the effect that drivers or operators of vehicles, and more particularly motor vehicles, must be specially watchful in anticipation of the presence of others at places where other vehicles are constantly passing. * * *

And in *Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066, in quoting from the case of *Meyers v. Bradford*, 54 Cal. App. 157, 201 P. 471, the court said:

"Accordingly the driver of an automobile has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate the presence of others. * * * The fact that he did not know that anyone was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway."

[9] The evidence here shows without contradiction that in approaching and attempt-

ing to cross said intersection appellant failed to look either way for approaching vehicles on Adams avenue, his attention being occupied at that time in conversing with the young lady seated beside him; and, consequently, he proceeded as far as the oiled portion of said intersection before he observed the presence of the Knight machine, which, according to the testimony of the occupants thereof, had already reached the intersection and stopped, but appellant, having failed to see it until it was too late to avoid a collision by stopping, attempted to pass in front of it, with the result already described. Therefore, even though appellant was within the law, so far as speed was concerned, his neglect to keep a lookout for passing automobiles at the intersection was sufficient of itself to justify the jury in concluding that he was guilty of negligence. *Meyers v. Bradford*, supra; *Rush v. Lagomarsino*, supra. Moreover, it must be assumed that, in addition to the foregoing evidence, the jury was aided in arriving at its conclusion that appellant was negligent by the blackboard diagrams and drawings which necessarily could not be made a part of the record on appeal, but which were used by the witnesses in illustrating their testimony before the jury. *Emerick v. Johnson*, 64 Cal. App. 460, 221 P. 675; *Godeau v. Levy*, 72 Cal. App. 13, 236 P. 354.

[10] Appellant contends that the evidence shows that the two automobiles were approximately the same distance from the intersection when the occupants of the Knight car saw appellant's car approaching the intersection "from the right," and that therefore under the provisions of section 131 of said Motor Vehicle Act appellant's car had the right of way. There seems to be a conflict of evidence upon this point; testimony having been given to the effect that Knight's car was first to enter the intersection. However that may be, it is evident that the provisions of said section 131 are not available to appellant, for the reason that the terms thereof limit the application of its provisions to a vehicle "traveling at a lawful rate of speed," and the evidence adduced here on the part of respondents shows, as already pointed out, that appellant approached and attempted to cross said intersection at an unlawful rate of speed.

[11] Further contention is made by appellant that he had a right reasonably to presume that any one approaching the intersection from his left would exercise due care in doing so; and that, inasmuch as the driver of Knight's car failed to do so, appellant is relieved from responsibility for the accident. It has been held, however, that reliance upon the presumption mentioned does not excuse one who himself is negligent (*Carroll v. Central Counties Gas Co.*, 74 Cal. App. 303, 240 P. 53; *Wiley v. Cole*, 67 Cal. App. 762, 228 P. 350; *McPherson v. Walling*, 58 Cal. App. 563,

209 P. 209); and therefore, since appellant was found to be negligent, he is precluded from claiming the benefit of such presumption.

[12] Counsel for appellant in their brief comment upon the relationship to each other of the parties by whose testimony some of the facts supporting the verdict were established, and they question the motives of those witnesses in giving such testimony. All of these matters were exclusively within the province of the jury to consider in passing upon the credibility and veracity of the witnesses; and, the jury having accepted their testimony as true and acted upon it, and there being nothing upon the face of the testimony to show that it is inherently improbable, it is beyond the power of this court on appeal to interfere with the discretion exercised by the jury with respect thereto.

[13, 14] A number of cases have been cited by appellant holding in effect that a violation of a statutory regulation constituting negligence does not create a liability, unless such negligence is the proximate cause of the accident. The rule stated is elementary, and cannot be questioned, but the evidence hereinabove set forth fully and fairly supports the inference which the jury drew therefrom that the negligence of appellant in approaching, and attempting to cross, said intersection at an excessive rate of speed, without looking either way for vehicles traveling along the intersecting highway, concurring with the negligence of the defendant Knight, was the proximate cause of the collision. *Berges v. Guthrie*, 51 Cal. App. 547, 197 P. 356.

For the reasons hereinabove stated, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

83 Cal. App. 797

Rose TRUITNER, by Her Guardian ad Litem, J. L. Truitner, Plaintiff and Respondent, v. Charles M. KNIGHT and H. K. Mahakian, Defendants, and Clifford Truitner, Defendant and Appellant. (Civ. 5664.)

District Court of Appeal, First District, Division 1, California. June 8, 1927.

Appeal by defendant from a judgment of the Superior Court of Fresno County, C. E. Beaumont, Judge, in an action for damages for personal injuries. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, and Carling & Cummings, of Fresno, for appellant.

G. L. Aynesworth, of Fresno, for respondent.

KNIGHT, J. A judgment of affirmance has this day been rendered and filed by this court in the case of J. L. Truitner and Alice Truitner, Plaintiffs, v. Charles M. Knight, H. K. Mahakian, and Clifford Truitner, Defendants (No.

5665) 257 P. 447, which was an action for damages arising out of a collision between two automobiles driven respectively by the defendants Truitner and Knight; the collision having occurred at the intersection of two highways in Fresno county on September 20, 1925. The instant action is also one for damages on account of personal injuries sustained by plaintiff in the same accident; plaintiff at the time being one of the occupants of the defendant Truitner's car. This action was tried subsequently before a different jury, and a verdict rendered against the defendants Truitner and Knight for the sum of \$1,000, judgment being entered accordingly. The defendant Truitner alone has appealed, and, as in the other appeal, contends as the single ground for reversal that the evidence is insufficient to support the verdict and judgment against appellant.

The appeal comes before us on a separate transcript, but, the facts being substantially the same as those upon which the verdict and judgment in the other case are based, the parties have stipulated that the instant appeal be submitted for determination on the briefs filed in that case. Inasmuch as the judgment in that action has been affirmed, it follows that, upon the same grounds, the judgment in the present case must be affirmed, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

83 Cal. App. 664

TRUITNER v. KNIGHT et al. (Civ. 5666.)

District Court of Appeal, First District, Division 1, California. June 8, 1927.

Trial 140(1)—Whether written statements showed testimony unworthy of belief held exclusively for jury, since going to credibility of witnesses and weight of testimony.

It was the exclusive province of the jury to pass on the contention that witnesses' written statements concerning an automobile accident claimed to contradict their testimony rendered their testimony unworthy of belief, since the contention went purely to the credibility of the witnesses, and to the weight, effect, and probative force to be given their testimony.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action for personal injuries brought by Ethel Truitner against Charles M. Knight, Clifford Truitner, and another. From a judgment for plaintiff against the named defendants, defendant Clifford Truitner appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, and Carling & Cummings, of Fresno, for appellant.

G. L. Aynesworth, of Fresno, for respondent.

KNIGHT, J. The plaintiff, Ethel Truitner, brought this action to recover damages on

account of personal injuries sustained by her while riding as a guest in an automobile owned and driven by her brother, the defendant Truitner, which automobile collided with one being driven by the defendant Knight at the intersection of Clovis and Adams avenues in the county of Fresno. The action was tried by the court sitting without a jury; the court finding that the collision was proximately caused by the concurrent negligence of the drivers of the two automobiles, Truitner and Knight; and judgment was rendered against them in the sum of \$300, from which judgment the defendant Truitner alone has appealed. Insufficiency of evidence is the only point raised.

This was the second action for damages growing out of the same accident, the first being one entitled J. L. Truitner and Alice Truitner, Plaintiffs, v. Charles M. Knight, H. K. Mahakian, and Clifford Truitner, Defendants (No. 5665), which was tried before a jury, resulting in a verdict and judgment in favor of the plaintiffs therein and against the defendants Knight and Truitner, the action as to the defendant Mahakian having been dismissed. The defendant Truitner appealed, and the judgment therein has been this day affirmed (Truitner v. Knight & Truitner [No. 5665; Cal. App.] 257 P. 447). The evidence in that case upon all material issues was substantially the same as that upon which the findings and judgment in the instant action are founded, and, like the present case, the appeal was taken upon the sole ground of the insufficiency of the evidence. The essential facts relating to the accident are set forth in the decision rendered on that appeal, and, since the points raised in the instant case are discussed and decided in that decision, it will be unnecessary to discuss them again here.

The only additional point made in the present case relates to certain written statements concerning the accident, which were prepared shortly after it occurred by an agent of the insurance carrier for the appellant, Truitner, and signed respectively by respondent and appellant, by which counsel for appellant sought to impeach respondent and appellant as witnesses, and to prove a material contradiction in their testimony. No claim is made that the trial court erred in ruling upon the admissibility of any part of this evidence; it being contended merely that said written statements tend to show that the testimony given by said witnesses during the trial is unworthy of belief. This contention relates purely to the matter of the credibility of the witnesses and the weight, effect, and probative force which shall be given to their testimony, and, consequently, presents a question of fact which was exclusively within the province of the trial court to determine; and, it having accepted as true the testimony of said witnesses given during the trial, despite

the contents of said written statements, its decision thereon cannot be disturbed on appeal.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

83 Cal. App. 720

COLEMAN v. EDGAR et al. (Civ. 3280.)

District Court of Appeal, Third District, California. June 10, 1927.

1. Vendor and purchaser ⇨80—Evidence held to support finding that land was sold for lump sum, not by acre.

In action for balance due on purchase price of land, evidence held to support court's finding that land was sold for lump sum, not by the acre.

2. Appeal and error ⇨1071(6)—Failure to find on issues of mutual mistake and vendor's representations as to boundary of land held not prejudicial error.

Where purchasers' attorney, after examining abstract of title, reported that land was overlapped by property described in certain deed, and such overlap was discussed by parties before executing sale contract, court's failure to find on issues of mutual mistake and vendor's representations as to boundary of land, in action for balance due on purchase price, was not prejudicial error.

3. Appeal and error ⇨1071(6)—Failure to make finding necessarily adverse to appellant, having burden of proof, is not prejudicial error.

Failure to find on issue, burden of sustaining which rested on appellant, is not prejudicial error, if finding must necessarily have been adverse to him.

4. Vendor and purchaser ⇨31, 37(1)—Representations and mistakes during negotiations for sale of land became immaterial, when parties learned facts before executing contract.

Representations and mistakes of fact, made in beginning of negotiations for sale of land, became immaterial, when parties learned true facts prior to execution of contract.

5. Vendor and purchaser ⇨317—Erroneous finding that price reduction was made because of overlap by another's land held unnecessary to support judgment for balance of purchase price.

Finding, in action for balance due on purchase price of land, that allowance or reduction of price was made because of overlap by property described in deed to another, whereas it was made because of shortage in acreage, held unnecessary to support judgment for plaintiff.

6. Appeal and error ⇨1058(2)—Exclusion of defendant's testimony as to matter already substantially testified to by him held not prejudicial error.

In action for balance due on purchase price of land, exclusion of defendant's testimony as to whether representations of plaintiff's agent

as to acreage influenced him in signing contract held not prejudicial error, where he previously testified that he would not have signed contract to purchase less than represented acreage.

7. Appeal and error $\S$ 1056(1)—**Exclusion of testimony that defendant was influenced to sign contract by representations as to fact already known to him held not prejudicial error.**

In action for balance due on purchase price of land, exclusion of defendant's testimony as to whether representations of plaintiff's agent as to acreage influenced him in signing contract held not prejudicial error, where evidence conclusively showed that he must have known, when he signed contract, that land did not all lie south of river as represented by such agent.

8. Vendor and purchaser $\S$ 22—**That boundaries of land, as stated in sale contract, did not close, held immaterial, in view of engineer's testimony that such discrepancy meant nothing.**

That boundary lines of land, for balance due on price of which vendor sued, were not accurately set forth in contract, as shown by civil engineer's testimony that they did not close, held immaterial, in view of his further testimony that such discrepancy meant nothing because survey must be balanced to return to starting place.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Emma V. Coleman against R. E. Edgar and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Dennett & Zion, of Modesto, for appellants.

Hawkins & Hawkins, of Modesto, for respondent.

FINCH, P. J. The plaintiff was given judgment for the balance alleged to be due on a contract, by the terms of which she agreed to sell and the defendants agreed to buy a tract of land and some personal property for the sum of \$44,850. This appeal is from the judgment. The land is described in the contract as follows:

"Beginning at the $\frac{1}{4}$ section corner between sections 17 and 20, township 2 south, range 10 east, Mount Diablo base and meridian, running thence south 80° west 1.44 chains, thence north $13\frac{1}{4}^\circ$ west 23.70 chains; thence south $87\frac{1}{2}^\circ$ west 2.32 chains; thence north $12\frac{3}{4}^\circ$ west 56.60 chains to the Stanislaus river; thence north $65\frac{1}{2}^\circ$ east 1.02 chains; thence north 46° east 10.04 chains; thence south $13\frac{1}{4}^\circ$ east 87.11 chains; thence south $89\frac{3}{4}^\circ$ west 6.04 chains to the point of beginning, containing 74.50 acres of land."

Prior to the execution of the contract, the plaintiff furnished the defendants an abstract of title, which they submitted to their attorney for examination. His report to them contained the following:

"On March 1, 1917, Arthur E. Leitch executed a deed to Ada Isabelle Patterson, * * *

the description of which overlaps on this property described in the abstract. This places a cloud upon the title to this property, but to what extent I am unable to ascertain from the abstract."

The description contained in the contract includes a part of the present channel of the Stanislaus river and about a half acre on the north side of the river; there being something over 4 acres in all lying north of the south bank of the river. The land described in the Leitch deed is bounded on the south by the middle of the river and overlaps that part of the plaintiff's land lying between the north boundary line thereof and the middle of the river. Plaintiff secured a quitclaim deed from Ada Isabelle Patterson for the overlapped part. The present controversy relates to the part of plaintiff's land which lies north of the south bank of the river. It is of little value, being mostly in the channel of the river and the small parcel north of the river being inaccessible from the south side. Defendants claim that they are entitled to a reduction in the purchase price of the land by reason of the worthless character of that lying in the river and that north thereof.

The answer alleges, in substance, that the plaintiff represented that all of her land lay south of the south bank of the river, and that both parties so believed and were mutually mistaken in that regard, and that it was the intention of the parties that the defendants "were to pay \$590.60 per acre for said land." The court did not expressly find whether such alleged representations were made by the plaintiff or whether the parties were mutually mistaken as to the location of the land, but did find the following facts to be true:

"That the defendants offered to purchase the whole of the tract of land, * * * and the said contract price agreed was a lump sum, and the land was not sold by the acre. That said tract of land was sold as a whole, and prior to the execution of said contract it was discovered that there was an overlapping boundary line on the north end of said tract of land, * * * and at that time an allowance was made by reason thereof, and a full, final, and complete settlement as to the number of acres in said tract of land was had and determined prior to the execution of said contract."

[1] Defendant R. E. Edgar conducted the negotiations for the purchase of the land on behalf of the defendants. In the beginning of such negotiations all parties apparently believed that the tract of land in dispute lay entirely south of the river and that it contained 75 acres. The evidence of both parties shows, without conflict, that it was discovered, prior to the execution of the contract, that the land did not all lie south of the river and that the tract contained only $74\frac{1}{2}$ acres. The defendants then demanded a reduction of \$300 in the purchase price on account of the shortage

in acreage, being at the rate of \$600 an acre. The plaintiff objected to any reduction, stating that she was selling the land as a whole and not by the acre. The parties finally compromised by reducing the price to \$44,850. Relative to what was said at that time, Edgar testified:

"She (plaintiff) said her price was \$45,000, and we said it was \$600 an acre; so we compromised. * * * We split the difference. * * * We figured it was \$600 an acre; * * * and she says, 'No; it is \$45,000.' * * *

"Q. In other words, you were claiming that you were paying \$600 an acre for the land? A. Yes; paying \$600.

"Q. And she was claiming that she was selling for \$45,000? A. Yes."

The plaintiff testified that she did not tell any of the defendants that she "would sell the land in question at so much per acre," but that she told them she would sell it for "\$45,000, with the farming implements." The foregoing testimony amply supports the finding that the contract price "was a lump sum, and the land was not sold by the acre."

[2-5] The report of the defendants' attorney, after his examination of the abstract of title, disclosed the fact that the property described in the Leitch deed overlapped the north end of the plaintiff's land. The south boundary of such property is described in the deed as the "center of Stanislaus river." It necessarily follows that the plaintiff's land must have extended northerly beyond such center line, because, otherwise, there could have been no overlapping. This overlap was known and discussed by the parties before the contract was executed, and they could not have believed, after such knowledge and discussion, that the plaintiff's land all lay south of the south bank of the river. The failure to find upon the issue of mutual mistake and the alleged representations of the plaintiff, therefore, is not prejudicial error. "It is not prejudicial error to fail to find upon an issue, the burden of sustaining which rests upon the appellant, if the finding thereon must necessarily have been adverse to him." 24 Cal. Jur. 944. Any representations made in the beginning of the negotiations and any mistake of fact then made by the parties became immaterial when, prior to the execution of the contract, they learned the true facts. The finding that an allowance or reduction of price was made by reason of the overlap is erroneous; that reduction having been made on account of the shortage in acreage. That finding, however, is unnecessary to support the judgment.

[6, 7] Appellants contend that the court erred in sustaining plaintiff's objection to the following question put to Mr. Edgar:

"In signing the contract, did or did not the representations that Mr. Schell made and the

abstract showing the acreage, showing it to be seventy-four and a fraction, influence you in signing the contract?"

Schell was the plaintiff's agent in the sale of the land. Edgar had previously testified that in the beginning of the negotiations Schell had shown him the land south of the river only and stated that the tract contained 74½ acres. Immediately prior to the question to which objection was sustained, Edgar had testified as follows:

"Q. Now, Mr. Edgar, would you have signed this contract had you known that there was any land across the river? A. I certainly would not. * * * I wouldn't have signed it.

"Q. Would you have signed the contract and paid this purchase price for seventy-four and a fraction acres? A. No; I would not."

It appears, therefore, that the question referred to had already been substantially answered. Besides, as stated, the evidence conclusively shows that the witness must have known at the time he signed the contract, that the land did not all lie south of the river.

[8] It is suggested that the boundary lines of the land are not accurately set forth in the contract. A witness for the defendants, who is a civil engineer, testified that such boundary lines do not close, but he further testified:

"That discrepancy, as far as it is concerned, as far as I can see, with this acreage, doesn't mean anything one way or the other, because the survey must be balanced to come back to the place where it started."

No prejudicial error appears in the record, and the findings of the court are fully supported by the evidence.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

83 Cal. App. 670

FIRST NAT. BANK OF ELY v. HAMAKER et al. (Civ. 4593.)

District Court of Appeal, Second District, Division 2, California. June 8, 1927.

1. Banks and banking §175(4)—Lapse of six weeks between drawee's repudiating draft and notice of dishonor to bank giving credit thereon held not negligence, as matter of law, chargeable to bank.

Six weeks' lapse between time from repudiation of draft by drawee on which bank had given credit and time when bank received notice of dishonor was not negligence, as matter of law, chargeable to bank suing on note given to replace credit extended on faith of draft.

2. Banks and banking §175(3)—Evidence held to support finding that bank suing on note was not negligent in notifying of repudiation of draft on which it gave credit.

In action on note, evidence held to support finding that plaintiff bank, on receiving notice

that draft with bill of lading attached, on which it had given conditional credit, had been repudiated, at once notified one of defendants, who directed plaintiff to continue to hold goods covered by bill of lading until such defendant ordered them sold, and was not guilty of negligence.

3. Banks and banking ⇨175(3)—Evidence held to show bank was collector and distributor under escrow agreement, and not owner of draft on which it gave conditional credit.

In action by bank on note, evidence held to show that bank was only collector and distributor of funds paid for goods under escrow agreement, and did not become owner of draft drawn to collect for such goods on which it gave conditional credit.

4. Bills and notes ⇨520—Evidence held to support finding that bank did not procure note by misrepresenting that one of defendants had overdrawn account.

In action on note in which defendants by cross-complaint set up that they were induced to sign it by fraudulent misrepresentation of plaintiff bank's manager that account of one of defendants was overdrawn, evidence held to support finding that such representation was not made, and to justify judgment for plaintiff.

5. Banks and banking ⇨171(6)—Forwarding bank is not responsible for correspondents' negligence in collecting drafts.

Forwarding bank is not responsible for negligence of its correspondents in collecting drafts.

6. Costs ⇨262—Showing of bad faith held not to justify penalty for taking frivolous appeal.

In action on note, although appellants' attorneys failed to file brief in reply to that presented by respondents showing of bad faith held not to justify penalty for taking frivolous appeal.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge pro tem.

Action by the First National Bank of Ely against W. N. Hamaker and others on a note. From a judgment for plaintiff, defendants W. N. Hamaker and George M. Rea appeal. Affirmed.

Paul Barksdale D'Orr, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondent.

MURPHEY, Justice pro tem. This is an action brought by the plaintiff against the defendants to recover on a promissory note in the sum of \$3,500. The defendant Shephard, being without the jurisdiction of the court, was not served. Judgment was in favor of the plaintiff against the defendants Hamaker and Rea, who are the appellants herein. It is the contention of the appellants: (a) That the note was without consideration; (b) that it was procured by fraudulent misrepresentations; (c) that the findings are not supported by the evidence; and (d) that the

judgment is against the evidence and against the law.

The circumstances under which the controversy arose were substantially as follows: The defendants were operating a tungsten mine near Ely, in the state of Nevada, under a conditional sales contract under which the defendants were let into the immediate possession and operation of the property. The contract provided that the vendors should place in escrow with the plaintiff bank a good and sufficient deed conveying the property to the defendants; that all shipments of ore were to be made in the name of the bank, and of the funds derived therefrom a certain percentage was to be retained by the operators of the mine and the remainder to be delivered to the grantors under the conditional sales agreement. Three shipments had been made to Wile Electric Furnace Company, a Pittsburg firm, prior to the shipment involved in this litigation. Shephard, the resident manager, had sold the tungsten concentrates to the Pittsburg firm at prices agreed upon between them, 75 per cent. of which selling price was to be paid on presentation of drafts attached to bills of lading, the balance after the receipt of the concentrates. In accordance with the escrow agreement, a draft attached to a bill of lading was drawn in the name of the plaintiff bank for \$4,450, being 75 per cent. of the agreed purchase price of the fourth shipment. This draft was forwarded by plaintiff through its regular banking correspondents to a Pittsburg bank for collection. At the time of forwarding the draft, the amount thereof was placed to the credit of Shephard's account in the following manner, according to the testimony of one Biggane, the manager of the Ely bank, who was the only witness upon the subject:

"The credit was made by preparing a deposit slip for that amount, which I produce, reading as follows: The First National Bank, deposit of A. R. Shephard, Ely, Nev., 4-24-1926. Advance on fourth shipment, \$4,450—advanced on—I ask leave to withdraw that. 'Advance on fourth shipment, \$4,450, to Wile Electric Furnace Company, Pittsburg, Pa., J. W. Biggane.' And at the foot of the deposit slip appear these words, printed, 'all checks and drafts of this and other banks credited subject to payment.'"

The market value of the tungsten products was declining and when presented to the drawee, payment was refused. The date of this refusal is fixed at about the 28th day of April, 1916, of which fact the plaintiff bank was not notified until the 16th day of June, when it received telegraphic advices to that effect. Shephard was immediately notified, and upon the return of the draft some days afterwards the Shephard account was charged with the amount of the draft. Under these circumstances, it is the contention of the ap-

pellants that the correspondent banks were negligent; that the plaintiff was responsible for their negligence, and that the plaintiff purchased the concentrates and the drafts; that the draft belonged to the plaintiff, and that it had no right to charge the amount to Shephard. Neither of these contentions may be sustained, either by the facts as found by the trial court, nor by the law applicable thereto.

[1] It is manifestly the theory of the appellant that the time elapsing from the repudiation of the draft by the drawee to the time when the plaintiff bank received notice of dishonor, a period of about six weeks, constituted negligence of which the court should have taken judicial notice, which negligence, as a matter of law, should be attributed to the plaintiff bank. If these acts or want of action constituted negligence, it was a matter of defense and it was incumbent upon the defendants to show that, under all the circumstances of the case, negligence might be fairly predicated thereon. This they did not do. There was not a word of evidence that the correspondent banks were negligent, nor is there any evidence as to what their conduct and acts with respect to this transaction actually were.

[2, 3] So far as the activity of the plaintiff bank is concerned the court specifically found:

"That upon receiving notice that the said draft had not been paid, the plaintiff at once notified said A. R. Shephard of said fact, and that the said concentrates were being held by the plaintiff subject to the order of said A. R. Shephard. That said Shephard directed that the said plaintiff continue to hold said concentrates, and plaintiff complied with said direction and held said concentrates until said Shephard-ordered them sold. That when said concentrates were finally disposed of by said Shephard, as aforesaid, the proceeds of the said sale were applied by A. R. Shephard upon a new and further indebtedness which defendants had incurred to the said plaintiff; that at the time the said note sued on was executed by the said defendants W. N. Hamaker and George M. Rea, the account of said A. R. Shephard was not overdrawn. * * *

This finding is supported by the evidence of Biggane, who was manager of the Ely bank during the time of the transactions involved in this litigation, and the only witness as to these matters. He said:

"When we got notice that the draft on Wile Electric Furnace Company had been dishonored, I immediately notified Mr. Shephard, by letter or verbally, if he happened to be in town, I don't recall which way, but I remember absolutely that I gave him immediate notice."

With reference to the claim that the plaintiff bank was the owner of the draft and of the concentrates, this same witness testified, in substance:

"We had a conversation with Mr. Shephard when the first shipment of concentrates was offered to us under the escrow agreement. That was approximately in the month of March or April, 1916. This was about four weeks or so before the shipment to Wile Electric Furnace Company. We told him we would accept the drafts for credit, subject to final payment and receipt of the money in our hands, and without responsibility on the part of this bank or any correspondent bank or any channels through which it might pass for miscarriage through the mails or loss or in any other way. He assented to that. The other three shipments were made in precisely the same way as the Wile Company shipment. They had already been made. The custom of banks in Ely and throughout the eastern part of the state of Nevada with reference to giving credit on drafts was to extent immediate credit, subject to final collection through the correspondent banks. If drafts, bills, or checks on banks in other cities were not paid, the custom was to charge them back to the customer."

It is apparent from this testimony, and there is nothing to dispute or discredit it, that the bank was a collector and distributor of the funds under the escrow agreement.

[4] There is some contention on the part of appellants that the Shephard account was overdrawn and so represented to them by the bank manager. There is no evidence to support this contention and the court specifically found such claim to be groundless, the finding in this regard being:

"That it is not true that on the 9th day of October, 1916, or at any time, J. W. Biggane represented to defendants W. N. Hamaker and George M. Rea, or either of them, that the account of A. R. Shephard was overdrawn, or make any representation to said defendants, or either of them, as to the account of their partner, A. R. Shephard, other than that there were checks drawn by A. R. Shephard on his account, aggregating approximately \$2,300 in excess of the funds available in said account, and that said statements and representations by said J. W. Biggane were not false or fraudulent or for the purpose of deceiving the said defendants W. N. Hamaker and George M. Rea, or either of them, but were true."

[5] Neither of the appellants took the witness stand nor did the defendant Shephard, although it appears by statement of counsel his deposition was taken and presumably he was available as a witness, certainly so to the extent of his deposition that had already been taken. No testimony was offered on behalf of the defendants to support the allegations of their cross-complaint that they had been induced to sign the promissory note by reason of fraudulent misrepresentations of the manager of the bank, but, on the contrary, the court found, as appears in the finding last above set out, that such statements as were made by the manager were true. The above analysis of the evidence would indicate that the judgment in favor of the plaintiff was proper, there being no showing

of negligence of either the forwarding or correspondent banks. However, in this state the law does not make the forwarding bank responsible for the negligence of its correspondents.

In the case of Nicoletti v. Bank of Los Banos, 190 Cal. 637, 214 P. 51, 27 A. L. R. 1479, the court said:

"The principle controlling the duty of a bank receiving commercial paper collection at a distant point would seem to be equally applicable to an agreement to transmit money to such a point. We are not lacking in authority upon that question in California, although the decisions are not agreed upon that matter. In the case of Davis v. First Nat. Bank of Fresno, 118 Cal. 600 (50 P. 666), this court, in dealing with the question of the liability of a bank which had taken a draft for collection, held that its duty was complete when it sent the draft through ordinary banking channels to another bank for collection, and this was true even though the plaintiff did not know that such was the custom of the bank. In that regard the opinion states as follows: 'In making the collection the bank was acting as the agent of the plaintiff, and from the nature of the transaction was required to employ a subagent, and, as the agent of the plaintiff, was bound to exercise reasonable care and diligence, as well in the employ of its subagent as in the discharge of any other of the duties assumed by it. If in making the collection it followed the course usually taken by banks under similar circumstances it cannot be held to have been negligent. *Dorchester Bank v. New England Bank*, 1 Cush. (Mass.) 177; *Indig v. National City Bank*, 80 N. Y. 105.' The decision of the Supreme Court of Massachusetts thus cited by this court as authority for the decision (*Dorchester Bank v. New England Bank* [supra]), contains the following: 'The bills undoubtedly were intended to be transmitted to Washington for collection, and if the defendants employed suitable subagents for that purpose, in good faith, they are not liable for the neglect or default of the subagents.'"

The Chief Justice, in delivering the opinion in the case of Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330, says:

"It is equally well settled, that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance, is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine, it is well settled, that if the acceptor of a bill or promisor of a note, has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank, that it was to be transmitted to the place of the residence of the promisor."

The rule announced in these decisions is supported by a decided weight of authority. Many cases are cited sustaining this doctrine. It must be conceded that there is a conflict of authority as to the liability of a bank which accepts commercial paper payable at

a distant point for collection, the New York rule being that the bank contracts to collect the paper and that its correspondents are its agents, for whose negligence it is liable. However, courts adhering to the New York rule have always held that that rule may be modified or changed either by universal custom or by positive agreement. In *Allen v. Merchants' Bank of the City of New York*, 22 Wend. (N. Y.) 215-232 (34 Am. Dec. 289), the court, speaking through Justice Verplanck, said:

"The bank, if its officers think fit, and the dealer will consent, may vary that liability in either case. It may receive the paper only for transmission to its correspondents. That would form a new and different contract, and would limit the responsibility to good faith and due discretion in the choice of an agent."

In *Exchange National Bank v. Third National Bank*, 112 U. S. 276-281, 5 S. Ct. 141, 143 (28 L. Ed. 722), the court, in speaking of the rule announced by those courts which had accepted the New York doctrine, said:

"* * * The contrary doctrine, that a bank receiving a draft or bill of exchange in one state for collection in another state from a drawee residing there, is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers or from that of its correspondent in the other state, or an agent employed by such correspondent, *in the absence of any express or implied contract varying such liability*, is established by decisions in New York. * * *" (Italics ours.)

In the present case, the only witness called by the defense testified without contradiction:

"The custom of banks in Ely and throughout the eastern part of the state of Nevada with reference to giving credit on drafts was to extend immediate credit, subject to final collection through the correspondent banks. If drafts, bills, or checks on banks in other cities were not paid, the custom was to charge them back to the customer. The original of the deposit slip, which has been put in evidence, stayed with the bank, but Mr. Shephard received a copy, in effect a duplicate original with the wording on it the same. All of our slips have this printed on them: 'All checks and drafts on this and other bank credited subject to payment.' That had been on all our deposit slips for years prior to this, * * * it was the universal custom of banks to accept all drafts upon foreign connections as cash items with provisions. I mean by my expression, 'with provisions,' if the bank feels that the depositors are responsible customers, in many cases they extend immediate credit with the privilege of charging back in the event of nonpayment through any cause. With people who are not responsible, of course, they do not do that."

In this state in the case of Davis v. First National Bank of Fresno, supra, the court said:

"The court should also have permitted the defendant to show by the witnesses, which it called

for that purpose, the usage of banks in regard to the collection of paper presented by persons who were unknown to them, and that the defendant conformed to that usage. * * * "The fact that one deals with the bank without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. It is clear that if a person hands over a note to a bank for collection, without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course and to retain him until the whole theory has been expounded to him, when his conduct unmistakably shows that either he already knows it, or else he does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank at his own deliberately assumed risk of its sufficiency. In such a case the bank not only has the right to assume, but it is even positively bound to assume that his desire is that the ordinary and established usage be pursued.' "

To the same effect is the case of *San Francisco National Bank v. American National Bank of Los Angeles*, 5 Cal. App. 412, 90 P. 558.

[6] In this case the attorneys for appellant have filed no brief in reply to that presented by the respondents. Certainly, this was not because of the fact that the respondent's brief failed in any respect to fully answer every point raised by the appellants in their opening brief. It is earnestly contended on the part of respondent that the appellants should be penalized for having taken a frivolous appeal. In this respect we do not feel that bad faith can be attributed to the appellants, although there seems to be very little merit in the appeal, either from the standpoint of the facts of the case or the law applicable thereto. It is probably unfortunate that the respondent's very clear exposition of the law and facts of the case was not available to appellants before the appeal was initiated.

The judgment is affirmed.

We concur: CRAIG, J.; THOMPSON, J.

83 Cal. App. 779

Ex parte GRIFFIN. (Cr. 1412.)

District Court of Appeal, First District, Division 1, California. June 15, 1927.

False pretenses §7(5)—Maker postdating check and telling payee he had no funds to meet it held not guilty of intent to defraud (Pen. Code, § 476a).

Maker postdating check and telling payee he had no funds to meet it, and instructing the payee not to present the check for payment until advised to do so, held not guilty of issuing check with intent to defraud within Pen. Code, § 476a.

Application for writ of habeas corpus by Russell L. Griffin to secure release from cus-

tody on an information charging violation of section 476a of the Penal Code. Writ granted, and petitioner discharged.

Franklin P. Bull, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Arthur W. Jonas, Asst. Dist. Atty., both of San Francisco, for respondent.

TYLER, P. J. Habeas corpus. The petition recites that Russell L. Griffin is imprisoned and restrained of his liberty by the sheriff of the city of San Francisco, by reason of an information being filed against him under which he is charged with the commission of a felony in violating section 476a of the Penal Code relating to issuing bank checks with intent to defraud; that his confinement is illegal, in this, that before the filing of said information he had not been legally committed on the charge by the magistrate for the following reasons: That the undisputed evidence adduced by the people at the preliminary hearing shows: (1) That petitioner did not commit the offense or any offense charged in said information, but on the contrary, the facts show that no crime had been committed; (2) that no check was ever uttered or delivered by defendant; (3) that the check set out in the information was postdated, and the payee instructed that defendant had no funds in the bank to meet the check, and that the same was not to be presented for payment until defendant advised said payee to do so, and which instruction was never given; (4) that the check was never cashed, but was deposited by the payee, Mrs. Thomas Fleming, for collection with the Mercantile Bank, the officers of which told her at the time not to draw against the check, as it would take a few days to collect it; (5) that the proof fails to show any intent to defraud. The evidence taken at the preliminary hearing shows petitioner delivered to one Mrs. Thomas Fleming the following instrument in writing:

"The Bank of Palo Alto. No. 108.

"Palo Alto, Cal., January 28, 1927.

"Pay to the order of Mrs. Thomas Fleming \$310.00, three hundred ten and 00/100 dollars.

"R. L. Griffith."

It further shows from the testimony of Mrs. Fleming, the payee named in the check, that the same was postdated, and that petitioner had informed her that he did not have funds in the bank upon which the check was drawn to meet its payment, but for her to withhold it until such time as he advised her to present it, as he was expecting to receive funds from his father. Notwithstanding these instructions, Mrs. Fleming deposited the check for collection before receiving such advice, at which time she was informed by an officer of the bank not to check against it until the amount was collected by the bank. Contrary

to these instructions, she drew upon her account for \$125. The check given to her by petitioner being returned unpaid, there was insufficient funds in her account to cover the amount she had drawn. An officer of the bank then caused the arrest of petitioner. Mrs. Fleming settled with the bank on her overdraft. Except in this particular no money was ever paid on petitioner's check either to defendant or to any one else. Mrs. Fleming refused to swear to a complaint against petitioner, as she considered she alone was to blame for his predicament in having deposited the check before being advised to do so. Under these circumstances it is manifest that there is an entire lack of evidence or probable cause to connect petitioner with the offense charged, and it utterly fails to show any intent to defraud. Where the maker of a check, at the time of delivery thereof to the payee, makes known to the latter that he has no funds in the bank to meet the payment of the check, there is no deception; and the mere fact that the maker fails or is unable to keep his promise to have funds there on or before a given date does not constitute any evidence that at the time of the transaction the check was issued with intent to defraud. *People v. Wilkins*, 67 Cal. App. 758, 228 P. 367.

The application for the writ is not opposed by any representative of the people. The writ is granted, and petitioner is discharged from custody.

We concur: KNIGHT, J.; CASHIN, J.

83 Cal. App. 792

CLINE v. CARPENTER. (Civ. 4859.)

District Court of Appeal, Second District, Division 1, California. June 15, 1927.

1. Brokers ⇐50—Agreement to pay commission on sale to purchaser, introduced within six months from expiration of listing, means to purchaser introduced within listing period.

Agreement to pay broker commission, if owner should sell property to any one broker introduced within six months from date of expiration of thirty-day listing, *held* to mean that owner would pay commission on sale made within 6 months to purchaser introduced by broker within thirty-day listing period.

2. Brokers ⇐50—Unless failure to sell within time limited is caused by owner, broker, to recover commission, must produce purchaser within time limited.

Broker, to be entitled to his commission, must produce purchaser within time designated in his contract or within such extension of time as may be granted by his employer, unless failure to sell within time limited is due to negligence or fraud of owner.

Appeal from Superior Court, Orange County; S. M. Reinhaus, Judge pro tem.

Action to recover commission on sale of real property by George Cline against A. D. Carpenter. From a judgment for plaintiff, defendant appeals. Reversed.

Arthur E. Koepsel, of Santa Ana, for appellant.

Head, Rutan & Scovel, of Santa Ana, for respondent.

McLUCAS, Justice pro tem. This is an action for the recovery of commission for the sale of real estate, and is founded upon the following instrument:

"George Cline and Arthur Shell, 117 North Spadra, Fullerton, California: I hereby authorize you, as my exclusive agent, for a period of 30 days from date hereof, to sell or exchange the following described property, to wit: 13 acres located at cor. Commonwealth & Nicholas streets. Price, \$4,500, per acre. Mortgage, \$2,500. Due, ——. Interest, 7%. Terms, about ½ or little less. If you succeed in negotiating the sale of the above described property within the time limit above stated, or should I sell said property to any one introduced to me by you within six months from date of expiration of this listing, I agree to pay you 5 per cent. on price accepted by me, for cash sale, or 2½ per cent., if exchanged, for services rendered.

"July 25, 1922.

"Phone ——.

"A. D. Carpenter, Owner.

"Address, ———."

The evidence is undisputed that plaintiff produced a purchaser ready, able, and willing to buy defendant's property on September 2, 1922, after the expiration of 30 days from the date of the foregoing instrument, though the sale was not actually made to the purchaser, for the reason that defendant's wife refused to sign the deed. Subsequently the defendant sold the property to another purchaser without the consent of the plaintiff. The trial court gave judgment for plaintiff, and defendant appeals therefrom.

[1, 2] But a single question is presented on this appeal, namely, whether the instrument sued upon was a thirty-day listing or was in fact a seven-month listing. In other words, does the instrument mean that plaintiff shall have a commission from defendant providing he produces a purchaser ready, able, and willing to buy at any time within six months after the exclusive agency had expired, or does the instrument limit the payment of commission to plaintiff by defendant only to a case where defendant sells to a purchaser introduced by plaintiff within the thirty-day period? A similar question was considered in *Elsea v. Fassler*, 29 Cal. App. 187, 154 P. 1067, where an option to sell property contained the following words:

"If I sell to any one within ninety days after the expiration of this option to whom said prop-

erty has been recommended by said agents or their assigns, I agree to pay them a commission of five (5) per cent. of the amount of said sale."

The court said (page 191 [154 P. 1069]):

"What, then, was evidently intended by the language of the agreement, 'If I sell to any one within ninety days after the expiration of this option to whom said property has been recommended by said agents,' etc., was that, if Fessler himself sold the property within the time so specified to any party to whom it had been recommended by the plaintiff and his associates during the life of the option agreement—that is, if the property had been so recommended while the plaintiff and his associates still had the authority to sell or negotiate the sale of the property under the provision expressly limiting their right so to do to the term of ninety days—then, in that case only, he would pay the brokers a commission of 5 per cent. on the gross amount for which he might so sell the property."

In the case at bar, the words, "should I sell said property to any one introduced to me by you within six months from date of expiration of this listing," were evidently intended to cover a sale made by the defendant within the time so specified to any party to whom he had been introduced while the plaintiff still had the authority to negotiate a sale of the property under the provision expressly limiting his right to do so to the term of thirty days, and in that case only he would pay the broker a commission on the sale. The words "expiration of this listing" clearly refer to the expiration of the thirty-day period; yet, if respondent's contention were true, the listing would continue for a period of six months thereafter, and plaintiff, within the succeeding six months, would have a right of action for any sale made to a person introduced within seven months after the date of the contract, thus giving a right of action for a period of thirteen months from the date of the contract. Clearly, such was not the intention of the parties. In *Wright & Kimbrough v. Dewees*, 52 Cal. App. 42, at page 45, 197 P. 957, 958, the court said:

"The obvious purpose of the insertion in the above-quoted clause of the words: 'or after termination of this contract, if sold to a party to whose attention said property was brought through the agency of the said agent,' was to protect plaintiff for his efforts during the life of the contract resulting in a sale not consummated until after the termination of the contract."

In the present case the obvious purpose of the inserted clause hereinbefore quoted was to protect the broker for introducing a purchaser during the life of the thirty-day contract, where the deal was consummated within six months "from date of expiration of this listing." The rule expressed in the foregoing cases was again followed in *Hobson v. Hunt*, 59 Cal. App. 679, 211 P. 242. We therefore conclude that the evidence is insufficient to support the finding of the trial court that said listing was a general authorization to the plaintiff to sell or exchange said property and was in full force and effect at the time plaintiff procured a purchaser for said property. A broker, to be entitled to his commission, must produce a purchaser within the time designated in his contract, or within such extension of time as may have been granted by his employer, unless the failure to sell within the time limited is due to the negligence or fraud of the owner. *Brown v. Mason*, 155 Cal. 155, 99 P. 867, 21 L. R. A. (N. S.) 328; *Hicks v. Post*, 154 Cal. 22, 96 P. 878; *Ropes v. John Rosenfeld's Sons*, 145 Cal. 671, 79 P. 354; *Zeimer v. Antisell*, 75 Cal. 509, 17 P. 642. In the present case the broker did not produce a purchaser within the time of thirty days designated in the contract; nor was there any extension of such time granted.

In view of the foregoing conclusions, the question whether defendant had a right to sell said property to any person he desired, notwithstanding said listing, becomes immaterial to the decision of this case.

The judgment is ordered reversed.

We concur: HOUSER, J.; YORK, J.

KIRK v. CULLEY. (Civ. 4755.) *

District Court of Appeal, Second District, Division 1, California. June 17, 1927.

Hearing Granted by Supreme Court Aug. 15, 1927.

Appeal and error $\Rightarrow$ 1170(10)—Finding against defendant's denial that he agreed to pay attorney named sum as fee in criminal prosecution held not miscarriage of justice (Const. art. 6, § 4½).

In action by an attorney at law for legal services in criminal prosecution, where issue as to whether defendant agreed to pay plaintiff a fee of \$1,350 was denied by defendant, except as to \$350 already paid, finding against defendant's denial *held*, under evidence, not a miscarriage of justice, in view of Const. art. 6, § 4½.

McLucas, Justice pro tem., dissenting.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Wally A. Kirk, as executrix of the estate of E. E. Kirk, deceased, against B. F. Culley. From a judgment for plaintiff, defendant appeals. Affirmed.

Lucien Gray, of Los Angeles, for appellant.

Wm. A. Schreider, of Los Angeles, for respondent.

YORK, J. Defendant appeals from a judgment rendered for plaintiff E. E. Kirk, and Wally A. Kirk, as executrix of the estate of E. E. Kirk, deceased, has been substituted as plaintiff and respondent in the place and stead of E. E. Kirk in the above-entitled cause.

The complaint alleged that certain legal services were performed for defendant at defendant's special instance and request; that defendant accepted the services, and promised and agreed to pay to plaintiff therefor the sum of \$1,350; that defendant paid \$350 on account; and that there was a balance due and owing of \$1,000. The answer of the defendant admits that plaintiff performed certain legal services at defendant's special instance and request, and that defendant accepted such services. But defendant's answer denies that he promised or agreed to pay plaintiff any sum in excess of \$350 for services performed, and also denies that he paid \$350 on account of a total sum of \$1,350, but alleges that the \$350 was paid to plaintiff and received by plaintiff in full satisfaction of the services of plaintiff. Plaintiff testified fully in regard to the employment, and there was evidence before the trial court to show that \$1,000 was to be paid to plaintiff when he should be able to convince the district attorney of the innocence and integrity of the defendant and succeed in having him dismiss the case against defendant, and that \$1,000 was agreed to be paid by defendant, and that he was to procure a certain cashier's check for that amount, and

have it indorsed in blank and delivered in escrow for plaintiff, and that it was to be delivered from escrow to plaintiff on the date that the charge was dismissed against defendant herein. But the evidence further shows that the defendant failed to procure the cashier's check for \$1,000, or in any amount, and that a short time after the contract was made the defendant was again indicted and charged with criminal intent to defraud and cheat, etc.; that thereafter the defendant came again to plaintiff, and he agreed to represent defendant for an additional preliminary fee, which he paid, and he made a second written memoranda, by which he agreed to defend defendant on both of said indictments for the same balance of \$1,000 over and above such preliminary fee or retainer. The evidence further shows that on November 1, 1922, when by the agreement the defendant was to pay \$1,000 into escrow for the benefit of plaintiff, defendant, instead of paying the money due on that day, substituted another attorney for plaintiff, without any notice to plaintiff, and defendant failed and refused to pay said money into escrow or at all. Plaintiff then brought this action. Plaintiff was the only witness, and defendant did not cross-examine, and the plaintiff rested upon his testimony. Defendant moved for a nonsuit on the ground "that there is not sufficient evidence to warrant a judgment for plaintiff." His argument was that plaintiff's action was premature, because a certain answer which plaintiff had moved to strike before as immaterial showed that the dismissal of the indictment against defendant occurred long after the case at bar had begun. The motion for nonsuit was denied. Thereafter defendant introduced as a witness the attorney who had been substituted in his place on November 21, 1922. This witness testified, in substance, as to his efforts in having two indictments against defendant dismissed, and he testified that they were finally dismissed, after certain other defendants had made reparation. The trial court found for the plaintiff and gave him judgment with interest from November 1, 1922, the day on which defendant had agreed to pay the balance of \$1,000 into the escrow, being the same day that defendant had refused to make such payment into escrow, and had substituted another attorney in place and instead of the plaintiff. The only issue made by the pleadings was whether or not the defendant had promised and agreed to pay the plaintiff the sum of \$1,350. It was denied by the defendant, except as to the \$350 already paid, and the court, upon evidence introduced found against this denial. Upon an examination of the entire case, we cannot say that there has been any miscarriage of justice. Section 4½, art. 6, Const. In the case of Daley v. Russ, 86 Cal. 114, 24 P.

867, cited by appellant, quoting from page 118 (24 P. 868) we note the possible reason for the court's very technical decision in that case:

"And where, as here, the demand is unconscionable (being for part of a brokerage of \$7,600 for obtaining a loan of \$4,000 for four months), we think that leave to amend should be refused. A party who seeks to enforce a liability like that must stand upon his legal rights."

Judgment affirmed.

I concur: HOUSER, J.

McLUCAS, Justice pro tem. I dissent.

The complaint states two causes of action. The first is indebitatus assumpsit, and alleges that plaintiff performed legal services for defendant at defendant's special instance and request; that defendant accepted said services, and promised and agreed to pay to the plaintiff therefor the sum of \$1,350; that defendant has paid on account of said sum of \$1,350 the sum of \$350. The second cause of action is in quantum meruit for the identical services alleged in the first cause of action. No evidence was introduced nor recovery sought under the second count.

Plaintiff prepared a writing, signed by himself, which he testified was agreed to, though not signed by defendant; said contract being plaintiff's Exhibit No. 2, as corrected by stipulation filed in this court, and reading as follows:

"Los Angeles, California, September 12, 1922.

"Messrs. B. F. Culley and Ovid D. Bohlen, Black Building, Los Angeles, California—Gentlemen: (Re People v. B. F. Culley and Ovid B. Bohlen. Re Indictments Nos. 18311 and 18491.) In order to reduce our understanding regarding services and fees in the above-entitled matters, the substance of our agreement is hereby set down in writing.

"In consideration of my services as the attorney for each of you, my fees are \$350 each, to include preparation for trial now set for November 1, 1922; these preliminary fees have been paid in full by each of you.

"For the trial of the above-mentioned cases my charges are to be \$250 in each case, from each of you, payable either during or before the termination of each of said trials or of the one trial should the cases be consolidated.

"Should these actions be dismissed against you at any time before the commencement of the trial, during the trial, or prior to the termination of the trial, or in the event of a verdict of acquittal, then it is agreed that my fee is to be a total of \$1,000 from each of you. This fee will eliminate all other fees excepting the ones already paid. It is understood and agreed that each of you will, on or before November 1, 1922, procure cashiers' checks, each payable to yourselves and indorsed in blank and deliver the same to William A. Schreider, attorney at law, in escrow with him, to be delivered to me unconditionally on the date said charges may be

dismissed against each of you in any of the manners above set forth.

"E. E. Kirk [Signed].

"I fully understand and agree to all of the terms of the above contract.

"Dated September 12, 1922.

"B. F. Culley [Not signed].

"I fully understand and agree to all of the terms of the above contract.

"Dated September 12, 1922.

"Ovid D. Bohlen [Not signed]."

Plaintiff prepared the case and appeared for the trial at the date set, on November 1, 1922, at which time another attorney was substituted by the defendant. The trial was continued, and the case was dismissed some time after the filing of the complaint in the instant case on April 17, 1923. The court gave judgment for plaintiff in the sum of \$1,000, with interest from November 1, 1922.

Appellant's first specification of error is that defendant's motion for nonsuit was improperly denied, for the reason that the action was prematurely brought, and for the further reason that there was a variance amounting to a failure of proof between the allegations of the complaint and the evidence. The rule is well settled that the cause of action must exist when the action is commenced. *Landis v. Morrissey*, 69 Cal. 83, 86, 87, 10 P. 258; *Lewis v. Fox*, 122 Cal. 244, 252, 54 P. 823; *Morse v. Steele*, 132 Cal. 456, 458, 64 P. 690.

In the case at bar, the contract was to pay \$1,000 on the date of dismissal or acquittal, a check for said sum to be deposited in escrow on November 1, 1922. There had been neither dismissal nor acquittal on the day the complaint was filed. Appellant's point is well taken. In *Cunee v. Davis*, 36 Cal. App. 351, 171 P. 1079, where a contract between attorney and client was under consideration, the agreement provided that, if the attorney defeated the pending action against the client or prevented a recovery, a certain fee should be paid. It was held that the action was not defeated until the judgment became final, and that an action brought for such services pending an appeal taken in the former action was prematurely brought. In the present case, the complaint declares a cause of action on the express contract, and alleges performance thereof. It is not a suit for damages for the breach of the contract on account of wrongful discharge. The cases cited by the respondent correctly state the measure of damages where the contract has been wrongfully breached by the defendant to be the full compensation provided in the contract. But here there is no opportunity for the application of such rule of damages. The complaint did not allege noncompliance and excuse therefor by reason of wrongful discharge, but instead the complaint expressly alleges the performance of the contract and fails to set out any excuse for nonperformance. Wrongful discharge was neither alleged nor proved,

and that issue could not be tried under the pleadings. Only the fact of substitution of attorneys was shown in evidence, without any reason therefor being shown. The evidence did not show performance of the contract set forth in the complaint. If the plaintiff in a suit on a contract pleads performance, he must prove it. Proof or excuse for nonperformance would not enable him to recover on such a pleading, and, if the plaintiff did not perform the contract, but relies on the conduct of the defendant as an excuse, he must set forth the excuse in his complaint. *Daley v. Russ*, 86 Cal. 114, 117, 24 P. 867; *Peek v. Steinberg*, 163 Cal. 127, 133, 124 P. 834. Plaintiff must recover upon the cause of action alleged in his complaint, and not upon some other which may be developed by the proofs. *Johnson v. Moss*, 45 Cal. 515, 518; *Mondran v. Goux*, 51 Cal. 151, 152; *Owen v. Meade*, 104 Cal. 179, 182, 37 P. 923; *Kredo v. Phelps*, 145 Cal. 526, 528, 78 P. 1044. Plaintiff's testimony does not show that he made any objection when the substitution was ordered in open court upon the suggestion of another attorney. Silence implies consent, and consent would prevent any right of action.

Respondent relies upon the rule that the order denying a motion for a nonsuit will not be reviewed upon appeal upon any ground not precisely and specifically stated in the motion for nonsuit, or where no ground is sufficiently stated, and insists that variance between the pleadings and the proof was not provided at the trial as ground for a nonsuit. We have examined the entire record and the plaintiff's motion for argument and nonsuit, and conclude therefrom that the question of variance between the pleadings and the proof was substantially raised on the motion for nonsuit.

Wally A. KIRK, as Executrix of the Estate of **E. E. Kirk**, Deceased, Plaintiff and Respondent, v. **Ovid L. BOHLEN**, sued herein as **Ovid D. Bohlen**, Defendant and Appellant. (Civ. 4756.)★

District Court of Appeal, Second District, Division 1. California. June 17, 1927.

Hearing Granted by Supreme Court Aug. 15, 1927.

Appeal from Superior Court, Los Angeles County; **John L. Fleming**, Judge.

Ray W. Bruce, of Los Angeles, for appellant.

Wm. A. Schreider, of Los Angeles, for respondent.

YORK, J. Defendant appeals from a judgment rendered for plaintiff, **E. E. Kirk**, and **Wally A. Kirk**, as executrix, of the estate of **E. E. Kirk**, deceased, has been substituted as plaintiff and respondent in the

place and stead of **E. E. Kirk** in the above-entitled cause.

It is stipulated by counsel that the above-entitled action may be heard and decided on the judgment roll, transcript, and briefs filed in the preceding action, entitled *Kirk v. Culley* (Cal. App.) 257 P. 461.

For the reasons stated in the opinion of *Kirk v. Culley*, it is ordered that the judgment be affirmed.

I concur: **HOUSER, J.**

McLUCAS, Justice pro tem. I dissent for the reasons stated in the dissenting opinion in *Kirk v. Culley*, Civil No. 4755.

84 Cal. App. 107

PEOPLE v. CROWFOOT. (Cr. 1396.)

District Court of Appeal, First District, Division 2. California. June 21, 1927.

Embezzlement § 11(1)—Evidence that purchaser exchanged garage for other property and failed to pay seller consideration called for did not warrant conviction for embezzlement.

Evidence, showing that defendant purchased garage and exchanged same for other property and failed to make payment for garage by delivering stock in corporation as agreed, held not to sustain conviction for embezzlement.

Appeal from Superior Court, Alameda County; **Leon G. Gray**, Judge.

Henry C. Crowfoot was convicted of embezzlement, and he appeals. Reversed.

E. A. Douthitt and **M. S. Hamilton**, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., **Earl Warren**, Dist. Atty., and **Leonard J. Meltzer**, Deputy Dist. Atty., both of Oakland, for the People.

NOURSE, J. The defendant was convicted upon an information charging him with embezzlement, on or about the 6th day of February, 1925, of certain personal property described as an automobile garage, together with the equipment therein, and a certain bill of sale thereof, which property it was alleged had been trusted to him as a bailee by one **Fred Schaefer**, the owner thereof. From the judgment following the conviction, and from the order denying his motion for a new trial, he has appealed on a typewritten record.

On this appeal the appellant presents but one ground which requires consideration—that the evidence wholly fails to sustain the verdict. Briefly, the facts are that the appellant, who was the owner of mining and lumber property situated in Butte county, this state, interested **Schaefer** in associating himself with him in the development of the property, with the ultimate object of organizing

a corporation for that purpose. In February, 1925, the parties entered into a written agreement, whereby the appellant agreed to sell to Schaefer 8,000 shares of stock of the corporation which was to be formed for the purpose of developing the properties mentioned, and in consideration thereof Schaefer agreed to sell to the appellant his entire interest in the Park Garage located in the city of Alameda. On February 6, 1925, a bill of sale was executed and delivered by Schaefer to the appellant conveying to him the entire interest in this garage and the appellant immediately assumed possession thereof, employing Schaefer to act as his agent in its management. Thereafter, and with the full knowledge and consent of Schaefer, the appellant exchanged the garage to one Elliott for an interest in real property situated in the northern part of the state. In accordance with the agreement of the parties, the appellant proceeded with the incorporation of the mining company and procured the permission of the state commissioner of corporations to issue 500,000 shares of stock, same to be held in escrow, subject to the further orders of the commissioner. This incorporation was effected on March 17, 1925, and on July 13 following, pursuant to the application of the directors of the corporation, the commissioner issued his authorization for the issue of the stock, and, on July 27 following, the stock was accordingly issued and deposited in escrow with a depositary approved by the commissioner. On October 13, 1925, the president of the corporation addressed a letter to Schaefer, stating that the appellant had represented that certain commitments for the issue of stock had been made, and asking Schaefer to communicate with him, stating what commitments he had had with the appellant, and assuring Schaefer that it was the desire of the corporation to make immediate adjustments of these commitments. No reply was received from Schaefer to this letter, but some time thereafter, through the insistence of counsel employed by him, the corporation commissioner was directed to withhold permission for the transfer of any shares from the cor-

poration for the adjustment of these demands. Thereafter demand was made upon the appellant by other counsel representing Schaefer that the appellant return the garage to Schaefer. The appellant readily agreed to comply with this demand, but when the offer was made to Schaefer he refused to accept the return of the garage and insisted that the appellant go through with his contract for the delivery of the stock. Counsel having prevented this delivery through a stop order from the corporation commissioner, these proceedings were commenced through the office of the district attorney, charging the appellant with embezzlement of the garage at the time of the original sale thereof in February, 1925.

At the time of the trial and upon this appeal the district attorney proceeded upon the theory that the parties had agreed that the appellant should take the garage, sell it, and with the proceeds thereof purchase for Mr. Schaefer 8,000 shares of the corporation stock. If this theory could have been supported by any evidence, a case might have been presented which would have put the appellant in the position of a trustee for Schaefer to hold the garage and the proceeds thereof and to apply the latter to the purchase of stock in the corporation. But there is not a particle of evidence in the record to support this theory. The evidence is without conflict that the transaction was an outright sale and transfer of Schaefer's entire interest in the garage and that the agreement to deliver shares of stock in the corporation was a personal agreement with the appellant, and not one executed by him as a promoter of the corporation. It is merely a case, then, where a sale was made and where the vendee had failed to make payment of the consideration called for. There is no evidence to show either a bailment or a trust between the parties.

Judgment and order are reversed, and a new trial ordered.

We concur: KOFORD, P. J.; STURTEVANT, J.

201 Cal. 470

NICHOLL v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 12277.)

Supreme Court of California. June 30, 1927.

1. Courts 55—That city and county paid probation officer's salary did not bring him within terms of retirement charter provision (Pen. Code, § 1203; Const. art. 11, §§ 5, 8½).

That city and county of San Francisco paid salary of county probation officer whose office is controlled by Pen. Code, § 1203, did not bring him within terms of charter provision relating to retirement, under Const. art. 11, § 8½, since duty to pay salary is controlled by section 5.

2. Courts 55—Where city and county had not exercised power to control office of probation officer by charter provision, general law controlled and retirement charter provision did not apply to him (Pen. Code, § 1203; Const. art. 11, § 8½).

Where city and county of San Francisco had not exercised power authorized by Const. art. 11, § 8½, to control office of county probation officer by proposing and having ratified by Legislature proper charter provision, Pen. Code, § 1203, controlling office, was not superseded and charter provision relating to retirement did not apply to such officer.

3. Counties 61—City and county cannot create county office, in absence of proper charter provision authorizing it to control office.

County office cannot be created by city and county of San Francisco, in absence of a proper charter provision authorizing it to control said office.

In Bank. Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action for a declaratory judgment by William H. Nicholl against the City and County of San Francisco. From the judgment, defendant appeals. Affirmed.

John J. O'Toole, City Atty., and Walter A. Dold, Asst. City Atty., both of San Francisco, for appellant.

James M. Hanley, of San Francisco, for respondent.

PRESTON, J. This is an appeal on the judgment roll by the city and county of San Francisco from a declaratory judgment to the effect that William H. Nicholl, the respondent, as adult probation officer of the

said city and county, is not subject to compulsory retirement from said office, under the terms of article 17, section 1, of the charter of said city and county, and ordinance No. 5561 (new series), enacted to carry said charter provision into effect.

The said charter provision, in so far as here involved, is as follows:

"The board of supervisors of the city and county are empowered under the conditions set forth herein, on the vote of fourteen members and the approval of the mayor, to establish a retirement system and to provide for death benefits for public employees other than policemen and firemen, who are now members of a pension system, and elective officers and officers appointed by the mayor."

There is no dispute that respondent is now and was at the time of commencement of this action over the age of 70 years, and that he is subject to retirement if the said charter provision applies to him. It is conceded by both appellant and respondent that the position held by respondent is a county office. *Nicholl v. Koster*, 157 Cal. 416, 108 P. 302.

Appellant insists, however, that a proper interpretation of said charter provision would bring the office of respondent under its terms and subject him to its rules of retirement, notwithstanding the word "employee" is used therein to designate him. This is so, it is said, because of the rule of *exceptio probat regulam de rebus non exceptis*—an exception proves a rule concerning things not excepted. This contention springs from the words of said above-quoted charter provision, "other than * * * elective officers and officers appointed by the mayor." For, says appellant, why except certain county officers if all others are not included?

[1] This argument is persuasive, but not conclusive, and the case of *O'Connell v. Retirement Board of City of Boston et al.*, 254 Mass. 404, 150 N. E. 2, to the contrary, likewise is not conclusive. But this question need not be definitely solved, for upon different and broader grounds, it must be held that neither the charter provision nor its attendant city and county ordinance have any application to the particular office held by respondent. This is true because said office is under the control of the general law, to wit, section 1203 of the Penal Code. Such assertion is conceded by appellant, but it is insisted that inasmuch as the city and county pays the salary of said respondent he thereby, under section 8½ of article 11 of the Constitution, must be held to come within the terms of said charter provision. In this contention appellant is in error.

The city and county of San Francisco has never accepted, in so far as respondent is concerned, the benefits or powers conferred by said section 8½ of article 11 of the Constitution. Admittedly the only connection the city and county of San Francisco has

with respondent is that under the law it must pay his salary. But this duty exists independent of and is in no wise connected with said section 8½—it is controlled by section 5 of said article 11. This conclusion is made certain by holdings in various decisions of this court and the District Court of Appeal, some of which will now be considered. Section 7½ of article 11 was designed to furnish to counties the same measure of authority conferred upon cities or cities and counties by section 8½ thereof.

In *Gibson v. Civil Service Comm.*, 27 Cal. App. 396, 150 P. 78, the provisions of said section 7½ and their bearing upon the position of probation officer were considered, and it was held that it is within the power of a county to adopt a charter provision, under the authority of said section 7½, which will supersede section 1203 of the Penal Code upon said subject. In that behalf the court said:

"* * * The full purpose and intent of the constitutional amendment [section 7½, article 11] is preserved and made effective by holding that the charter provisions governing the removal of all officers superseded the direction of the general statute, known as the juvenile law [Penal Code, § 1203]. * * *"

In *Anderson v. Lewis*, 29 Cal. App. 24, 154 P. 287, considering the same position of probation officer, the District Court of Appeal reaffirmed the holding in the *Gibson* Case, but said:

"Our opinion is that, where the board of supervisors has failed or declined to exercise a right to legislate as to the manner of appointment of subordinate officers, the general laws of the state touching such matters should govern."

Noel v. Lewis, 35 Cal. App. 658, 170 P. 857, is only indirectly involved and throws no particular light upon the question at issue, but *Jones v. De Shields*, 187 Cal. 331, 336, 202 P. 137, is important. In that case the county of Tehama undertook to invest itself with the power conferred upon it by said section 7½ of article 11, but the charter contained no provision for the fixing and regulation by the board of supervisors of the manner of appointment and removal or compensation of deputy county clerks as authorized by said section. In this situation it was held that the general law as to such office had not been superseded by the charter provision, respecting which the court said:

"These provisions contemplate that there may be a case where a charter will fail to provide for matters which it properly should cover, and the intention is clear that in such a situation the general law, which in such a case has not been superseded by the charter, shall govern. See *Cline v. Lewis*, 175 Cal. 315, 316, 165 P. 915. Such a situation is presented here, and it follows that the general law on the subject of petitioner's appointment and compensation has not been superseded, but remains effective."

[2, 3] This case seems almost an exact parallel to the situation before us. Here it is admitted that the city and county has not availed itself of the power authorized to control the office in question by proposing and having ratified by the Legislature a proper charter provision. This being true, the general law has not been superseded. It follows from this statement that no provision of said section 8½, respecting compensation or any other matter, is in operation respecting respondent's office because of the failure of the city and county to procure authority thereunder. In so far as the duty of the city and county to pay the salary of respondent is concerned, as above stated, that duty is referable to section 5 of article 11, as will abundantly appear from the following citations: *Jones v. De Shields*, supra; *Nicholl v. Koster*, supra; *Reed v. Hammond*, 18 Cal. App. 442, 123 P. 346. It is also true that a county office may not be created in the absence of a proper charter provision authorizing the city and county of San Francisco to control said office. *Logan v. Shields*, 190 Cal. 661, 214 P. 45.

We agree with respondent that the disposition of every question essential to this appeal is found in *Nicholl v. Koster*, supra, and that said decision determines them in favor of respondent. That case was instituted by respondent himself and was decided in 1910, respondent apparently having administered the duties of this office in said city and county for many years.

Section 1203 of the Penal Code makes no mention of age limit, nor does it provide for compulsory retirement.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

201 Cal. 450

FOSTER v. FERNANDES et al. (Sac. 4015.)

Supreme Court of California. June 23, 1927.

Appeal and error — 469—Undertaking on appeal to stay execution, not being jurisdictional, is not subject to attack that some defendants did not authorize appeal.

Undertaking on appeal to stay execution of judgment, not being jurisdictional, is not open to attack on ground that numerous defendants did not give authority to attorney of record to file for them notice of appeal, and never intended to and did not appeal from judgment entered.

In Bank.

Suit by M. Elma Foster against J. V. Fernandes and others. Judgment for plaintiff, and defendants appeal. Writ of supersedeas

was granted by Supreme Court (252 P. 726) and plaintiff moves to vacate writ. Motion denied.

Russell & Heid, of Tulare, for appellants.
Feemster & Cleary, of Visalia, for respondent.

LANGDON, J. This is an application to vacate a writ of supersedeas heretofore issued by this court in the above-entitled matter. The plaintiff secured judgment in an action to recover certain cattle or their value, from which judgment the defendants filed notice of appeal, and also filed an undertaking on appeal in the sum of \$15,000. The respondent excepted to the sufficiency of the sureties, and after due examination the trial court found the sureties were qualified to act as such, but refused to permit them to justify upon the ground that they appeared one day too late. Thereupon, the appellants applied to this court for a writ of supersedeas, which was granted and an opinion filed in connection with said order on January 18, 1927. 252 P. 726.

Respondent now moves to vacate this writ, and the ground urged is that the undertaking upon appeal is unenforceable against the appellants because of the following facts: Affidavits are presented by respondent to the effect that certain of the numerous defendants did not give authority to the attorney of record to file for them a notice of appeal and never intended to and did not appeal from the judgment entered herein. The undertaking follows the notice of appeal with reference to parties named therein, and it is urged that some of the parties to the undertaking were not properly parties to the appeal, and, therefore, the undertaking is void and unenforceable, under the ruling in *Zane v. De Onativia*, 135 Cal. 440, 67 P. 685, and other authorities cited by respondent. Assuming that the record could be collaterally attacked in this manner by affidavits, nevertheless the case of an appeal bond of this character, which is not jurisdictional, has been differentiated from the case of *Zane v. De Onativia*, supra, and the other cases relied upon by respondent in a recent case decided by this court. *El Dora Oil Co. v. Gibson et al.* (Cal. Sup.) 256 P. 550. Under the authority of the case just cited the undertaking in the instant case is not open to the attack made upon it by respondent, and there is no ground for vacating the writ heretofore issued by this court herein pending the decision of the appeal from the judgment.

The motion to vacate the writ of supersedeas is denied.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

201 Cal. 451

ABEL v. RECLAMATION DIST. No. 2047.
(Sac. 3827.)★

Supreme Court of California. June 25, 1927.

Rehearing Denied July 25, 1927.

1. Drains 70—Owner of lands surrounded by irrigation waters held required to pay drainage assessment, though not raising rice requiring irrigation.

One owning lands which were entirely surrounded by irrigation waters, brought by artificial means at cost to others in reclamation district, held required to pay drainage assessment, though his lands were used for raising alfalfa rather than rice, and winter rains were sufficient for all purposes excepting irrigating rice crops.

2. Drains 91—Supreme Court cannot interfere with findings of board of supervisors modifying drainage assessment unless assessment is unreasonable (Pol. Code, § 3456).

Supreme Court is not permitted to interfere with findings of board of supervisors in modifying drainage assessment under Pol. Code, § 3456, against one owning lands in reclamation district, unless assessment appears to be arbitrary and unreasonably made.

In Bank.

Appeal from Superior Court, Colusa County; J. O. Moncur, Judge.

Suit by George H. Abel against Reclamation District No. 2047 to enjoin the collection of a drainage assessment. Judgment for defendant, and plaintiff appeals. Affirmed.

Theodore W. Chester, of Sacramento, for appellant.

Thos. Rutledge, of Colusa, and George R. Freeman, of Willows, for respondent.

SEAWELL, J. This appeal was taken by the plaintiff from a judgment rendered against him that he take nothing by his action and that the defendant have judgment for its costs of suit. By the record before us it appears that the plaintiff was at all the times mentioned in the complaint and proceedings in this cause the owner of four separate parcels of real property aggregating 670.45 acres, situate in defendant reclamation district No. 2047, county of Colusa. Said district contains an area of about 235,000 acres. That by proceedings taken by the board of trustees of said reclamation district a comprehensive system of drainage was inaugurated for the purpose of conducting out of said district by means of a main canal and laterals large quantities of water brought therein from the Sacramento river by several irrigation systems existing within the district for the purpose of flooding extensive areas of land devoted to rice culture and for general irrigation purposes. Plaintiff's lands are not within any one of the several irrigation districts formed within the limits of defendant reclamation district, and said lands

have never been devoted to rice growing, but have been quite continuously used in recent years for the production of alfalfa crops. The four parcels which are assessed are portions of appellant's entire acreage, through which the Glenn-Colusa irrigation district canal courses. Those portions lying west of said canal are without the limits of the district and are not included in the assessment. Those parcels lying on the east side of said canal and situate within said reclamation district fall within the levy made as well as do all other lands within said reclamation district for drainage purposes. The assessment commissioners appointed by the board of supervisors of said county of Colusa placed upon said four parcels of plaintiff's lands as their proportionate share of the entire cost of the improvements the aggregate sum of \$4,755.67. Upon a hearing of the objections made by plaintiff as to the illegality and inequality of said assessment as compared with other lands, the board of supervisors modified the assessment as reported by the trustees of the district by reducing it to \$1,853.15. Section 3456, Pol. Code. In all other respects the objections were overruled and the assessment was approved as modified. The principal reason for the modification was that plaintiff's lands were not planted to rice, and the drainage factor applied in estimating the benefits that would accrue to lands within the district by reason of the improvement should not be as large in cases where land was used for growing alfalfa as in those cases where it was used for or was adaptable to the use of rice culture.

The main objections urged by plaintiff in the court below, and insisted upon here, were that said assessments levied upon said four parcels of land were illegally made for the reason that none of said parcels or any portion thereof was or could possibly be benefited by the drainage project and would, in fact, suffer a positive detriment therefrom; that said assessments were not apportioned according to the benefits, if any, that would accrue to said separate parcels with respect to each other or to the lands generally situate within the district, and the cost of constructing said drainage improvement was disproportionate to and greatly in excess of any and all benefits that could accrue to said parcels or to all other lands situate within said reclamation district. The main canal is several miles distant from the lands of plaintiff, but lateral F cuts the southerly boundary line of plaintiff's lands and lateral F-1 is approximately but one mile south of the southerly boundary line of said lands, two miles from its central point, and three miles from its remotest portion. Lateral F-4 is a constructed or excavated canal 7 feet deep, 18 or 20 feet wide at the top, and from 2 to 5 feet wide at the bottom. It is 4½ miles easterly from plaintiff's lands. The flow of wa-

ter or drainage from the lands of plaintiff is generally easterly with a trend north of east at the north line and south of east at the south line. Lateral F was dredged from the main canal westerly a distance of two miles. Thence it continues as a natural swale or ancient creek channel. Lateral F-1 is an arm or branch of lateral F. It appears that the drainage waters from plaintiff's lands find their way into the laterals and finally into the main canal. If the laterals should prove to be inadequate to drain the lands in a satisfactory manner, the construction of a ditch or slight enlargement of the laterals, which is tentatively a part of the plan, would be made to relieve the situation. There is, however, no showing of such immediate necessity, and it could not reasonably be expected that a definite provision would be made for a contingency that may not occur. St. Maurice, the engineer for the district, testified that such work, while not definitely provided for at the present time, is in the contemplation of the general plan, and will be done if the exigencies of the situation should require it, either as a drainage or irrigation expediency.

[1, 2] Plaintiff's most insistent objection to the improvement is that his lands will not be benefited either by drainage or irrigation works. It would seem that his lands are upon an elevation slightly above the general level of adjacent lands and have a natural, easy drainage. He produced witnesses who testified that grain crops had been grown upon his lands for many years without irrigation and in the latter years alfalfa has been successfully grown without irrigation. It is a fact, however, that the lands abutting on three sides of his lands have for several years been annually flooded during the summer seasons by his neighbors who are engaged in rice culture. On the west, or remaining side, said lands are bounded by the large central irrigation canal. Thus it is seen that his lands are entirely surrounded by irrigation waters brought to the borders of his lands by artificial means at a cost to others. Thus surrounded by water, it would not appear strange that his lands, even though at a slight elevation, should have produced alfalfa without the necessity of surface irrigation. That the lands of plaintiff were substantially benefited by percolating and subsurface waters can scarcely be doubted. The waters used for irrigating rice crops are held on the lands during the summer seasons and drained off in the fall of the year. The winter rains are sufficient for all other purposes. It would seem, in the light of the facts of the case, that plaintiff has suffered no apparent injustice by being required to pay an assessment which seems to be calculated upon a reasonable basis. But there are other alleged elements of benefit, which were considered by the triers of the facts in the order

provided by the statute, and we are not permitted to interfere with the findings of those tribunals unless the assessments appear to be arbitrarily or unreasonably made. Much must be left to the sound judgment and discretion of the officers appointed by law to determine the question of benefit in reclamation and drainage matters and finally to the court which makes a judicial review of the proceedings.

The central points urged by appellants, such as the validity, scope, and effect of section 3455, Political Code as amended in 1919 (St. 1919, p. 604, § 1), as counsel for appellant points out, were involved in the case of *Hershey et al. v. Reclamation District No. 108* (Cal. Sup.) 254 P. 542, and *Browning v. Reclamation District No. 108* (Cal. Sup.) 254 P. 551, and are controlled by the cases above cited. Upon the grounds and for the reasons given in those cases, all questions not specifically noticed herein, being within the purview of the cases last cited, must be held to be concluded by those cases.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

201 Cal. 456

JOHNSON, Superintendent of Banks, v. ULREY. (L. A. 8549).

Supreme Court of California. June 27, 1927.

1. Bills and notes $\S$ 525—Evidence held insufficient to show bank knew of alleged fraud in sale of worthless stock, for purchase of which from third persons defendant gave note to bank.

Evidence held insufficient to show that bank or its officers knew of, or participated in, alleged fraud in sale of worthless stock, for purchase of which defendant issued his note to the bank, and the bank issued certificates of deposit to the sellers.

2. Bills and notes $\S$ 525—Bank cashier's failure to ask for financial statement of company in advising customer concerning investment held not to show fraud.

Bank cashier's failure to ask for financial statement of corporation when assisting customer who had made numerous investments in corporate securities in determining whether to invest in its stock held not to show that cashier was party to scheme to defraud.

3. Bills and notes $\S$ 525—Bank cashier's agreement to loan money on borrower's promise to transfer business to bank held not circumstance showing participation in fraudulent sale of stock.

Bank cashier's agreement to loan money for stock investment to well-to-do resident of nearby community on borrower's promise to transfer part of business to bank held not circum-

stance showing cashier's participation in scheme to defraud.

4. Evidence ☞10(1)—Supreme Court takes judicial notice that Chino is sparsely settled farming district of limited area.

The Supreme Court takes judicial notice that Chino is a farming district of limited area, and only sparsely settled.

5. Bills and notes ☞525—Bank cashier's offer to help investigate investment by customer held not to show participation in fraud.

Bank cashier's offer to go with intending borrower to another city to help investigate an investment for which the bank loaned money, and which proved worthless, *held* not to show cashier's participation in fraud, where borrower promised to transfer part of his business to bank in consideration of the loan.

6. Bills and notes ☞525—Evidence that bank followed unsound practices held not to show intention to defraud customer who borrowed to invest in worthless stock.

Evidence that bank issued many certificates of deposit in exchange for notes, in violation of sound practice, *held* not to show intention to defraud borrower, who gave note to bank to buy worthless stock from third persons.

7. Appeal and error ☞1043(6)—Refusal to permit opening of depositions in another case held not prejudicial, if error, where credible witness testified as to relevant matter.

Refusal to permit opening of depositions taken in another case without absent counsel's consent, in order to impeach witness, *held* not prejudicial, if error, where credible witness testified as to relevant portion of deposition.

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action on a promissory note by John Franklin Johnson, as Superintendent of Banks, in charge of the liquidation of Farmers' & Merchants' State Bank of Chino, a banking corporation in liquidation, against S. J. Ulrey. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry G. Bodkin, Harold L. Watt, both of Los Angeles, and M. O. Hert, of Colton, for appellant.

Leonard, Surr & Hellyer, of San Bernardino, for respondent.

CURTIS, J. On February 21, 1923, the appellant herein, S. J. Ulrey, executed and delivered to the Farmers' & Merchants' State Bank of Chino, Cal., a promissory note for the sum of \$5,000, together with interest thereon at the rate of 8 per cent. per annum, payable six months after date. Thereafter, the note not having been paid at its maturity, the plaintiff as superintendent of banks of this state, and in charge and in control and in possession of the property and business of said bank in liquidation, instituted this action to recover the amount due on

said promissory note. Appellant answered and admitted the execution of said note, but alleged that there was an entire want and absence of consideration for the execution thereof; that said note was delivered to Charles F. Carrere, C. J. Little, and the Farmers' & Merchants' State Bank of Chino, and that nothing of value was received by appellant, except certain purported certificates of beneficial interests in the Dairy Loan Association to be converted into shares of the common stock of the Southwest Mortgage Company, a corporation; that said beneficial interests and said stock were worthless; and that Carrere, Little, and the bank knew that they were worthless at the time of the execution and delivery of said note to said bank, and that the worthless character of said beneficial interests and of said stock was unknown to appellant at the time he executed and delivered said note, and at all times prior thereto. Appellant further alleged as a defense to said note that he was induced to execute and deliver the same through the false and fraudulent representations made by the said Carrere and Little to appellant as to the financial condition of the Southwest Mortgage Company and as to the value of its stock, and also as to the financial standing and ability of the said Carrere and Little. Briefly stated, said representations which appellant alleges were made to him by said Carrere and Little, and which were alleged to be false and fraudulent, were that the Southwest Mortgage Company had been organized to take over the business of the Dairy Loan Association; that said Southwest Mortgage Company had earned an average profit of 2 per cent. per month during the period of its existence on its preferred stock, and that the earnings of said corporation were such that its common stock had an actual value of \$50 per share; that, if appellant would purchase certain certificates of beneficial interests in the Dairy Loan Association, to be thereafter converted into shares of the common stock of the Southwest Mortgage Company, and execute and deliver to Carrere and Little and the Farmers' & Merchants' State Bank a promissory note for \$5,000 on account of the payment thereof, said Carrere and Little would resell said stock within six months from date so as to net appellant \$75 per share, or, upon their failure to do so, said Carrere and Little would themselves purchase said shares at said figure at the end of said period of six months; and that Carrere and Little were men of large means, and well able to carry out said agreement with appellant. The answer further alleges that appellant relied upon said representations, and was induced thereby to execute and deliver the promissory note sued on herein, and that but for such reliance thereon he would not have exe-

cuted nor delivered said note. Then follows in the answer the necessary and proper allegations that said representations were untrue, and were false and fraudulently made, for the purpose of inducing appellant to execute said promissory note, and, furthermore, that said Carrere and Little had no intention at the time of making said promises of performing the same. Finally, it is alleged in appellant's answer that Carrere and Little in making said false and fraudulent representations and promises were acting in collusion with one J. S. Brown, who was, during all of said times, the cashier and executive officer of said Farmers' & Merchants' State Bank, and that said J. S. Brown, as cashier and executive officer, had full knowledge of the false and fraudulent character of said representations and promises, and with such knowledge, said Brown, on behalf of said bank, accepted said note from appellant, and in accepting said note was acting with the intent and purpose of assisting in the perpetration of the fraud upon appellant, and that by accepting said note, through its cashier and executive officer, said bank did so with full knowledge of the fraud perpetrated upon appellant as set forth in said answer.

Upon the issues made by said complaint and answer the action went to trial before the court with a jury. The evidence produced presented but slight, if any, conflict. In the main, it showed that Carrere and Little were stock salesmen. The appellant some time previous to meeting either of said men had become the owner of certain shares of capital stock of the Leach-Biltwell Motor Company. Appellant's brother, living in the northern part of the state, also was the owner of stock in this corporation. The latter had some business dealings with Carrere, and had given to him a letter of introduction to appellant, in which he recommended Carrere as an able salesman with whom he had considerable business of a satisfactory nature, and whom he considered, according to appellant's testimony, was "the best man to help us dispose of our Leach-Biltwell stock which we were desirous of turning over." Carrere presented this letter of introduction to appellant at the latter's ranch near Chino, Cal., about the middle of February, 1923, at which time the two men talked over a possible sale or exchange of the Leach-Biltwell stock owned by appellant and his brother. Carrere represented to appellant that it would require a considerable amount of capital to finance a campaign to sell the Leach-Biltwell stock owned by appellant and his brother; that he was forming a partnership with Little; and that he had an opportunity to secure some beneficial interests in the Dairy Loan Association or stock in the Southwest Mortgage Company at a very low figure; that if appellant would take 200 of

these beneficial interests in the Dairy Loan Association, which in turn would be exchanged for 266⅔ shares of the capital stock of the Southwest Mortgage Company, the same would be turned over to appellant for \$10,000 and 1,000 shares of his Leach-Biltwell stock. Carrere suggested appellant could go to his bank in Ontario and borrow the money upon his note. This appellant objected to doing, for the reason, as stated by him, that it would prejudice his credit at his own bank. It was finally agreed, after some days spent in consideration of the matter, that appellant would investigate the stock of the Southwest Mortgage Company, and, if he became satisfied with its value, he would endeavor to finance the project by negotiating a loan with the Farmers' & Merchants' State Bank at Chino. Accordingly, appellant met Carrere and Little at Ontario the next day, and the latter then assured appellant that the common stock of the Southwest Mortgage Company was worth \$50 per share, and that they would resell any stock acquired by appellant in said company within six months from that date for \$75 per share, net to appellant. From Ontario the three men went to the Farmers' & Merchants' State Bank at Chino, where they met J. S. Brown, the cashier of said bank. Appellant was introduced to Brown by Carrere or Little, as he had never met Brown before. He had never done any business with said bank prior thereto. After laying said matter before Brown, the latter agreed to make a loan of \$5,000 to appellant, but stated the bank was not in a position "to handle the ten." The appellant, as a witness, testified regarding this meeting, as follows:

"Q. Just tell what was said and done at that time between the four of you. A. One of the boys, I think Mr. Carrere, suggested to Mr. Brown that I was ready to go ahead and close up the deal on the condition that they would handle my paper at the bank there and hold it there. Q. Did he say the amount of the paper? A. Yes—no, I don't think the amount of the paper was mentioned at that time. I will get to that. He said I was ready to go ahead with the deal if they would handle my paper there at the bank and hold it there, and Mr. Brown in shaking hands suggested that he had never had the pleasure of my acquaintance, that he had heard of me, and, if they handled my paper, would I open an account with them, or could I see fit to give them a part of my business, and I said I was tied up with the First National at Ontario at that time, but, however, I presumed that later I could open an account with them and give them a part of my business. Mr. Brown said they would be glad to handle \$5,000 of my paper, but they were not in a position at that time to handle the ten."

Either Carrere or Little suggested that they could get the other \$5,000 in Los Angeles. Up to this time appellant had furnished no financial statement to the bank. He later

furnished such a statement, which showed that his total assets were \$255,425, with liabilities of \$75,500. After some discussion relative to the probability of securing from Los Angeles a loan of \$5,000, which, together with the \$5,000 the Chino bank had agreed to furnish, would make up the necessary \$10,000, the appellant asked to talk with Brown alone. Carrere and Little thereupon left the room, and appellant asked Brown what he knew of Carrere and Little and of the Southwest Mortgage Company. Brown replied that he knew nothing of Carrere or of the Southwest Mortgage Company, but Little had come to him highly recommended, and that he had had considerable business with him, and found him reliable. Appellant desired more information regarding the two men and the mortgage company, but stated to Brown that he did not feel competent to make the necessary investigation. Brown replied that he had had considerable experience along that line; that he had been in the banking business 15 years, and had handled a good many securities. At the request of appellant he agreed to assist appellant in determining the value of stock in the Southwest Mortgage Company and whether appellant would be justified in going into the deal. For this purpose they left for Los Angeles that afternoon. Before leaving, they stated the object of their trip to Los Angeles to Carrere and Little, and the latter suggested that they see a Mr. Johnson, trust officer in the Citizens' Trust & Savings Bank, and a Mr. Bennett, who was the president and manager of the Southwest Mortgage Company. On arriving in Los Angeles they went direct to Mr. Johnson, of the Citizens' Trust & Savings Bank, and Mr. Brown introduced himself as the cashier of the Farmers' & Merchants' State Bank of Chino. He also introduced appellant. Appellant thereupon said:

"Mr. Johnson, what we want to know is concerning the standing of the Southwest Mortgage Company and its management."

To this statement Mr. Johnson replied, according to appellant's testimony:

"Mr. Bennett was a man of splendid character and standing; that he had done business over Southern California for a number of years; that he was one of those kind of men that always paid his bills before they were due, always discounted his paper first he said, then he said that he always paid his bills before they were due. He said, 'If he owes a bill to you the 2d, 3d, or 4th, he will be in the 1st,' and he only reorganized, as I understand it, the Imperial Dairy Loan to broaden its scope and give him a chance to increase its earnings; that they had been organized less than three months, had earned 1½ per cent. the first month, 2 per cent. the second month, and so far during the third month, about two-thirds of it—in February, 1923—they were earning on the same basis. * * * Mr. Johnson said that he consid-

ered that the company had a splendid outlook with Mr. Bennett as manager, and suggested that we should interview Mr. Bennett, and we told him—I think I told him probably; one of us spoke up and said we had intended to interview Mr. Bennett."

Appellant and Brown then went to Bennett's office, and, after Brown had introduced himself and appellant, the following took place, as shown by appellant's testimony:

"I said, 'Mr. Bennett, I want to know what you know about these men Carrere and C. J. Little, what the standing of your company is, and what it is doing and so on, or know concerning the Southwest Mortgage Company,' and Mr. Bennett told us the same, practically identically as Mr. Johnson concerning the reorganization of the Imperial Dairy Loan into the Southwest Mortgage Company so as to increase its scope. Its scope was not broad enough, and didn't give them powers enough to handle the variety of paper to enable the company to earn what it should. Therefore they were reorganizing—well they had reorganized it, but it was still in transition as I understood it into the Southwest Mortgage Company; that they had earned the first month 1¼ per cent. the second month 2, and were earning on the same basis at that time; and I think this was in answer to a question probably, that they had 1,350 shares of stock issued of the capital stock, \$100 shares [\$100 per share] making the capitalization \$135,000; that their assets were at that time between 160,000 and 165,000. In answer to the question as to Carrere and Little, Mr. Bennett told us they were not fly by nights; they had offices in the Pacific Mutual Building; they had fine offices there; that Mr. Carrere had been there quite a time; that he was worth probably a couple hundred thousand dollars, and Mr. Little was worth probably \$50,000; and that he considered them responsible and able to carry out any contracts they would enter into. I explained to him they had entered into a contract in writing to sell this stock, and he said he figured they were capable of any financial responsibility, and as to the Southwest Mortgage Company he said there was but little of this stock for sale. * * * Q. By the Court: Mr. Ulrey, did you ask Mr. Bennett how much stock was outstanding? A. I asked him concerning the stock, and he answered, as I said just now, that there were 1,350 shares of the capital stock outstanding, but as to common stock I did not ask him the amount, nor was it stated in my presence anything concerning the amount. I had in mind necessarily what my knowledge had been at those times, that there was probably share for share. Q. But you made no personal inquiry? A. I made no personal inquiry. Q. By Mr. Bodkin: Did you know at that time there had been 50,000 shares of common stock issued? A. I did not know that until I had received my certificate later. * * * The Court: The question is, Did you tell Mr. Bennett that—that you were contemplating the purchase of common stock, as I understand the question? Mr. Bodkin: That is the question, yes. A. Well, I would say it would be my recollection that we did because of the answer which I do know that he stated that there was very little of this stock for sale, and that he, Carrere, and Little owned it all, so he must have understood what stock. I cannot

say we said 'common stock,' because I say to you, gentlemen of the jury and the court, what little experience I had had in stock I had noted that the common stocks I had any acquaintance with usually fluctuated with the preferred stock. The main experience I had was with the Leach-Biltwell Company stock, which usually fluctuated one with the other. What I was going to say Mr. Bennett said, there were—going back to that stock proposition— Q. By Mr. Bodkin: Well was anything said about what the par value of the common stock was? A. Yes, we spoke of that; Mr. Bennett spoke of that. He said the common stock was no par stock, but that the earnings of the company would make it a nice stock to handle, but he said it was no par stock. Q. Was anything said at that time as to whether or not the stock had a book value? A. The book value according to my recollection was never mentioned there. * * *

After this meeting at Mr. Bennett's office, appellant and Brown left for Ontario in the latter's automobile. Appellant's testimony as to what took place between him and Brown on the trip from Los Angeles to Ontario was as follows:

"Q. Did you have any conversation with Mr. Brown on the way home regarding the advisability of purchasing that stock? A. Yes. I said to Mr. Brown—I asked Mr. Brown what his impression was, what he thought of the stock and of the proposition, and he said it looked good to him. Q. At that time did you tell him whether you were going to purchase the stock or not? A. Yes; I told him that it looked good to me, and I thought I would go ahead with the deal."

The next morning appellant, after calling up Carrere and Little on the telephone, met them at Ontario, and the three then went to Chino and to the Farmers' & Merchants' State Bank, where they met Mr. Brown. The note sued on herein was prepared and signed by appellant, and the latter wrote out an agreement, which was signed by Carrere and Little, whereby they agreed to resell the stock within six months, and to turn the money into the bank. Two certificates, each for 100 beneficial interests in the Dairy Loan Association, were left with the bank for the purpose of exchanging them for common stock in the Southwest Mortgage Company. This was later done, and said stock was held by the bank as security for appellant's note. As a part of the same transaction the bank issued to Carrere and Little two certificates of deposit, each for \$2,500, payable six months after date. At this meeting Mr. Brown asked appellant for a financial statement, and one was prepared and signed by appellant, and contained the matters already referred to. At the same time appellant signed another note for \$5,000, and delivered the same to Carrere and Little, which was subsequently transferred by them to a corporation in Los Angeles city. After the transaction was closed, the appellant made frequent demands upon Carrere and Little to sell the stock as

agreed, but they neither sold it nor any part of it, nor would they purchase it from appellant. Prior to their maturity the two certificates of deposit issued by the bank to Carrere and Little had been transferred by them to third parties, and the same were proven as legal claims against the bank, which in the meantime had suspended business, and was in course of liquidation under the direction of the plaintiff, the superintendent of banks.

There is ample evidence in the record to sustain the allegations of the answer that the common stock of the Southwest Mortgage Company at the date when appellant acquired it was of little, if any, value. Mr. Bennett stated that he told appellant and Brown on the occasion of their visit to his office that the common stock had no value, but appellant and Brown both testified that they did not hear Bennett make any such statement. The evidence as to the financial ability of Carrere and Little at the time of their negotiations with appellant is not entirely satisfactory. It does appear, however, that they subsequently became involved in financial difficulties to such a degree that those who had had business dealings with them were compelled to resort to litigation, and that the proceedings against them were not confined on all occasions to civil side of the courts.

[1] One of the grounds upon which the trial court directed the jury to return its verdict in favor of respondent was that there was no substantial evidence tending to prove that Brown, the cashier and executive officer of the bank, was a party to the fraud practiced upon appellant by Carrere and Little, nor that he had any knowledge of said fraud at or prior to the time appellant executed said promissory note. If the evidence was such as to justify the action of the trial court in directing a verdict in respondent's favor upon this ground, the judgment must stand, irrespective of the merits of any other ground upon which the court may have based its action. Appellant concedes that "there was no direct evidence of the culpability of the cashier of the bank acting on behalf of the bank," but contends that "the circumstances shown were sufficient to have justified the jury in drawing the conclusion that the cashier was in fact a party to the scheme to rob the appellant."

[2] One of the circumstances which appellant contends as showing that Brown was a party to the fraud was that Brown, an experienced financier, having volunteered to assist appellant in investigating the value of the stock of the Southwest Mortgage Company, failed during such investigation to ascertain the assets and liabilities of the company or the amount of the preferred and common stock issued by it, and that, had he ascertained these facts, they would have shown that the common stock of the company was worthless. The failure of Brown to ask for

a financial statement of the company showing its assets and liabilities, or to ascertain the amount of preferred and common stock issued by the company, would not necessarily show that he was a party to the scheme to defraud the appellant. It may not have occurred to him, as it appears it did not occur to the appellant, to ascertain these facts. It is true Brown was a banker of experience, and appellant was a farmer who claimed to be unfamiliar with such matters, but appellant's financial statement made to the bank shows that he was possessed of property valued at over \$250,000, among which were stocks and bonds owned by him in the following companies: "F. M. Loan, Discount, Dusenberger Motors, Imperial Cotton Mills, Leach-Biltwell Motor Company." These stocks and bonds were valued by appellant in his statement at the sum of \$37,600. To have acquired these stocks and bonds, and thereafter to have managed the business necessarily connected with their ownership, appellant must have gained some familiarity with corporations and their manner of doing business. It is hardly probable that with the experience thus gained he had not himself learned of the importance of a financial statement in the affairs of a corporation or of the advisability of ascertaining the amount and character of its capital stock issued before investing therein. It may be conceded that there was a difference in the degree of knowledge possessed by these two men in this regard, but in our opinion the difference was not so great that an omission on the part of one would be naturally expected but on the part of the other could be considered as an inference of fraud.

[3-5] Another circumstance which appellant claims indicated that Brown must have had a personal interest in the scheme with Carrere and Little was the fact that he had agreed to make the loan to appellant before receiving from him any statement showing the character, amount, or value of appellant's property. While Brown had never met appellant before he was introduced to him by Carrere, he testified that he had heard of him, although there was evidence that he had stated in a deposition taken in another action that he had never heard of appellant before he was introduced to him by Carrere. The evidence showed that appellant resided upon his farm at Chino, consisting of 265 acres of land, and valued at over \$100,000. We may take judicial notice of the fact that Chino is a farming district of limited area, and only sparsely settled. It would have been unusual for a man in Brown's position in a community of the size of Chino not to have known something regarding a man of appellant's means and standing in that community. As a rule, bank officials make it a part of their duty to inform themselves regarding the people of their community, and especially as to the extent and value of their property in-

terest. It is not strange, therefore, much less a circumstance from which fraud could be inferred, that Brown, as cashier of the bank, was led to promise appellant a reasonable loan without first exacting of him a detailed statement of his property. Neither was the circumstance that Brown volunteered to go with appellant to Los Angeles and help him investigate the offer of Carrere and Little and spent the greater part of a day in making such investigation, without compensation or remuneration, indicative of any fraudulent interest of Brown in the scheme of Carrere and Little. When the subject of the loan was first broached to Brown by appellant, the former based his assent thereto, upon appellant transferring his business to the Farmers' & Merchants' State Bank at Chino, and, on ascertaining that appellant was tied up with the Bank of Ontario, he exacted a promise from appellant that he would at least divide his account between the two banks. It is apparent that Brown was looking after business for his bank, and, if a trip to Los Angeles would secure appellant's patronage, it would not be an unreasonable service for him to gratuitously render in order to gain appellant's good will.

While the evidence as recited herein is not all the evidence contained in the record, yet it comprises the main features thereof, and has been stated as strongly in favor of appellant as the record warrants. We have, however, carefully read all the evidence to which our attention has been directed by appellant and the greater part of the entire transcript, and we are of the opinion that the evidence taken as a whole was not sufficient to justify a jury in drawing an inference that Brown conspired with Carrere and Little to defraud appellant, or that he had any knowledge of their unlawful scheme to defraud appellant of his property.

[6] Appellant assigns as error certain rulings made by the trial court in excluding evidence offered on his behalf. It appears that prior to the Ulrey transaction, in which, as we have already seen, the bank issued two certificates of deposit, each for \$2,500, Brown, as cashier of the bank, had had other dealings with Little and one C. F. Wood, in which the bank has discounted two promissory notes for \$400 and \$800, respectively, and in payment thereof had issued certificates of deposit to Wood and Little. Thereupon appellant asked Brown the following question: "How many hundreds or thousands of dollars have you issued to Mr. Wood and Mr. Little prior to February 1, 1923?" To this question the respondent objected, and his objection was sustained by the court, and appellant assigns as error the action of the court in sustaining this objection. Appellant contends that the above question was proper, and by it and other like questions he proposed to show that the bank, "acting through

its officers, had issued certificates of deposit in payment of promissory notes received by the bank out of all proportion to the capitalization of the bank and not in conformity with good banking practices." Proof of such fact, appellant argues, would be a circumstance tending to show that the bank, through its officers, was in the conspiracy to defraud appellant. We confess our inability to see the force of appellant's argument. Conceding that the bank had pursued a method of doing business which was unsound, this fact would be no evidence whatever of any intention on the part of the officials to practice a fraud upon appellant or upon other persons occupying positions with reference to the bank similar to that occupied by appellant. This contention, therefore, is without merit.

[7] While the witness Brown was on the stand, he testified that he had heard of the appellant before he was introduced to him by Carrere. This testimony has already been referred to. For the purpose of impeaching him, appellant asked leave to open a deposition of Brown taken in another action pending before said trial court, and which had not yet been tried. The attorneys for appellant represented the defendant in said action, and expressly consented to the opening of said deposition. The attorneys for the plaintiff in said action, however, were not present, and their consent was not, and could not be, obtained. Under these circumstances the trial court refused to permit the deposition to be opened. No authority is cited by appellant holding that this action of the trial court was erroneous, and, in the absence of any such authority, we would hesitate to rule that the trial court did not pursue the proper course. We are satisfied, however, that the appellant was not prejudiced by the refusal of the trial court to permit this deposition to be opened, for the reason that a copy of the deposition was in the possession of the appellant, and he was permitted to call Mr. Watt, one of his attorneys, who testified that he was present at the taking of said deposition, and heard Brown make the statement contained in the copy of the deposition to the effect that he had never met appellant before that day. Appellant was therefore permitted to impeach Brown by the testimony of a creditable witness, and, if any error was committed in refusing permission to open the deposition, appellant was not prejudiced thereby.

As we have already indicated, the evidence fails to show that Brown, the cashier of the bank, had any knowledge of the unlawful scheme of Carrere and Little. The bank, therefore, took appellant's note freed of any notice or knowledge of said fraud, and, having given a valuable consideration therefor, is entitled to enforce the payment thereof against appellant. The court's action, there-

fore, in directing the jury to return a verdict in respondent's favor, was proper and valid, and the judgment based thereon should be sustained.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

201 Cal. 423

PEOPLE v. ALLIED ARCHITECTS' ASS'N OF LOS ANGELES. (L. A. 9482.)

Supreme Court of California. June 20, 1927.

1. Corporations  14(2)—A corporation may practice architecture, and cannot be ousted from exercise of privilege (Civ. Code, §§ 236, 653b-653d).

A corporation may be formed under Civ. Code, §§ 286, 653b-653d, to practice architecture, and cannot be ousted from the exercise of that privilege.

2. Corporations  396—Corporation, formed to practice architecture, does not lose right to further practice as a penalty for violating regulatory statute (Civ. Code, § 286; St. 1901, p. 641, as amended by St. 1903, p. 522).

Where a corporation is authorized under Civ. Code, § 286, to practice architecture, loss of right of further practice may not be inflicted on it as a penalty for violation of St. 1901, p. 641, amended by St. 1903, p. 522, requiring that its members or employees be certified architects.

3. Corporations  22—Law requiring corporation to file certified copies of articles of incorporation with county clerk held not to affect previously organized corporations; "shall" (Civ. Code, §§ 296, 299, as amended by St. 1921, p. 125).

Civ. Code, §§ 296, 299, as amended July 29, 1921 (St. 1921, p. 125), requiring a corporation to file with the county clerk of the county where its principal place of business is located a certified copy of its articles of incorporation, held not retrospective, and did not affect corporations fully organized before July 29, 1921; "shall" as used therein, while mandatory in meaning, usually referring to the future.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Shall.]

4. Statutes  263, 267(2)—No law shall be given retroactive effect to divest individuals of rights vested previous to its passage, or to affect pending litigation, unless contrary intent is manifest.

No statute or constitutional provision shall be so construed as to give it a retroactive effect to divest individuals of rights vested previous to its passage or to affect pending litigation, unless such intent is expressly declared or necessarily implied in language of the provisions.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Quo warranto by the People against the Allied Architects' Association of Los Angeles, a corporation. From a judgment for defendant and from an order denying a temporary injunction, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

Howard Robertson and Meserve, Mumper, Hughes & Robertson, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondent.

WASTE, C. J. In this proceeding in quo warranto, in which the plaintiff seeks a judgment that the defendant be excluded from the practice of architecture in the state of California, and from the exercise of any and all corporate rights, privileges, and franchises therein, and also asks for a temporary injunction to restrain the defendant from proceeding further with the performance of certain contracts which it has made with the county of Los Angeles for the performance of architectural services, the trial court denied the temporary injunction and sustained the demurrer of the defendant without leave to amend. From the judgment of dismissal thereupon entered, the plaintiff has appealed, urging several grounds for a reversal of the action of the lower court. The two decisive questions, however, are whether or not the defendant corporation is entitled to practice architecture in this state, and whether or not it has complied with the provision of the Civil Code relating to the filing of its articles of incorporation in the office of the county clerk. All the contentions of the appellant revolve about these two points.

The act regulating the practice of architecture in this state (Stats. 1901, p. 641, amended Stats. 1903, p. 522) establishes a state board of architecture, and empowers the board to examine persons who desire to follow the profession of an architect, and to issue to them licenses for that purpose, and makes it a misdemeanor, punishable by a fine, for any person to practice architecture without such a certificate. It is provided, however, that nothing in the act shall prevent any person from furnishing plans or other data for buildings for other persons, provided the one furnishing such plans and data shall fully inform the other that he is not a certificated architect. In addition to the facts appearing from the complaint, to which the trial court necessarily confined its decision in ruling on the demurrer, other undisputed facts were established in opposition to the motion of plaintiff for a temporary restraining order. The defendant, Allied Architects' Association of Los Angeles, is a corporation. Each of its thirty-three original incorporators was a duly certified architect, licensed and entitled to practice the profession of architecture within

the state of California. While, according to its by-laws, "any architect who, because of his ability and qualifications, has advanced the art and profession of architecture and thereby is fitted to render professional services for the public welfare, is eligible as a member of [the] association," at no time since the incorporation of the defendant has any one been elected a member except and only he was a duly licensed architect under the laws of the state of California, and entitled to practice the profession of architecture in this state. All the present members of the association are certificated architects. It further appeared, so far as the connection of the defendant with the work agreed to be performed for the county of Los Angeles was concerned, that such work—

"in so far as the same already has been done, was done and performed by a licensed architect, duly licensed to practice the profession of architecture under and by virtue of the laws of the state of California, and all architectural work required or called for by said contracts to be done in the future will be done and performed for defendant and through it for said county by such a duly licensed architect; that the county of Los Angeles * * * will receive, in the doing of all architectural work called for by or done or to be done under said contracts, the services of trained, experienced, and duly licensed architects, and none others."

When the cause was in the court below, Hon. Hartley Shaw handed down a written opinion which so ably and conclusively determines the principal questions here involved that we adopt it as the opinion of this court:

[1] "The complaint alleges that the defendant was organized as a co-operative association under the provisions of sections 653b, 653c, and 653d of the Civil Code; that the purposes for which it was formed were, in general, the practice of architecture in connection with the erection of public buildings and the rendition of architectural services for its members, with other incidental powers; that neither its articles of incorporation nor its by-laws require that its members, officers, or employees be certificated architects under the statute hereinafter referred to; and that defendant has been and now is engaged in the practice of architecture, and in particular that it has made several contracts to perform architectural services for the county of Los Angeles, all of which have been completed but one. The uncompleted contract is for architectural services in connection with an acute hospital building for the county of Los Angeles, and it is against the further performance of this contract that a temporary injunction is sought.

"Plaintiff relies upon *People v. Merchants' Protective Corporation*, 189 Cal. 531, 209 P. 363, and other cases holding that a corporation cannot practice law, and that, if it undertakes to do so, quo warranto will lie against it. In view of certain other decisions of the Supreme Court, I have come to the conclusion that the principles on which the cases relating to the practice of law were decided do not apply to the instant case. Those principles, as stated in the case just cited, are: First, that individuals

may not generally and as a matter of right associate themselves together for the practice of law, special licenses being required in all cases for the practice of law, and hence the provisions of section 286 of the Civil Code, that corporations may be formed for any purpose for which individuals may lawfully associate themselves, confers no right to form a corporation for the practice of law; and, second, that the essential element underlying the relation of attorney and client is that of trust and confidence of the highest degree, growing out of the employment and entering into the performance of every duty which the attorney owes the client in the course of his employment, and that the intervention of a corporation between the client whom it secures and the attorney whom it employs, even though the latter be duly licensed, prevents this relation of trust and confidence from arising.

"Taking up the second proposition first, it must be noted that the relation of attorney and client is, as the court says, a relation of trust and confidence of the highest degree. An attorney may be, and often is, intrusted with his client's most intimate and vital secrets and details of his financial and business affairs, so that a violation by the attorney of his trust will in many cases result in financial ruin and perhaps shame and disgrace for the client. Such a relation is *sui generis*. If a corporation could enter into this relation it might be, as the court points out, that those in control of its affairs would be without character, learning, or standing, and the standards of the profession would thereby be degraded, to the great injury of the state. * * *

"The law in this state regulating the practice of architecture, after providing for the issuance of certificates entitling architects to practice, declares that it shall be unlawful for any person to practice architecture without a certificate, but adds to this a proviso that 'nothing in this act shall prevent any person from making plans for his own buildings, nor furnishing plans or other data for buildings for other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished, that he, the person furnishing such plans, is not a certificated architect.' St. 1901, p. 644, § 5. In *Ex parte McManus*, 151 Cal. 331, 90 P. 702, the Supreme Court held that this statute is valid against the objection that it discriminates between uncertificated architects. The court said: 'There is no class discrimination as to uncertificated architects, but, on the contrary, the act operates uniformly upon all that class. Any one of the class of uncertificated architects can practice his profession under the terms of the act—that is, prepare plans and other data for buildings—without rendering himself amenable to punishment, by informing his client or patron that he is not a certificated architect. * * * Neither do we perceive how under the act any special privileges or immunities are granted to any of the class of uncertificated architects, which are not possessed by, or extended to, all. That entire class are accorded the privilege and right to practice architecture, provided they inform their patrons that they do not hold certificates, and they are granted immunity from punishment provided they do so.'

"Thus the act, as construed in this case, does not prevent a natural person from practicing

architecture without a certificate, but merely requires him, if he has no certificate, to inform his patrons of that fact; or, to follow the language of the court in the case of *People v. Merchants' Protective Corporation*, individuals may generally and as a matter of right associate themselves together for the practice of architecture, such right not being limited to those who have certificates; and hence the first proposition on which *People v. Merchants' Protective Corporation* was decided is not applicable here, and the defendant was lawfully formed to engage in the practice of architecture.

"In *Binford v. Boyd*, 178 Cal. 458, 174 P. 56, this statute again came before the Supreme Court in an action to recover the amount due to a corporation for plans and specifications prepared by it for the construction of a building for the defendants. These plans were prepared by the corporation in pursuance of a contract between it and the defendants to that effect, and were made by a duly certificated architect who was employed by the corporation for that purpose. The defense was that the contract was void as in contravention of the statute regulating the practice of architecture. The court held the contract lawful, however, saying: 'Prior to this statute there was no restriction upon the right of any person to contract for or to furnish plans and specifications for another, or to follow the profession of architecture. All persons were at liberty to form corporations for any lawful purpose, and such corporations, when formed, had full capacity and power to make all contracts necessary or convenient for the carrying out of their lawful powers. * * * The terms of the act show clearly that it was directed only to individuals as distinguished from corporations. It requires an examination of the person who applies for license, and its language shows that a license can be given only to human beings and not to artificial creations such as corporations. As a corporation could not obtain a license to engage in the profession of architecture, and as it must act wholly by human agency, it could engage in that art or business only by employing individuals who would carry on that business as its officers, agents, or employees. The act is effective upon corporations only to this extent, that, if it undertakes to do business of that character, either the persons whom it engages therein must be certificated architects under this statute, or, when contracting for plans and specifications for the erection of buildings for other persons, such persons must be informed that the plans and specifications will be prepared by some one who is not a certificated architect. The act does not prohibit a corporation from contracting to furnish to another person plans and specifications which are to be prepared by a third person who is a certificated architect. Nor is there anything in the object of the act, or the evils to be removed thereby, which would raise the necessary implication that it was intended to prevent such practice.'

"This decision fully covers the present case, and holds that a corporation may practice architecture. Defendant was therefore lawfully formed for that purpose, and cannot be ousted from the exercise of that privilege.

[2] "The complaint in this case alleges that defendant's articles of incorporation and by-laws do not require its members or employees

to be certificated architects, but does not charge that they are not in fact certificated, or that, if any of them are not certificated, defendant has failed to inform the county of Los Angeles of that fact; and hence, for all that appears in the complaint, the defendant may be practicing in an entirely lawful manner. Whether it is so doing or not, the fact remains that the practice of architecture was lawfully open to it, and that it was lawfully formed for that purpose. Should it in fact violate the law by engaging uncertificated persons to perform the architectural services for which it has contracted without informing its patrons of that fact, it will be subject to penal prosecution for violation of the statute and its contracts with its patrons will be void, but I know of no law by which the loss of the right to further practice architecture may be inflicted upon it as a penalty for such violation of the statute.

[3] "Plaintiff's complaint also alleges that defendant's articles of incorporation were filed in the office of the county clerk of Los Angeles county and in the office of the secretary of state on July 1, 1921, but that defendant has never filed in the office of the county clerk of Los Angeles county, where its principal place of business is located, a copy of its articles of incorporation certified by the secretary of state, as required by section 296 of the Civil Code, and that therefore it is not authorized to transact any business. I do not think the provision of section 296, to which reference is thus made, is applicable to the defendant. In 1921, the statutory mode of organizing corporations was remodeled and substantially changed in several respects. Prior to that time, the original articles of incorporation were in all cases filed with the county clerk of the county in which the principal place of business was located, and a certified copy thereof was filed with the secretary of state, upon which, if the name did not conflict with that of other corporations, he issued a certificate of incorporation, and the organization of the corporation was then complete (Civ. Code, § 296); but the corporation was required to file in every county where it owned property, except that where its original articles were filed, a certified copy of the copy of its articles filed with the secretary of state (Civ. Code, § 299). In 1921, this plan was changed so as to require the original articles of incorporation to be filed with the secretary of state and a certified copy thereof to be filed with the county clerk of the county where the principal place of business is located, and in every county where the corporation transacts business; and to carry out this change the Legislature amended sections 296, 299, and other sections. These amendments took effect July 29, 1921 (St. 1921, p. 125), while the defendant's incorporation was completed under the then existing law on July 1, 1921. The amendment of section 296 contains the following provision:

"Upon filing the articles of incorporation in the office of the secretary of state * * * the secretary of state must issue to the corporation, over the great seal of the state, a certificate that the original articles containing the required statement of facts have been filed in his office, and thereupon the persons signing the articles and their associates and successors shall be a body politic and corporate; * * * provided, however, that no corporation shall be authorized to transact any business until it

shall have filed in the office of the county clerk of the county in which its principal business is to be transacted a copy of its articles of incorporation."

"Plaintiff claims that this proviso, which was first inserted in the section by this amendment, applies to corporations organized before the amendment took effect, and hence to the defendant. In support of this claim, plaintiff contends that the Legislature has full power to make such a change of law applicable to existing corporations. This may be conceded, but the question here is whether, under a proper construction of the law, it has done so. * * *

[4] "The construction of the amendment which plaintiff proposes would give it a retroactive effect. Plaintiff disputes this proposition, but I see no escape from it, for corporations, including defendant, which were fully organized before July 29, 1921, were entitled to do business from the date of organization until July 29, 1921, and on the latter date, if the plaintiff's construction be followed, this existing right was terminated by the amendment. In other words, a corporation which had been fully organized under the law in force at the time, lost its corporate existence, or at least its corporate powers, by the effect of a subsequent law. Such a statute is within this definition of a retrospective law in 5 Cal. Jur. 747: 'A retrospective law is one which operates upon matters which occurred, or rights and obligations which existed, before the time of enactment.' The established rule regarding such statutes is that 'no statute or constitutional provision shall be so construed as to give it a retroactive effect, to divest individuals of rights vested previous to its passage, or to affect pending litigation, unless such intent is expressly declared or necessarily implied in the language of the provision to be construed.' 5 Cal. Jur. 750. I find no such intent expressed in the amendment of section 296. Its language indicates rather that it was dealing with corporations whose organization should be thereafter begun. Such corporations would not file their original articles in the county where the principal place of business was located, and to assure persons there doing business with them some local means of ascertaining their corporate existence and powers, the Legislature added the proviso requiring a copy of the articles to be filed in the office of the county clerk of the county where the principal place of business is located. No such provision was needed as to corporations previously organized; their original articles already being on file in that office. The word 'shall,' found in this proviso, while mandatory in meaning, usually refers to the future, and the expression 'shall be authorized' is directed to such authority as may be conferred in the future. It does not cover the case of the defendant, which had already received its authority when the amendment took effect."

For the foregoing reasons the judgment of the lower court and the intermediate order entered therein, denying the plaintiff's motion for a temporary injunction, are, and each is, affirmed.

We concur; LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

201 Cal. 414

FRANK v. MAGUIRE et al., Board of Public Works. (S. F. 12384.)

Supreme Court of California. June 20, 1927.

1. Statutes $\S$ 123(7)—Title of Street Opening Act held sufficient to permit authorizing municipalities to contribute to improvement cost (St. 1903, p. 376).

Title of Street Opening Act of 1903 (St. 1903, p. 376) held sufficient to permit the act to authorize municipalities to contribute toward the cost of street improvement.

2. Statutes $\S$ 123(7)—Title of amended Street Opening Act held sufficient to permit authorizing municipalities to contribute to improvement, even if title to original act was insufficient (Street Opening Act, as amended by St. 1913, p. 429, St. 1921, p. 565, and St. 1925, p. 238; Const. art. 4, § 24).

Title of St. 1925, p. 238, specifically referring to contribution by the municipality, amending Street Opening Act (St. 1903, p. 376), as amended in 1913 (St. 1913, p. 429) and 1921 (St. 1921, p. 565), held sufficient to permit the act to authorize municipalities to contribute toward the cost of improvement, even if title to original act was insufficient, since purpose of Const. art. 4, § 24, is to prevent entrapment of Legislature and public by misleading titles.

3. Statutes $\S$ 109—Chief purpose of constitutional requirement as to title of statutes is to prevent entrapment (Const. art. 4, § 24).

The chief purpose of Const. art. 4, § 24, providing that every act shall embrace but one subject which shall be expressed in the title, is mainly to prevent entrapment of Legislature and the public by misleading titles.

4. Statutes $\S$ 109—Title of amending act is sufficient independently of original title, if it expresses subject of legislation (Const. art. 4, § 24).

Title of an amending act is sufficient independently of the original title, if it expresses the subject dealt with in the body thereof and is germane to the subject-matter of the legislation, under Const. art. 4, § 24, providing that every act shall embrace but one subject to be expressed in the title.

5. Constitutional law $\S$ 208(14)—Statutes $\S$ 72, 93(1)—Proceeding under Street Opening Act held not discriminatory, where municipality decided to contribute definite sum (Const. art. 1, §§ 11, 21, art. 4, § 25, subd. 7; Street Opening Act, § 2, as amended by St. 1925, p. 238, § 1).

Proceeding under Street Opening Act (St. 1903, p. 376) § 2, as amended by St. 1925, p. 238, § 1, authorizing the municipality to contribute the whole, a percentage, or any sum toward the expense of improvements mentioned in section 1, held not discriminatory within Const. art. 1, §§ 11, 21, prohibiting class legislation and requiring uniformity in operation, and Const. art. 4, § 25, subd. 7, prohibiting special laws authorizing opening of streets on ground not owned by state, where the municipality decided to contribute a definite sum.

6. Statutes $\S$ 64(4)—Provision of Street Opening Act for adding frontage for determining sufficiency of protests, when city's contribution is by percentage of cost, held severable (Const. art. 1, § 21; Street Opening Act, § 2, as amended by St. 1925, p. 238, § 1).

Provision of Street Opening Act (St. 1903, p. 376) § 2, as amended by St. 1925, p. 238, § 1, authorizing the municipality to contribute toward expense of improvements mentioned in section 1, providing for added percentage of frontage for determining the sufficiency of protests when the city's contribution is expressed in terms of percentage, is severable, so that even if violative of Const. art. 1, § 21, prohibiting class legislation, other methods of determining city's contribution are not thereby rendered discriminatory.

7. Statutes $\S$ 72—Street Opening Act subjecting property owner to assessment for benefits is not violative of uniformity requirements of Constitution, though eminent domain statutes require severance damages to be offset by benefits (Street Opening Act, § 10, as amended by St. 1925, p. 242, § 4; Code Civ. Proc. § 1248).

Method for assessing compensation and damages provided by Street Opening Act (St. 1903, p. 376) § 10, as amended by St. 1925, p. 242, § 4, whereby property owner is subjected to assessment for benefits, is not violative of uniformity requirements of Constitution, though Code Civ. Proc. § 1248, relating to eminent domain, requires severance damages to be offset by benefits received from the improvement, since theoretically both methods comprehend same factor.

8. Statutes $\S$ 68—Street Opening Act covers field of legislation to which general code sections are not made adaptable (St. 1903, p. 376, as amended).

Street Opening Act (St. 1903, p. 376, as amended) covers a field of legislation to which the general code sections are not made adaptable and is a law general as to all coming within its provisions.

9. Municipal corporations $\S$ 266—Magnitude and public benefit of improvement do not deprive city of authority to proceed under Street Opening Act (St. 1903, p. 376, as amended).

Fact that an improvement is of great magnitude and also of certain public benefit held not to deprive the city of authority to proceed under Street Opening Act (St. 1903, p. 376, as amended), authorizing establishment of an assessment district, in absence of abuse of discretion.

10. Municipal corporations $\S$ 450(2)—Power to determine primarily confines of assessment district is one of legislative discretion (Street Opening Act [St. 1903, p. 376, as amended]).

The power to determine primarily the confines of an assessment district under Street Opening Act (St. 1903, p. 376, as amended) is one of legislative discretion.

11. Municipal corporations ☞887—Street Opening Act provision requiring council to transfer cost to special improvement fund held not in conflict with Los Angeles Charter (Street Opening Act, § 30, as amended by St. 1925, p. 244, § 6).

Provision of Street Opening Act (St. 1903, p. 376) § 30, as amended by St. 1925, p. 244, § 6, requiring city council to transfer city's proportionate cost of improvement to Tenth street improvement fund, held not in conflict with Los Angeles City Charter, §§ 380, 381, requiring credits to be made in funds required by law and prohibiting transfer between funds except in certain cases.

12. Municipal corporations ☞450(4)—Description of assessment district in ordinance of intention held proper, though in greater detail than required by statute (Street Opening Act, § 2, as amended by St. 1925, p. 238, § 1).

Description of assessment district in ordinance of intention purporting to contain legal description of boundaries held proper, notwithstanding it was in greater detail than required by Street Opening Act (St. 1903, p. 376) § 2, as amended by St. 1925, p. 238, § 1, providing for description in general terms.

13. Municipal corporations ☞450(4)—Purpose of act amending Street Opening Act was to make less than technical legal description of assessment district sufficient (Street Opening Act, § 2, as amended by St. 1921, p. 566, § 2).

Purpose of St. 1921, p. 566, § 2, amending Street Opening Act (St. 1903, p. 376, as amended), providing that ordinance of intention should describe assessment district in general terms referring to a map, was to make something less than a technical legal description sufficient.

14. Municipal corporations ☞450(2)—Street Opening Act held applicable to improvement of continuous street, though termini were widely separated (Street Opening Act [St. 1903, p. 376, as amended]).

Street Opening Act (St. 1903, p. 376, as amended) held applicable to opening, widening, and extending one continuous street, though termini widely separated, against contention act does not contemplate inclusion in one proceeding of improvements in widely separated parts of the city.

15. Municipal corporations ☞293(1)—Language of statute in ordinance of intention held sufficient without specifying fund from which city's expense should be paid (Street Opening Act, § 2, as amended by St. 1925, p. 238, § 1).

Language of Street Opening Act (St. 1903, p. 376) § 2, as amended by St. 1925, p. 238, § 1, held sufficient in ordinance of intention without specifying fund from which the city's proportion of expense should be paid.

In Bank.

Application by Anna Frank for writ of mandate to be directed to H. J. Maguire and others, as the Board of Public Works of the

City of Los Angeles, to compel them to post and publish notices of the passage of an ordinance of intention to do certain street work. Writ granted.

Jess E. Stephens, City Atty., Robert J. Stahl, Deputy City Atty., and Hewitt, Ford, McCormick & Crump, all of Los Angeles, for petitioner.

C. B. Penn, of Los Angeles, for respondents.

SHENK, J. This is an application by an interested property owner for a writ of mandate to compel the respondents as members of and constituting the board of public works of the city of Los Angeles to post and publish, as required by law, notices of the passage of an ordinance of intention to open, widen, straighten, lay out, and extend certain streets in the city of Los Angeles. The proceeding is designated as the Tenth street project and is taken under the Street Opening Act of 1903 (Stats. 1903, p. 376) as amended. The matter is submitted on a general demurrer to the petition.

As disclosed by the petition and as thus admitted by the respondents, the proceeding under attack is prosecuted for the purpose of acquiring certain property for street purposes, which property, in connection with existing public streets connecting therewith, will constitute a continuous public street from the easterly boundary of the city of Los Angeles at Indiana street and Mines avenue to Country Club Drive at Lucerne Boulevard. The extent of the improvement and of the assessment district is shown upon a map approved by the city council on January 5, 1927, and filed in the office of the city engineer. An examination of the petition and of the map discloses that this proceeding is practically the same as that attempted to be accomplished in a former proceeding which was declared by this court to be fatally defective in *O. T. Johnson Corp. v. City of Los Angeles*, 198 Cal. 308, 245 P. 164.

On the 6th day of January, 1927, the council adopted an ordinance of intention, a copy of which is attached to the petition. This ordinance was duly approved by the mayor on the following day and was published as required by law. On January 26, 1927, the respondents adopted a resolution wherein they formally refused to post and publish the notices of the passage of the ordinance of intention on the ground that said ordinance and the statute under which the same was adopted are invalid, and that there is therefore no duty enjoined upon them by law to post and publish the "Notice of Public Work" as provided by the act, and that to proceed therewith would be an illegal expenditure of public money.

The demurrer presents eight separate objections to the proceeding. They will be con-

sidered in the order raised by the respondents and discussed in the briefs.

[1-4] 1. In section 6 of the ordinance of intention it is provided that the sum of \$1,500,000 shall be paid out of the city treasury toward the expense of said improvement. It is first contended that the title of the Street Opening Act of 1903 is insufficient to permit the act to authorize municipalities to contribute toward the cost of the improvement. The same point was raised, discussed, and insisted upon, but ruled adversely to the contention, in *O. T. Johnson Corp. v. City of Los Angeles*, supra. It is insisted that the determination of the question of the sufficiency of the title of the act was not necessary to that decision for the reason that before the ruling on the point in that case it had been decided therein that the city had not complied with the jurisdictional requirements of the statute. Conceding that the ruling on the point was not necessary to the result in that case, nevertheless it was involved therein, and we are satisfied with the declaration therein made. When considered with reference to the rules governing the construction of titles (23 Cal. Jur. 650), it may not rightly be said that the title to the original act would constrict the body of the act to proceedings for improvements to be paid for wholly by special assessment. There is an additional reason why the present proceedings are not subject to attack on this ground. The former proceedings were instituted under the act as amended in 1913 (St. 1913, p. 429) and in 1921 (St. 1921, p. 565). The present proceedings were commenced after the effective date of amendments to the act adopted by the Legislature in 1925 (Stats. 1925, p. 238). The title of the amending act specifically refers to "the contribution by the municipality to the expense of the improvement" provided for in the body of the amending act. It is insisted that the title to the original act should have been amended in order that the legislation be effective and that reference to the new matter in the title of the amending act was insufficient. The purpose of section 24 of article 4 of the Constitution with respect to the title of acts was mainly "to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another." *Abeel v. Clark*, 84 Cal. 226, 228, 24 P. 383; *Matter of Maginnis*, 162 Cal. 200, 121 P. 723. During the session of 1925 the particular bill before the Legislature and the public was the amending bill and not the original bill. The amending bill clearly referred to the subject of contribution by the municipality. If the title of the amending act express the subject dealt with in the body thereof and is germane to the subject-matter of the legislation, it is sufficient independently of the original title. *Miller & Lux v. Drainage District*, 182 Cal.

252, 187 P. 1041. That the amending act here in question does sufficiently refer to the subject of contribution by the municipality provided for in the body of the act is beyond question.

[5] 2. It is next contended that the method provided by statute for determining the sufficiency of protests is illegally discriminatory. Section 1 of the act provides for a class of public work and improvements which may be brought about under the act. The improvements under the present proceedings fall within such class. Section 2 of the act as amended in 1925 empowers the municipality to contribute toward the expense of the improvement mentioned in section 1 in the following language:

"Said city council may, in its discretion, order and declare that the whole or any percentage of, or any sum toward the expense of said improvement be paid out of the treasury of the municipality, in which case the sum or percentage to be paid shall be stated in said ordinance of intention."

The city is thus authorized to contribute (a) the whole, (b) a percentage of, or (c) any sum toward the expense of such improvements. Section 4 of the act as amended in 1925 provides:

"For the purpose of passing upon and determining the sufficiency of such protests in cases where by a resolution of intention it is declared that the city shall pay a percentage of the expense of the improvement, the city shall be deemed to be the owner of frontage within the assessment district bearing the same proportion to the whole frontage therein as the proportion of the expense which it is to pay, and the actual frontage of property within such district shall be increased by the addition of such amount as is necessary to produce said result, and the amount of frontage as so increased shall be the total frontage to be used in determining whether a protest is signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district."

[6] Respondents take the position that where the city contributes toward the expense of an improvement a property owner should have the same privileges and burdens respecting the right of protest whether the city's contribution be expressed in terms of percentage or in a specified sum; that to add a fictitious or constructive frontage for determining the sufficiency of protests when the city's contribution is expressed in terms of percentage, and to fail to add a like or any frontage when the contribution is a specified sum, amounts to a discrimination prohibited by sections 11 and 21 of article 1 of the Constitution and is special legislation prohibited by subdivision 7 of section 25 of article 4 of the Constitution. There are two answers to this contention: First, it is only when the city in terms decides to contribute a percentage of the cost of the improvement

that the so-called fictitious frontage may be added. It is not pointed out by respondents, nor do we perceive, how, by any equitable or practicable method, the frontage may be increased by percentage when the city decides to contribute a definite sum. The one method is entirely inapplicable to the other, and the property owners in both cases are not similarly situated. The statute bears no evidence whatsoever of arbitrary discrimination as between the property owners in the two cases, and there appears to be a reasonable basis for the classification. The constitutional requirement of uniformity is therefore satisfied. *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 24 S. Ct. 784, 48 L. Ed. 1142; *Johnson v. Gunn*, 148 Cal. 745, 84 P. 665; 5 Cal. Jur. 823, 831. Secondly, if it be assumed that the added percentage of frontage in the one case imposes more of a burden on the property owners who desire to obtain a requisite frontage protest than is imposed on the property owners in the other case, and if it be further assumed that the property owners in both cases are similarly situated, it would not follow that the entire provision with reference to contribution by the municipality must be stricken down. There is and can be under the statute no added percentage of frontage in the present proceeding, and the property owners in the assessment district created therein will not therefore be subjected to the alleged additional burden. If the provision of the statute requiring an added percentage of frontage be declared in a proper case to grant a special privilege, it is clear that such provision is severable. In such case said provision might be stricken as contrary to section 21 of article 1 of the Constitution without disturbing the right of the municipality to make the contribution in terms of percentage without an added frontage. *Bacon Service Corporation v. Huss*, 199 Cal. 21, 248 P. 235. We are not to be understood as deciding or intimating that the provision of the statute requiring the added frontage is invalid, but are simply meeting counsels' argument that the entire provision with reference to contribution must fall if the requirement of added frontage be invalid.

[7, 8] 3. It is next contended that the method provided by section 10 of the act of 1903 for assessing compensation and damages is contrary to the uniformity requirements of the Constitution. Said section 10 provides that the severance damages awarded to the several defendants in the condemnation suit authorized by the act "must be fixed irrespective of any benefit from such improvement." Title 7 of part 3 of the Code of Civil Procedure prescribes the rules to be followed in a proceeding under the general eminent domain law. Section 1248, which is embraced within that title, requires severance damages to be offset by benefits received from the im-

provement. It is insisted by counsel for respondents that there is no difference between the condemnation of property under the act of 1903 and the condemnation of property under the general provisions of the Code of Civil Procedure upon which to base a discrimination entitling a property owner to more severance damages in one proceeding than in the other. While there may be no difference between the results ultimately accomplished in the two proceedings, i. e., the acquisition of private property for public street purposes, there is a vast difference between the methods employed to bring about that result. In both cases just compensation to the owner for the taking or damaging of his property for public use is contemplated. In both cases the owner is subjected to a charge for benefits accruing to his remaining property. Under the general law this benefit is deducted from his damages in computing the award. Under the act of 1903 no deduction for benefits is made in making the award, but the property owner is subsequently and in the same proceeding subjected to such a deduction by way of assessment for benefits. The fact that the deduction in the one case may not be exactly the same in amount as the assessment in the other is of no consequence. Theoretically, they are intended to comprehend the same factor. The same general result to the property owner is thus sought to be accomplished, although it is impossible to say that in each case the exact result in dollars and cents is effectuated. So far as the city itself and the taxpayers generally are concerned, the proceedings are vastly different. Under the general law the cost of the improvement is usually borne by the taxpayers at large either from the general funds of the city or from funds derived from the sale of bonds. In the special assessment proceeding the cost falls upon the property owners in the assessment district. In the former case the right of eminent domain is exercised. In the latter both the right of eminent domain and the right of taxation are exercised. If in any proceeding under the act of 1903 the condemnation defendant be subjected to a deduction from severance damages of the amount of benefits and be later required to pay an assessment for the identical benefits, a double payment or a species of double taxation would inevitably result. The foregoing are considerations which lead to the conclusion that the act of 1903 covers a field of legislation to which the general code sections are not made adaptable, and is a law general as to all coming within its provisions. *Hellman v. Shoulters*, 114 Cal. 136, 44 P. 915, 45 P. 1057. The act therefore involves no unlawful discrimination as contended for by the respondents.

[9, 10] 4. The proceedings under review admittedly contemplate an improvement of great magnitude. The termini of the proposed

improvement are many miles distant and the project is doubtless a matter of much public concern. From these facts the respondents conclude and insist that the improvement is not of a local nature and hence a local district cannot legally be created to meet any part of the expenses thereof. This objection to the proceedings is grounded upon the fact that in section 1 of the ordinance of intention it is declared "that the public interest and convenience require, and that it is hereby found and determined that the public interest and necessity require, and that it is the intention of the council of the city of Los Angeles to order the following improvement to be made." We find no merit in the contention. Section 1 of the act of 1903 provides that "Whenever the public interest or convenience may require the city council of any municipality shall have full power and authority to order the laying out, * * * [of any one or more] of any public streets," etc. Section 2 of the act authorizes the city council to establish a district "to be benefited by said improvement, and to be assessed to pay the expenses thereof, and to be known as the assessment district." Admittedly the proceedings are taken under the act of 1903 and the assessment district is described in the ordinance of intention. The fact that the city is proceeding under said act is evidence that the improvement is local in its nature, beneficial to the property in the assessment district, and there is nothing in the record to justify a conclusion to the contrary. The power to determine primarily the confines of the assessment district is one of legislative discretion. *Cohen v. City of Alameda*, 183 Cal. 519, 191 P. 1110; *Rockridge Place Co. v. City Council*, 178 Cal. 58, 172 P. 1110; *Duncan v. Ramish*, 142 Cal. 691, 76 P. 661; 25 R. C. L. 97, 98; 29 C. J. 743. The fact that the improvement is of great magnitude and also of certain public benefit does not deprive the city of the authority to proceed under the act of 1903. If it were otherwise, it is conceivable that all similar proposed improvements might be subjected to attack on this ground and the act practically nullified. Unless an abuse of discretion is manifest, and none here appears, the proceedings cannot be disturbed on this ground.

[11] 5. It is next contended that the provision of section 30 of the act of 1903, in so far as it requires the city council to transfer the city's proportionate cost of the improvement to the Tenth street improvement fund, is in conflict with the charter of the city of Los Angeles. Section 30 of the act provides:

"The street superintendent shall, from time to time, pay over to the city treasurer all moneys collected by him on account of any assessment made under the provisions of this act. The city treasurer shall, on receipt thereof, place the same in a special fund, designating such fund by the name of the improvement for which the assessment was made. The city

council shall on or before the time when said assessments become delinquent, cause to be transferred from the general or other appropriate fund of the city to said special fund the percentage of, or the sum toward the total expense of such improvement to be paid by the city as and when so provided in the ordinance of intention."

Section 380 of the city charter provides:

"All money paid into the city treasury shall be credited to and kept in separate funds in accordance with the provisions of this charter, the law, or ordinance."

The said section then establishes certain specifically named funds of which the city has ownership or control either in its governmental or proprietary capacity and then specifies "trust funds and other funds as may be required by law or ordinance" as funds to be accounted for on the books of the city treasurer. Section 381 of the charter then provides:

"It shall not be lawful to transfer money from one fund to another, or to use the same in the payment of demands on another fund, except in the case of the unappropriated balance fund and the reserve fund or except as in this charter specifically provided."

It is the contention of the respondents that the charter contains no provision for the transfer of money from any city fund to the fund of a special assessment district. The argument seems to be that since the assessment district fund is a fund "required by law" to be established during the course of the proceedings, and as the charter contains no specific provision for the transfer of money from a city fund to such an assessment district fund to defray a portion of the cost of the improvement, therefore the city is without power to make any contribution whatsoever. It is conceded by the respondents that the city had the option to proceed under the act of 1903 and that when it elected to proceed thereunder it was bound by the terms of the act. When it so elected the city became the mandatory through which the purposes of the act were to be accomplished. The city itself will have no interest in the special fund thus created other than to see that it is properly collected and paid out as provided for in the statute. The provisions of the charter and of the act must be read together. When so read and considered, it cannot be said it was the intention of the charter to prohibit the transfer of the city's contribution from a city fund to the special assessment fund. Undoubtedly it would have been competent for the act of 1903 to have provided that the custody of the special assessment fund be in the county treasury or in a savings bank subject to disbursement on the order of the board of public works. In such event the payment from the city fund to the said special fund for the purpose of contribution could in no

wise be affected by the charter provision. Furthermore, section 380 of the charter provides that funds "required by law" be kept in the city treasury in accordance with law. It is manifest that when the city is authorized to make a contribution toward such an improvement, the funds in the city treasury from which the contribution may be made are held subject to the terms of the statute specifying how the contribution may be made in order to accomplish the purpose. We find no inconsistency between the charter and the general law in the respects thus contended for by respondents.

[12, 13] 6. Section 2 of the act of 1903, as amended (Stats. 1925, p. 239), provides that the ordinance of intention "shall in general terms, describe the district to be benefited by said improvement and to be assessed to pay the expense thereof, * * * and refer to a plat or map, approved by the city council, which shall indicate by a boundary line the extent of the territory to be included in said assessment district, which plat or map shall be on file in the office of the city engineer * * * and shall govern for all details as to * * * the extent of the said assessment district." This map or plat was so approved and filed in the present proceedings. It is contended by respondents that the description of the assessment district in the ordinance of intention was not a description "in general terms," but was in much detail and so technical as to render it unintelligible. The ordinance of intention contains what purports to be a legal description of the boundaries of the assessment district. The act as originally adopted required that the ordinance of intention should specify the boundaries of the district to be benefited. This requirement was deemed to impose the duty on the city of describing by correct and legal description the boundaries of the assessment district, and proceedings were declared invalid because the boundaries of the assessment district had not been so described. *Walker v. City of Los Angeles*, 23 Cal. App. 634, 139 P. 89. The rigid requirements of the statute remained in force until 1921, when it was provided by amendment (section 2) that the ordinance of intention "shall in general terms, describe the district to be benefited" with the further requirement that the ordinance should refer to a map or plat approved by the city council and filed in the office of the city engineer, which map or plat should "govern for all details as to the extent of the said assessment district" (Stats. 1921, p. 566). The rigidity of the former requirement was thus relaxed, and the undoubted purpose of the new provision was to make something less than a technical legal description sufficient, aided by a reference to the map or plat on file. It is obviously impossible to lay down a general rule as to what in all cases should constitute a "description in gen-

eral terms." Something short of a full legal description is authorized by the statute. If a general description be sufficient, a full description would also seem to be sufficient. Undoubtedly the description of the assessment district in the present proceedings could with propriety have been made much shorter and more general, but we find no sufficient reason for declaring the proceedings invalid because the description is longer and more in detail than it properly might have been.

[14] 7. The ordinance of intention shows that certain streets in the extreme easterly portion of the city are to be widened and that certain property is to be taken for street purposes in the extreme westerly section of the city. It is contended by the respondents that the act of 1903 does not contemplate the inclusion in one proceeding of street improvements in widely separated sections of the city. The case of *Southwick v. Santa Barbara*, 158 Cal. 14, 109 P. 610, is relied upon. It appeared in that case that the improvement in hand consisted of grading, curbing, guttering, and paving certain streets in two separate and distinct sections of the city that were not contiguous and were widely separated; that the said two sections had no community of interest; that the real property of either one of said sections would not receive any benefit from street improvements had in the other section; and that the work to be done in the one section was different from the work to be done in the other. It was held that the inclusion of these two widely separated sections of the city in one assessment district, all of the property of which was to be assessed to pay the cost of all of the improvements, was not authorized by the local Improvement Act of 1901 (St. 1901, p. 34). But the improvement contemplated by the present proceedings is not of the character described in that case. In the present case the improvement will be the opening, widening, and extending of one continuous public street. It will constitute the establishment of a broad thoroughfare from its eastern to its western terminus. From an examination of the record it cannot be said as a matter of law that all property in the assessment district is not benefited by the entire improvement.

[15] 8. It is next contended that the act of 1903 as now in force, when read in connection with the charter of the city, requires that the fund from which the city's proportion of the expense is to be paid must be designated in the ordinance of intention. Prior to the amendment of 1925, section 2 of the act, so far as material here, read as follows:

"Said city council may, in its discretion, order and declare that the whole or any percentage of the expense of said improvement be paid out of the treasury of the municipality from such fund as the council may designate, in which case it shall be so stated in said ordinance of intention." St. 1921, p. 566.

By the amendment of 1925 that portion of the section was made to read as follows:

"Said city council may, in its discretion, order and declare that the whole or any percentage of, or any sum toward the expense of said improvement be paid out of the treasury of the municipality, in which case the sum or percentage to be paid shall be stated in said ordinance of intention." St. 1925, p. 239.

It will be noted that the clause "from such fund as the council may designate" was omitted from the section as amended. Section 6 of the ordinance of intention provides:

"It is further ordered and declared by said city council of the city of Los Angeles that the sum of \$1,500,000.00 be paid toward the expense of said improvement, in section 1 of this ordinance described, out of the treasury of said city."

Under the statute prior to its amendment the name of the fund from which the contribution was to be paid was required to be stated. *O. T. Johnson Corp. v. City of Los Angeles*, supra. The undoubted purpose of the amendment was to avoid the requirement that the fund be so designated. When the time comes for the city to order the payment of the contribution, it must be assumed that such payment will be made from a fund from which it will be lawful to make the payment. The language of said section 6 is deemed sufficient for the purposes of the ordinance of intention.

A peremptory writ is ordered to be issued commanding the respondents to post and publish the notices of the passage of said ordinance of intention in the manner and form required by law.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

201 Cal. 438

CENTRAL SAV. BANK OF OAKLAND v. LAKE et al. (S. F. 11359.)★

Supreme Court of California. June 22, 1927.

Rehearing Denied July 21, 1927.

1. Appeal and error ⇨452—Notice of appeal, filed in Supreme Court within 10 days from nonappealable order of trial court resetting cause for trial, held not to deprive trial court of jurisdiction.

Notice of appeal from order, filed in Supreme Court within 10 days from order of trial court resetting cause for trial after remittitur from Supreme Court, held not to deprive superior court of power to proceed further pending appeal, where order disclosed on its face that it was not appealable and the Supreme Court before the second trial refused an application to stay the trial court.

2. Appeal and error ⇨106—Order resetting case for trial after remittitur from Supreme Court held not appealable; "appealable order."

Order resetting ejectment case for trial after remittitur from Supreme Court held not an "appealable order."

3. Appeal and error ⇨1180(1)—Unqualified reversal places parties in trial court in same position as before trial, except opinion on appeal must be followed.

An unqualified reversal remands a cause for a new trial and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable.

4. Judges ⇨43—That judge is stockholder in title insurance company, not party to suit or insurer of property involved, held not to disqualify him.

Fact that a trial judge is a stockholder in a title insurance company, which is not a party to the suit and not shown to have insured specific property in controversy, held not to disqualify him on ground that, if in present proceeding a trust deed should be adjudged void, similar deeds on property insured by the company would be void.

5. Judges ⇨45—That judge's son was stockholder in bank affiliated with plaintiff bank did not disqualify judge (Code Civ. Proc. § 170, subd. 2).

In suit involving trust deed, the fact that judge's son was stockholder in bank affiliated with bank which was plaintiff in ejectment suit, without showing son was an officer, agent, or attorney of either corporation, did not disqualify judge, within Code Civ. Proc. § 170, subd. 2.

6. Removal of causes ⇨43—Suit held not removable on ground that by judgment of reversal resident defendants were eliminated, where judgment was not final (U. S. Comp. St. § 1010).

Ejectment suit was not removable, under Federal Judicial Code, § 28 (U. S. Comp. St. § 1010), on ground that by a judgment of reversal all defendants except a nonresident had been eliminated, since the judgment was not final.

7. Removal of causes ⇨18—Suit held not removable on ground of denial of civil rights where trust deed in suit was executed when relevant state law was in force (Const. U. S. Amend. 14; U. S. Comp. St. § 1013).

Ejectment suit was not removable, under Federal Judicial Code, § 31 (U. S. Comp. St. § 1013) and under Const. U. S. Amend. 14, on ground that state law, barring right to enforce sale of mortgaged property when debt is barred although right of sale was not extinguished as to debt secured by trust deed, denied civil rights since law of state was in force at the time deed was executed.

8. Removal of causes $\S$ 18—Constitution and statute may be invoked only against state legislation, constitutional or statutory (Const. U. S. Amend. 14; U. S. Comp. St. $\S$ 1013).

Const. U. S. Amend. 14, and Federal Judicial Code, $\S$ 31 (U. S. Comp. St. $\S$ 1013), may be invoked to secure removal of cause on ground of denial of civil rights only as against state legislation, constitutional or statutory.

9. Removal of causes $\S$ 95—Trial court may determine whether removal has been effected where petition for removal presents issues of law only (U. S. Comp. St. $\S$ 1013).

Where issues of law only are presented by a petition for removal, under Federal Judicial Code, $\S$ 31 (U. S. Comp. St. $\S$ 1013), on ground of denial of civil rights, the trial court is at liberty to determine for itself whether removal has been effected.

10. Removal of causes $\S$ 95—Filing petition for removal of cause not removable does not necessarily work transfer (U. S. Comp. St. $\S$ 1013).

The mere filing of a petition for removal of a cause which is not removable, under Federal Judicial Code, $\S$ 31 (U. S. Comp. St. $\S$ 1013), does not necessarily work a transfer, but the action must be one that may be removed, and petition must state present facts showing a right in petitioner to demand removal.

11. Mortgages $\S$ 360—Sale by one of joint trustees under trust deed held valid where deed provided that one might act (Civ. Code, $\S$ 2268).

Sale under trust deed held valid, though only one of joint trustees was present, where deed specifically provided that the trustees or either of them might act, under Civ. Code, $\S$ 2268, providing that cotrustees must act together unless deed provides otherwise.

12. Mortgages $\S$ 360—Trustees' sale under trust deed after declaration of default and proper notice held valid.

Trustees' sale under trust deed with assistance of auctioneer after declaration of default and proper notice held valid.

13. Mortgages $\S$ 364—Payment at sale to holder of indebtedness under trust deed need not be made in gold coin, as required by notice of sale.

Where property at sale under a trust deed is sold to the holder of the indebtedness, it is not necessary that payment should be made in gold coin, as required by notice of sale, since consideration for the property is satisfaction of the debt.

14. Frauds, statute of $\S$ 139(5)—Statute does not apply to sale of property under trust deed to holder of indebtedness in satisfaction of debt (Code Civ. Proc. $\S$ 1973).

Validity of sale of property under trust deed to holder of indebtedness in satisfaction of the debt is not affected by fact that no cash was paid at the time of sale and no written contract executed, since contract becomes by the sale an executed contract to which the statute (Code Civ. Proc. $\S$ 1973) is not applicable.

15. Mortgages $\S$ 342—Substitution of new trustee, pursuant to authority in trust deed to replace one who died prior to sale held proper.

Substitution of new trustee to replace one who died prior to the sale, pursuant to authority in the trust deed, whereby directors of beneficiary bank passed a resolution naming the successor and caused the resolution to be recorded in the office of the county recorder, held proper.

16. Mortgages $\S$ 374—Trustees' deed at sale under trust deed passed fee and all incidents thereto, including right of possession.

Trustees' deed pursuant to sale under trust deed passed not only the fee but all incidents thereto, including the right of possession, free from all claims on the part of the trustors.

17. Costs $\S$ 254(4)—Item in appellants' bill of costs for printing portions of record as supplement to brief was properly disallowed (Code Civ. Proc. $\S$ 953c, 1027).

Item in bill of costs for printing portions of record as supplement to opening brief of appellants, who prevailed in first and were unsuccessful in second appeal, filed after remittitur on former appeal, was properly disallowed under Code Civ. Proc. $\S$ 953c, requiring appellants to print portions of the record to which they desired to call attention, and, where appellants included in their cost bill an item for cost of printing briefs, allowed under Code Civ. Proc. $\S$ 1027.

18. Mortgages $\S$ 374—In ejectment by purchaser at sale under trust deed, defendants claiming under conveyances subsequent to deed were in no better position than trustors.

In ejectment to obtain possession by purchaser at valid sale under a trust deed, the claims of defendants, predicated on conveyances subsequent to the trust deed, held in no better position than those of original trustors.

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action in ejectment by the Central Savings Bank of Oakland against Fannie D. Lake and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Anson Hilton, of San Francisco, and Fred W. Lake, of Oakland, for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff in an action in ejectment. The plaintiff asserts title and the right of possession to the property in question, consisting of a house and lot in the city of Oakland, under a deed issued by trustees pursuant to a sale under a deed of trust. In 1914 the plaintiff bank loaned to the defendants Fannie C. Lake and Fred W. Lake the sum of \$3,500, for which said defendants, on June 16, 1914, executed a promissory note and as security therefor executed a deed of trust covering said property. The plaintiff bank was named as beneficiary in the deed of

trust, and J. F. Carlston and Arthur L. Harris were named as trustees. Prior to the sale Arthur L. Harris died, and the plaintiff, pursuant to the provisions of the trust deed, substituted J. F. Carlston and H. C. Sagehorn as such trustees. For failure of payment of the principal and interest default was declared and the property was sold. Thereafter the said trustees made, executed and delivered their deed to the plaintiff in due form. The defendants refused to surrender possession, and on July 12, 1919, this action was commenced. By their answers in that behalf the defendants denied the plaintiff's title and right of possession. Trial was had and judgment rendered for the plaintiff. From this judgment an appeal was taken and the judgment was reversed on the ground that the recitals in the trustee's deed were not sufficient in themselves to prove the substitution of the trustees, and that there was no other evidence of the fact. *Central Savings Bank of Oakland v. Lake*, 62 Cal. App. 588, 217 P. 563. The remittitur was filed in the superior court on August 21, 1923. Thereupon, on motion of plaintiff, the court, on September 14, 1923, reset said cause for trial on November 19, 1923. On the date last mentioned the cause came on for trial. Findings of fact and conclusions of law and judgment in ejectment in favor of the plaintiff and against the defendants were signed and filed on May 22, 1924. It is from this judgment that the present appeal is prosecuted.

[1, 2] Several jurisdictional questions are presented. On the 24th day of September, 1923, or within 10 days from the date the court made its order resetting the cause for trial, the defendants filed a notice of appeal in this court from said order. It is contended that this notice of appeal had the effect of depriving the trial court of the power to proceed further in the cause pending the purported appeal. Under all of the circumstances here shown, we think that such was not the case. The order from which the appeal was attempted to be taken was not an appealable order (see *Sherman v. Standard Mines Co.*, 166 Cal. 524, 137 P. 249) and the notice of appeal on its face disclosed that such was the fact. Furthermore, on November 3, 1923, the defendants filed in this court an application to have the hand of the trial court stayed during the pendency of said appeal on the ground that the filing of said notice of appeal had ousted said court of the power to proceed with the trial. The application was denied on November 13, 1923. The said application and denial thus took place before the second trial of the cause on November 19, 1923, and must, therefore, be deemed a proceeding in which it was determined as against the present objection that the trial court retained jurisdiction to retry the cause. Following said proceeding this court, on August 12, 1924, cleared its records

of the matter by dismissing said appeal on motion of the plaintiff on the ground that the said order was nonappealable.

[3] Notwithstanding the foregoing, the defendants insist that as the District Court of Appeal on the former appeal made its order in the following form: "The judgment is reversed," and did not in specific words remand the cause for a new trial, the trial court could do nothing after the filing of the remittitur but enter a judgment in favor of the defendants on the theory now advanced by defendants that said judgment of reversal was a final judgment amounting to *res judicata* as between the parties for the reason that the court on appeal did not specifically order a new trial to be had. There is no merit in the contention. It has long been the law of this state that an unqualified reversal remands the cause for a new trial (*Falkner v. Hendy*, 107 Cal. 49, 54, 40 P. 21, 386) and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable (*Sharp v. Miller*, 66 Cal. 98, 4 P. 1065; *Estate of Pusey*, 177 Cal. 367, 170 P. 846). The court on the former appeal decided that on the record then presented a necessary link in plaintiff's chain of title was missing and the judgment was reversed for that reason. On the second trial the additional and necessary proof on this point was supplied.

[4] At the opening of the second trial the defendants moved the court for a change of venue. The motion was based on an affidavit made by one of the defendants charging the trial judge with bias and prejudice and with a disqualifying interest, under section 170 of the Code of Civil Procedure. A counter affidavit was filed, and the motion was denied. The alleged disqualification on the ground of bias and prejudice is not now and could not, in the light of the record before us, be seriously pressed. *Estudillo v. Security Loan, etc., Co.*, 158 Cal. 66, 109 P. 884. On the question of the alleged disqualification on the ground of interest it is shown that the trial judge was a stockholder and director in a title insurance company engaged in the business of issuing and theretofore having issued policies insuring the title to many parcels of land after the sale thereof under similar trust deeds. Said title insurance company was and is not a party to this action, nor was it shown that the said company had issued a policy of title insurance on the property in controversy. Notwithstanding these facts, the defendants contend that, if in the present proceeding it be declared that the said trust deed and the sale thereunder be unauthorized and void under the laws of this state, then such other trust deeds covering property, the title to which has been insured by said title company, would also be void and

the said judge would suffer a loss in proportion to his stock interest by reason of the policies of title insurance heretofore issued on such other properties. The contention is entirely unavailing. The interest so alleged is so indirect, incidental, remote, and contingent as not to bear the slightest resemblance to the direct, measurable, and pecuniary interest in the subject-matter of the action required to be shown in order to disqualify the judge. 14 Cal. Jur. 809-814.

[5] It is next contended that the trial judge was disqualified, under subdivision 2 of section 170 of the Code of Civil Procedure, by reason of the fact that his son is a stockholder in the Central National Bank, which is alleged to be an interlocking concern with the Central Savings Bank, the plaintiff in this action. It will be first noted that the Central National Bank is not a party to this action, but assuming that the alleged affiliation of the Central Savings Bank with the Central National Bank be of such a nature that the stockholders of the latter, for all practicable purposes, own and control the Central Savings Bank, it was not shown that the judge's son was or is an officer of either banking corporation, nor was it shown that said son was or is "an attorney, counsel, or agent" of either corporation as required by the statute in order to show a disqualification. The proof of disqualification is thus entirely lacking. See *Favorite v. Superior Court of Riverside County*, 181 Cal. 261, 184 P. 15, 8 A. L. R. 290.

[6] On November 10, 1923, the defendant E. D. Lake filed in the trial court an application demanding the removal of said cause to the federal court, under section 28 of the Federal Judicial Code (U. S. Comp. St. § 1010), on the ground that he was a citizen of the state of Nevada, that the cause had been reduced by the elimination of all the other defendants to a single cause between the plaintiff and himself, and that there thus remained a severable controversy between himself and the plaintiff for the reason, as claimed, that the judgment of reversal on the former appeal constituted a final judgment against the plaintiff and in favor of the defendants, including himself. Since the judgment of reversal, at the time the petition for removal was filed, did not amount to a final judgment between the parties under the law of this state, the grounds for the removal were insufficient.

[7] On the same day, to wit, November 10, 1923, the defendant E. D. Lake also filed a petition for removal to the federal court, under section 31 of the Federal Judicial Code (U. S. Comp. St. § 1013). That section provides that, when any civil suit is commenced in any state court against any person who is denied or cannot enforce in the judicial tribunals of the state any right secured to him by any law providing for the

equal civil rights of the citizens of the United States, said cause may be removed to the federal court. Said defendant alleged the right of protection under the Fourteenth Amendment to the Constitution of the United States and relief thereunder by reason of the fact that in this state the right to enforce the sale of real property mortgaged to secure a debt is barred when the debt is barred and the purchaser after the bar takes the property free of any incumbrance on account of the debt (*Faxon v. All Persons*, 166 Cal. 707, 137 P. 919, L. R. A. 1916B, 1209; *Muhs v. Hibernia Sav. & Loan Society*, 166 Cal. 760, 138 P. 352), while, on the other hand, the right of sale is not extinguished by the statute of limitations when the debt is secured by trust deed (*Travelli v. Bowman*, 150 Cal. 587, 89 P. 347; *Sacramento Bank v. Murphy*, 158 Cal. 390, 115 P. 232). By reason of this court's construction of the different effect of the statute of limitations as applied to these contractual obligations and the rights incidental thereto, it is claimed that said defendant is thereby denied the equal protection of the laws and that his petition for a removal was effectual to transfer the cause out of the trial court and oust it of jurisdiction to retry the same. At the time the trust deed here involved was executed the law of this state with reference to the effect of the statute of limitations upon the question of the enforcement of said contract was in force. Such law therefore became a part of the contract entered into between the parties to the trust deed. In said application for removal it was thus sought to invoke the Fourteenth Amendment for relief as against the effect of the voluntary contractual obligation thus assumed.

[8, 9] Protection was not sought as against any state legislation, either constitutional or statutory, and it is only as against such state action that the Fourteenth Amendment and section 31 of the Federal Judicial Code may be invoked. *Corrigan v. Buckley*, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969; *Kentucky v. Powers*, 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667; *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 P. 596, 9 A. L. R. 115. The present case was therefore not properly removable to the federal court on the grounds stated in this second application. A third removal petition was filed by the defendants Fannie D. Lake, Fred W. Lake, and A. F. Lake on grounds alleged also to be within said section 31 of the Federal Judicial Code. In their application these defendants likewise asserted that the judgment of the District Court of Appeal on the former appeal was a final judgment, and they sought the protection of the Constitution and laws of the United States under said alleged final judgment. As said judgment of reversal was not in law a final

judgment, this application on its face failed to state sufficient grounds for removal. The trial court declined to make an order of removal on any of the grounds stated in said applications. Issues of law only were thereby presented. In such case the said court was at liberty to determine for itself whether or not on the face of the record a removal had been effected. *Burlington, etc., Ry. Co. v. Dunn*, 122 U. S. 513, 7 S. Ct. 1262, 30 L. Ed. 1159. It was correctly decided that such removal had not taken place.

[10] The mere filing of a petition for removal of a cause which is not removable does not necessarily work a transfer. To accomplish this result the action must be one that may be removed and the petition must present facts showing a right in the petitioner to demand the removal. *Southern Pacific Co. v. Waite* (D. C.) 279 F. 171, and cases therein cited. Not only did the trial court correctly determine questions of law presented on the face of the petition, but the District Court of the United States for the Northern District of California, the very federal court which the defendants claim to have acquired jurisdiction by reason of said petitions, held, prior to the judgment from which the present appeal is taken, that no cause for removal was shown and granted a motion of the plaintiff remanding the said cause to the superior court, thus clearing its docket of the matters.

[11, 12] The validity of the sale under the trust deed is challenged by the defendants. They contend that the power of sale was joint and that since trustee Sagehorn was the only trustee present at the sale the same was void. There is no merit in the point. The trust deed in terms provided that "in conducting the sale, they, [the trustees] or either of them may act." This was sufficient under section 2268 of the Civil Code, which provides:

"Where there are several cotrustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides."

The trust deed contains the usual provisions for sale by the trustees in case of default. Default was declared and the trustees gave notice of sale. The notice has been examined. It was found by the trial court to be sufficient and we are of the same opinion. An auctioneer assisted in conducting the sale. There can be no valid objection to the course thus pursued under the terms of the trust deed itself and under the law of this state. The trust deed provided that in conducting the sale the trustees or either of them "may act, either in person or through the agency of an auctioneer." This procedure has been approved. *Kennedy v. Dunn*, 58 Cal. 339.

[13, 14] The notice of sale declared the intention of the trustees to sell "at public auction to the highest bidder for cash, gold coin of the United States." The auctioneer prop-

erly acted as a crier and the property was sold to the creditor bank. No cash was paid at the time and no written contract of sale was at that time executed. From these facts it is contended that the sale was void. It is well settled that, when the property is sold to the holder of the indebtedness, it is not necessary that the payment should be made in gold coin. The consideration for the property is the satisfaction of the debt (*Portola Realty Co. v. Carlston*, 32 Cal. App. 282, 162 P. 899; *Davies v. Ramsdell*, 40 Cal. App. 424, 181 P. 94), and thereupon the contract becomes an executed contract to which the statute of frauds (Code Civ. Proc. § 1973) is not applicable (12 Cal. Jur. 926, and cases cited; 27 Corp. Jur. 321).

[15, 16] The defendants attack the substitution of trustee Sagehorn. The trust deed expressly covenanted that the bank might by a resolution of its board of directors from time to time appoint and substitute other trustee or trustees to execute the trust thereby created, and that upon such appointment, either with or without a conveyance to said substituted trustee or trustees by the grantees named therein or the survivor of them or their successors or assigns, such new trustee or trustees should be vested with all the title, interest, powers, duties, and trusts in the premises vested in or conferred upon the original trustees. It was also provided that a copy of such resolution, duly certified by the officers of the bank and recorded, should be conclusive proof of substitution. Such a resolution was duly passed and certified and was on the 4th day of January, 1918, recorded in the office of the county recorder of Alameda county. This resolution was the muniment of title held on the former appeal to be the necessary proof of substitution, and it was received in evidence on the second trial. Upon examination it is found to be sufficient in all respects. Nor do we find any merit in the contention of the defendants that the trustees' deed transferred to the purchaser the naked fee only and not the right of possession. Upon the execution of the trust and the conveyance of title to the purchaser, the purchaser not only obtained the fee but all incidents thereto, including the right of possession, free from all claims on the part of the trustors. *Bryant v. Hobert*, 44 Cal. App. 315, 186 P. 379, and cases therein referred to.

By citation of numerous authorities and by much argument the defendants seek to have it declared that trust deeds are or should be held to be invalid under the laws of this state. Reference to cases decided by this court recognizing the validity and sufficiency of such trust deeds are too numerous to require citation.

[17] Finally, we are asked to review the action of the trial court in striking out an item of \$104.60 included in the defendants' bill of

costs filed after the going down of the remittitur on the former appeal. This item was for printing portions of the record as a supplement appended to the appellants' opening brief. Assuming that this matter is properly before us on this appeal, it is clear that the item was properly disallowed. The portion of the record thus printed was required, if the appellants deemed it necessary, by section 953c of the Code of Civil Procedure wherein the appellants are required to "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." This supplement is deemed to have been a part of the briefs of the appellants on said appeal, and, as they included in their cost bill an item of \$100 on account of the cost of printing their briefs and as such item was allowed under the provisions of section 1027 of the Code of Civil Procedure, the defendants have no just cause for complaint. Other points discussed in the briefs do not require notice.

[18] After what has been said it is deemed appropriate to note that the defendants Fannie D. Lake and Fred W. Lake received the loan of \$3,500 from plaintiff and the same has never been repaid, notwithstanding repeated offers on the part of the plaintiff to accept the payment thereof with the interest and costs in full satisfaction of the debt. The equitable position of the plaintiff is thus plainly apparent. The claims of the other defendants are predicated upon conveyances subsequent to the execution of the trust deed and such claims are in no better position than those of the original trustors.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

201 Cal. 381

CITY OF PASADENA v. PORTER et al.
(L. A. 8962.)

Supreme Court of California. June 16, 1927.

1. Eminent domain ⇨157—Lump sum award to reimburse tenant in accordance with lease for taking property for widening street held proper (Street Opening Act, 1903, as amended).

In condemnation proceeding, under the Street Opening Act 1903, as amended (Deering's Gen. Laws 1923, Act 8198), damages for taking of property were properly proportioned to owner and tenant in accordance with rent to be paid and property to be taken by computing a certain sum which reimbursed tenant for amount of rent he was compelled to pay under terms of lease.

2. Eminent domain ⇨82—Interest of tenant for years is "property" authorizing damages on taking property for widening street (Civ. Code, § 761; Street Opening Act 1903, as amended).

Interest of tenant under lease for term of years is "property," subject to ownership, in view of Civ. Code, § 761, so as to authorize damages for condemnation, under the Street Opening Act 1903, as amended (Deering's Gen. Laws 1923, Act 8198).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

3. Landlord and tenant ⇨100, 191—Taking of entire demised property releases tenant from liability for rent; but taking of portion does not terminate lease or absolve liability to pay full rent.

Taking of entire demised property by condemnation proceeding operates to release tenant from liability for subsequently accruing rent; but a taking of a portion only does not terminate the lease or absolve lessee of his covenant to pay full rent.

4. Eminent domain ⇨172—Court in condemnation proceeding for widening street cannot determine to what extent covenant to pay rent is affected (Street Opening Act 1903, as amended).

Court sitting in proceeding for condemnation of private property, under the Street Opening Act 1903, as amended (Deering's Gen. Laws 1923, Act 8198), has no power to reform or revise a lease on property affected, or to determine to what extent the covenant to pay rent is affected, if at all.

5. Eminent domain ⇨124—Awarding tenant for taking portion of building for period between appointment of referees and final decree held not unconstitutional (Street Opening Act 1903, § 10, as amended; Const. art. 1, § 14; Code Civ. Proc. § 1249).

Amount awarded tenant as damages for taking of portion of building, under the Street Opening Act 1903, as amended (Deering's Gen. Laws 1923, Act 8198), for period between date of appointment of referees and date of final decree, or date when tenant would lose possession, in accordance with section 10 of the act as amended, held not in violation of Const. art. 1, § 14, prohibiting taking property without just compensation, since it is necessary for purpose of assessing compensation and damages that right thereto shall be deemed to have accrued at a fixed date, as is done by Code Civ. Proc. § 1249, fixing value of property taken as of date of issuance of summons.

Curtis and Richards, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Condemnation proceeding by the City of Pasadena against Anna G. Porter and others. From the judgment, the defendant named appeals. Affirmed.

James H. Howard and Roscoe R. Hess, City Atty., both of Pasadena, and Frederick G.

Stoehr, of Pasadena, and Leonard A. Diether, of Los Angeles, for plaintiff and respondent.

Porter & Sutton, of Los Angeles, for appellant.

Willis I. Morrison, Arthur W. Eckman, and Wm. B. Himrod, all of Los Angeles, Merriam, Rinehart & Merriam and J. D. Rinehart, all of Pasadena, F. E. Peterson, F. McD. Spencer, and Howard Robertson, all of Los Angeles, and Hahn & Hahn, Cruickshank, Brooke & Evans, and Simpson & Simpson, all of Pasadena, for defendants and respondents Degelman and others.

Jess E. Stephens, City Atty., and Chandler, Wright & Ward, all of Los Angeles, amici curiae.

WASTE, C. J. The city of Pasadena instituted proceedings under the Street Opening Act of 1903, as amended, to open, widen, and extend Garfield avenue from Colorado street southerly to Green street. The defendant Anna G. Porter owns one of the parcels of land affected by the proceedings, and the respondent Gekco Company is the owner of a lease for years, executed by her, of a store building located on the land, and having a frontage of 35 feet on Colorado street. The portion of the land sought to be taken includes 8.3 feet of the frontage of the store premises. Referees appointed by the trial court on January 23, 1925, subsequently made an award for the taking of this property in the total sum of \$36,063, made up of the following items: Value of land, \$29,050; value of improvements destroyed, \$2,000; cost of restoring residue of the building, \$5,013. The \$5,013 allowed as restoration damages was divided, \$3,000 to the owner and \$2,013 to the lessee. The sum of \$16,682.68 was allocated to the owner of the fee, and the sum of \$19,380.32 to the holder of the leasehold estate. The owner excepted to the report of the referees, but her objections were overruled. The report was confirmed, and an interlocutory decree duly entered in accordance with the findings. The owner of the fee thereupon appealed to this court from that portion of the interlocutory judgment confirming the report of the referees, in so far as it related to her land.

The lease of the store premises held by the respondent Gekco Company was made June 19, 1923, to extend for a period of 10 years from August, 1924, at a monthly rental of \$700; that amount being the equivalent of \$20 per front foot per month. During the pendency of the proceedings in the court below the appellant, orally and, finally, in writing, offered to reduce the rent to be paid by the Gekco Company under the terms of the lease from \$700 to \$534 per month, such reduction of rent to commence from the date of the entry of the final decree in condemnation, and to be in lieu of any allowance to the Gekco Company of a lump sum estimated

as the equivalent of the rental of the 8.3 feet of storeroom about to be taken from the tenant. The proposed reduction of rent was in the proportion that the amount of frontage and floor space to be taken bore to the total amount of frontage and floor space occupied. The referees took the position that, as a legal proposition, they were without authority to modify the lease between the owner and her tenant by reducing the rent fixed by its terms; that, therefore, throughout the remaining 114 months of the lease yet to run, the tenant would have to continue to pay the full rental fixed by its terms. By computation the referees found a sum which, if placed in the hands of the lessee and by it invested at 6 per cent. per annum, compounded semiannually, and drawn on at the rate of \$166 per month for the remainder of the term, would exactly reimburse the Gekco Company for the \$166 per month it had to pay appellant; and, upon payment of the last month's rent, the entire sum, principal and interest, to be exhausted. This present equivalent of future installments was found to be \$14,839.88. The referees next found as a fact that the market value of the 8.3 feet frontage, over and above the \$20 per front foot per month the lessee would have to pay, until the termination of the lease, and of which excess value the lessee would be deprived, was \$2,527.44. These last two sums, together with the lessee's restoration damage of \$2,013, made the respondent Gekco Company's award \$19,380.32. The finding and conclusion of the referees was reflected in and confirmed by the interlocutory decree awarding a lump sum to the tenant for damages. It is from this portion of the judgment that the owner has appealed. She does not object to the restoration damage, amounting to \$2,013, paid to the lessee, and apparently does not assail the \$2,527.44 excess value. Her objection goes to the item of \$14,839.88, both as to amount and as to the right to award any sum whatever to the tenant for rent to be paid for the property to be taken where the owner has offered to make a proper and fair reduction in rent on account of the taking of a portion of the demised premises.

Appellant's contention is that the Street Opening Act, under which these proceedings were taken, makes no special provision relative to the respective rights of landlord and tenant in property condemned. She admits that general damages suffered by the tenant in such cases, the cost of repairing the remaining portions of the demised premises in order to make the same usable, and increased or bonus value of the lease over the rent to be paid, may properly be paid in lump to the tenant, but contends that, instead of awarding a tenant a lump sum as the present equivalent of rents to be paid by the tenant in the future for property to be taken, and

without requiring from the tenant any security that it will pay such future rents, the proper and more equitable adjustment of damages would be arrived at by reducing the rental to be paid in the future. The question thus presented has never been considered by this court.

[1] In support of her contention appellant enumerates certain advantages in favor of a reduction of rent over awarding a tenant a lump sum as equivalent of rents, but we deem it unnecessary to consider them, for the question to be considered is one of law. Appellant argues that the authorities from other jurisdictions are conflicting, and contends that the rule that rents shall be reduced pro rata finds support in decisions from New York, Pennsylvania, Maryland, Missouri, and Mississippi. We find no substantial conflict of authority, and the decisions on which appellant relies do not support her contentions. In *In re Seventh Avenue and Varick Street in City of New York*, 196 App. Div. 451, 188 N. Y. S. 197, 201, the decision was based upon earlier decisions, which, in turn, rested upon a statute expressly providing for a pro rata abatement of rents in cases of termination of leasehold interests where a part only of the property was taken. *Gillespie v. Thomas*, 15 Wend. (N. Y.) 464; *Gillespie v. Mayor, etc.*, 23 Wend. (N. Y.) 643. Subsequent decisions from other jurisdictions, and text-writers, supporting the New York rule, fail to note that it rests on the terms of the statute. Others make no distinction between the taking of the entire premises and the taking of only a part. *Dyer v. Wightman*, 66 Pa. 425, 427, which seems to be relied on to a considerable extent by text-writers as supporting the contention now advanced by appellant, was not a condemnation suit. It was an action in equity for rent under a sublease. *Biddle v. Hussman*, 23 Mo. 597, 600, was also an action to recover rent. *Board of Levee Commissioners v. Johnson*, 66 Miss. 248, 6 So. 199, related to a controversy between a landlord and a tenant following condemnation proceedings, where the whole of the premises was taken, thereby dissolving the relation. *Baltimore v. Latrobe*, 101 Md. 621, 61 A. 203, 4 Ann. Cas. 1005, appears to state an exception to the general rule, but cites with approval *Gluck v. Baltimore*, 81 Md. 315, 32 A. 515, 48 Am. St. Rep. 515, the leading case in that state on the subject of apportionment of rents, where a part only of the demised premises is taken. In that case the court directly held that the rent should not be apportioned, but that the tenant was entitled to the present worth of the rent payable in futuro, and that the covenant to pay rent under the lease was not affected or diminished by virtue of the partial taking. Read in the light of the facts, *Baltimore v. Latrobe*, supra, does not depart from the rule laid down in the earlier cases in that state.

[2, 3] We are satisfied that the trial court followed the proper rule and procedure in this case. The Street Opening Act of 1903, as amended (*Deering's Gen. Laws 1923*, p. 3309, Act 8198), after providing for the appointment of referees to assess the damages for property taken, provides (section 10):

That they shall "find separately: First. The value of each parcel of property sought to be condemned, and all improvements thereon pertaining to the realty, and of each separate estate or interest therein. * * *

The interest of the respondent Gekco Company under the lease from the appellant, is an estate for years, and therefore is property, subject to ownership. *Civ. Code*, § 761; *San Pedro, etc., v. City of Los Angeles, etc.*, 180 Cal. 18, 20, 179 P. 393; 15 Cal. Jur. 600, par. 3. As the owner of such estate it is guaranteed just compensation before its title can be divested under the power of eminent domain. It holds its term as any other interest in land is held, subject to the exercise of that power. It holds its title subject to this right the same as the landlord holds her title. *Corrigan v. City of Chicago*, 144 Ill. 537, 543, 33 N. E. 746, 21 L. R. A. 212. The reciprocal rights of the landlord and tenant, in case the demised property, or a part of it, is taken by condemnation in eminent domain, are as well established. According to the majority of the decisions, the taking of the entire demised property by condemnation proceedings operates to release a tenant from liability for subsequently accruing rent, but a taking of a portion only does not terminate the lease or absolve the lessee of his covenant to pay the full rent. 36 *Cor. Jur.* 319, par. 1122; 10 *R. C. L.* 136, § 120. In *Corrigan v. Chicago*, supra, the court said (page 544 [33 N. E. 747]):

"When a portion only of the land is taken, and a portion remains, which is susceptible of occupation under the lease, we have held, following what we regard as the weight of authority, that the covenants of the lease are not abrogated, and that the tenant is bound by his covenant to pay full rent according to its terms. *Stubbings v. Village of Evanston*, 136 Ill. 37 [26 N. E. 577, 11 L. R. A. 839, 29 Am. St. Rep. 300]. And that in such case the lessee would not be entitled to apportionment or an abatement of the rent for the part of the land taken, but was bound to pay rent for the whole of the premises demised. * * * If the covenant to pay rent is not affected by the proceedings and judgment of condemnation, it is clear that the lessor would be entitled as compensation only to the present value of his reversion, which he holds subject to the term created by the lease; and the lessee continuing personally liable, but losing his estate, and right to its enjoyment, would be entitled to receive not merely the value of the term, but also a sum of money equivalent to the present value of the sum of the rents payable in futuro; that is, he should receive the value of his term, subject to the rent, and such further sum as would be considered a present

equivalent for the rent thereafter to be paid, and the lessor would receive correspondingly less."

Only recently the same court said:

"It is well settled in this state that the taking of a part of leased premises by the exercise of the right of eminent domain, leaving a part susceptible of occupation under the lease, does not release the tenant from the payment of any part of the rent, but he is bound to the landlord for the payment of the rent reserved for the full term, without apportionment or abatement for the part taken. [Citing cases.] This view is in accordance with the weight of authority elsewhere. *Parks v. Boston*, 15 Pick. [Mass.] 198; *Patterson v. Boston*, 20 Id. [Pick. (Mass.)] 159; *Dobbins v. Brown*, 12 Pa. 75; *Workman v. Mifflin*, 30 Id. [Pa.] 362; *Gluck v. Baltimore*, 81 Md. 315 [32 A. 515, 48 Am. St. Rep. 515]; *Foote v. Cincinnati*, 11 Ohio, 408 [38 Am. Dec. 737]; *Olson Land Co. v. Alki Park Co.*, 63 Wash. 521 [115 P. 1083, Ann. Cas. 1912D, 365]." *Yellow Cab Co. v. Stafford-Smith Co.*, 320 Ill. 294, 296, 150 N. E. 670, 671 (43 A. L. R. 1173).

From the note to this case in 43 A. L. R. 1173, 1177, it appears that the rule is the same in Illinois, Maryland, Massachusetts, New Hampshire, Ohio, Pennsylvania, Oregon, and Washington. In *Olson Land Co. v. Alki Park Co.*, 63 Wash. 521, 115 P. 1083, Ann. Cas. 1912D, 365, cited by the Illinois court, supra, the court rejects the rule contended for by the appellant, and aptly criticises the decisions appearing to support it. Certain of the text-writers, Lewis, Taylor, and Tiffany, express a preference for a rule allowing a proportional reduction of the rent in cases such as this, but we conclude, upon the decided weight of authority, that the lower court followed the proper course in awarding damages for the taking of the separate estates and interests of the appellant and the respondent Gekco Company.

[4] Aside from the foregoing considerations, another insurmountable objection appears to prevent the application, in this action, of the rule contended for by the appellant. A proceeding for the condemnation of private property under the Street Opening Act is a special statutory proceeding. The court sitting therein has no equitable jurisdiction, and accordingly, has no power to reform or revise the lease in question, nor to determine to what extent the covenant to pay rent shall be affected, if at all. The tenant cannot compel the landlord to accept a lessened rent. *Olson Land Co. v. Alki Park Co.*, supra. Neither can the landlord force a readjustment of the rent. It was said in *Stubbings v. Village of Evanston*, 136 Ill. 37, 43, 26 N. E. 577, 578 (11 L. R. A. 839, 29 Am. St. Rep. 300):

"* * * If a case should arise where, upon the payment of the value of the leasehold interest to the tenant, the remedy of the landlord to collect his rent might be impaired or defeated on account of the insolvency of the tenant, or other cause, a court of equity might interpose to pre-

vent the payment of the damages recovered into the hands of the tenant, and appropriate the fund, or so much thereof as might be necessary, to the payment of the rents due or to become due from the tenant to the landlord during such time as the lease might, by its terms, continue to run."

We express no opinion as to the question whether or not such a proceeding would lie in an independent action between appellant and respondent, but see no room for its invocation in the present situation of the parties. In this proceeding the landlord and the tenant are confined to their remedies against the condemning municipality.

It has been argued here that, if the respondent be allowed to recover for the full value of the leasehold interest, there will be handed over to the tenant a portion of the damages which is the equivalent of the rent to be paid, and appellant may lose her rent by the insolvency of the respondent, or otherwise. The same contention was advanced in *Gluck v. Baltimore*, supra, and the court said:

"It has, however, been contended that, if the tenant should be allowed to recover for the full value of the leasehold interest, and the landlord should be required to rely upon the personal obligation of the tenant for the payment of rent, a rule of this character would or might in many instances result in great loss to the landlord. At best this is a mere suggestion of a possible hardship. * * * Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results. That it may, in consequence, operate in some instances with apparent or even with real harshness and severity does not indicate that it is inherently erroneous. Its consequences in special cases can never impeach its accuracy."

[5] The Street Opening Act, supra (section 10), provides that in cases in which referees have been appointed for the purpose of assessing the compensation and damages under such proceedings, the right to such damages shall be deemed to have accrued at the date of the order appointing the referees. The referees and the court in this case, following the statute, accepted January 23, 1925, as the date from which damages should be computed. The appellant contends that damages awarded the tenant should date only from the time of the actual loss of possession by the tenant. The amount awarded the tenant, she therefore contends, is excessive, because it includes an allowance for account of rent for a period between the date of the appointment of the referees and the date of the final decree, or the date when the tenant will lose possession, during all of which period the Gekco Company has had, and will retain, the possession, use, and enjoyment of the entire premises. Such a proceeding, she asserts, amounts to a violation of article 1, § 14, of the state Constitution, which provides that private property shall

not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. There is no merit in the contention. It is necessary, for the purpose of assessing compensation and damages in eminent domain proceedings, that the right thereto shall be deemed to have accrued at a fixed date. Under the general law relative to eminent domain, the value of property taken is assessed as of the date of the issuance of the summons. Code Civ. Proc. § 1249. It is settled by the decisions that this rule, the equivalent of which is found in many states, involves no violation of constitutional right. *California Southern R. v. Kimball*, 61 Cal. 90; *Marin Municipal Water Dist. v. Marin W. & P. Co.*, 178 Cal. 308, 314, 173 P. 469, and cases cited. On analysis, it will be found that the distinction between the provision of the Code section and that of the Street Opening Act, *supra*, is formal, rather than substantial, as it was held to be between the Code section and the provisions of the Public Utilities Act considered in the cases just cited. Furthermore, during all of the period here complained of, the appellant has received, and we assume will receive, the full rent reserved in the lease—all she would receive if no condemnation had occurred. We have considered the many contentions of the parties and of amici curiæ on the question of the amount of damages, and are not prepared to question the finding of the trial court.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

CURTIS, J. I dissent.

There is, undoubtedly, very respectable authority from other jurisdictions to support the conclusions reached in the majority opinion. It is admitted, however, that the question involved in this controversy has never been expressly passed upon by the courts of this state. The rule, as enunciated in the opinion, is to my mind both unreasonable and inequitable.

On the other hand, there is ample authority to support the contention of appellant that the rent to be paid by the tenant should be reduced pro rata and that the value of the land taken should be paid to the landlord. In *Lewis on Eminent Domain* (3d Ed.) § 718, we find the following:

"Undoubtedly, the conclusion which is practically the most satisfactory and which can be applied with the least injury to the parties is that the taking operates to extinguish the obligation to pay rent, in whole or in part, as the case may be. Under the opposite rule there is handed over to the tenant a portion of the damages which is the equivalent of the rent to be paid, and the landlord may lose his rent by the insolvency of the tenant or otherwise, or be put

to a suit in equity to have the fund impounded for his benefit."

Taylor on Landlord and Tenant (8th Ed.) § 386, states the law in practically the same language as that used by *Lewis on Eminent Domain*. 1 *Tiffany on Landlord and Tenant*, pp. 1184-1186, also agrees with both *Lewis* and *Taylor*, and states the rule as follows:

"It appears to the present writer that, when the ownership of either a part or the whole of the leased premises, the 'fee' as it is usually called, is taken under the power of eminent domain, the liability for rent should be proportionally reduced or extinguished for the simple reason that the leasehold interest in the land taken has come to an end by reason of its merger in the reversion."

It appears to me that it is more important that we lay down a just and equitable rule in this state to be followed in condemnation proceedings of this character than to adopt one which is neither fair nor equitable, even though this latter rule is supported by authorities both numerous and weighty from other jurisdictions.

It is conceded that, when the whole of the leased premises is taken by the condemnation proceeding, the lease is terminated, and such taking operates to release both the tenant and the landlord from the terms of their lease. I can see no good reason why there should be a different rule applied to a case where only a portion of the premises is taken. If the condemnation proceeding can wipe out a lease in its entirety, is there any good or legitimate reason for saying that it cannot modify it to the extent of the property taken? I am unable to see why any distinction is made in these two classes of cases.

I concur: RICHARDS, J.

201 Cal. 273
MINES v. DEL VALLE et al. (L. A. 8197.)

Supreme Court of California. June 1, 1927.

Rehearing Denied June 30, 1927.

1. Municipal corporations ☞999—Taxpayer's complaint to compel municipal officers to repay funds illegally expended held not required to show plaintiff to be resident of city (Code Civ. Proc. § 526a).

Complaint by taxpayer against municipal officers to compel repayment of funds claimed to have been illegally expended held not defective under Code Civ. Proc. § 526a, for failing to show that plaintiff is a resident of city.

2. Municipal corporations ☞1000(5)—Answer to taxpayer's suit to compel municipal officers to repay money illegally expended denying unlawful payments, did not raise issue of fact.

In action by taxpayer to compel repayment by municipal officers of money claimed to have been illegally expended in advertising to secure

favorable vote for bond issue to extend municipal electric plant, answer denying that officers unlawfully approved, allowed or ordered payments objected to did not raise issue of fact requiring submission of case to jury.

3. Municipal corporations ⇨1000(5)—Answer to taxpayer's suit to compel repayment of money illegally expended, denying expenditure materially increased taxation, did not raise issue of fact.

In action by taxpayer to compel repayment by municipal officers of money claimed to have been illegally expended in advertising to secure favorable vote for bond issue to extend municipal electric plant, answer, denying that officers' acts materially increased burden of taxation on property in city, did not raise issue of fact, requiring submission of case to jury, since illegal expenditure would inevitably increase burden of taxation.

4. Municipal corporations ⇨860—Illegal expenditure by municipal officers increases tax burden, though expenditure represented receipts from public utility.

In taxpayer's action to compel repayment by municipal officers of money claimed to have been illegally expended, fact that funds unlawfully withdrawn from public treasury were not raised by direct taxation, but represented receipts from a public utility operated by the city, would not prevent illegal expenditure from increasing burden of taxation on property.

5. Municipal corporations ⇨995(1)—Illegal expenditure of public funds may be enjoined or recovered, though taxpayer cannot show special damage.

Taxpayer may stay illegal expenditure of public funds or recover same on behalf of city, though he cannot show that he thereby sustained some special damage.

6. Municipal corporations ⇨272—Power conferred on public service commissioners to "extend" electric plant referred to management and not to raising of money for extending business (City Charter of Los Angeles, §§ 192 [g], 192[h]).

City Charter of Los Angeles, §§ 192(g), 192(h), empowering board of public service commissioners to extend electric power plants of city, and to expend funds in power fund to extend plant, refers to physical management of plant, and does not include power to raise money directly or indirectly for operating plant or extending its business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extend—Extension.]

7. Municipal corporations ⇨921(3)—Funds from bonds issued by council for extension of municipal electric plant come under jurisdiction of public service commission only after receipt (Municipal Bond Act).

Under Municipal Bond Act (St. 1901, p. 27 [Deering's Gen. Laws 1923, Act 5178]), authorizing city council to determine necessity and procedure for issuance of bonds to extend municipal electric plant, funds derived come under jurisdiction of board of public service com-

missioners only after they are received and placed in fund for plant.

8. Municipal corporations ⇨861—Public service commissioners held unauthorized to expend public money to secure favorable vote for bond issue to extend municipal electric plant (City Charter Los Angeles, §§ 192[g], 192[h]).

Under City Charter of Los Angeles, §§ 192(g), 192(h), empowering board of public service commissioners to expend funds for purpose of extending municipal electric plant, board is not authorized to expend public money on publicity for purpose of inducing electors of city to vote in favor of bond issue designed to enable city to increase its electric system.

9. Municipal corporations ⇨57—Proprietary powers of city are more liberally construed than governmental powers.

Powers of city of a proprietary character are given more liberal construction than those which are strictly governmental in character.

10. Municipal corporations ⇨59—Municipality cannot, under proprietary powers, do any act deemed necessary by officers for proper conduct of its business.

Municipality, in exercising its proprietary powers, does not have authority to do any act which its officers may think necessary for proper conduct or maintenance of business in which it is engaged.

11. Municipal corporations ⇨861—Public service commissioners could not use municipal electric plant funds to secure favorable vote on bond issue, unless expressly authorized.

Use of public funds by board of public service commissioners, derived from municipal electric plant to induce favorable vote on bond issue to extend plant, would be unfair to electors opposing bond issue, and cannot be sustained, unless power to so use funds is given board in unmistakable language.

12. Municipal corporations ⇨861—Public service commissioners could not use municipal electric plant funds to secure favorable vote on bond issue, because necessary to correct misinformation.

Use of public funds by board of public service commissioners, derived from operation of municipal electric plant to secure favorable vote for bond issue to extend plant, held not justified because necessary to correct misinformation disseminated among voters by private power companies.

13. Municipal corporations ⇨861—Court could not invest Public Service Commission with authority to expend public funds to secure favorable vote on bond issue (Charter of City of Los Angeles, §§ 192[g], 192[h]).

Where board of public service commissioners were not expressly authorized by charter of city of Los Angeles to expend funds derived from municipal electric plant for publicity to secure favorable vote on bond issue to extend plant, and such power could not be implied from §§ 192(g), 192(h), authorizing board to expend money for extension of plant, neither board nor court could invest board with authority to so ex-

pend public funds, no matter how desirable or necessary it was.

14. Municipal corporations ➡170—**Municipal officers held liable for repayment of public funds illegally expended, though acting honestly under belief expenditures were authorized.**

In action by taxpayer to compel repayment by municipal officers of money illegally expended in publicity to secure favorable vote for bond issue to extend municipal light plant, officers were liable for repayment, though expenditure was made honestly and under belief that it was within authority of board of public service commissioners.

In Bank.

Appeal from Superior Court of Los Angeles County; Edward I. Butler, Judge.

Action by W. W. Mines against R. F. Del Valle and others, Officers of the City of Los Angeles. Judgment for plaintiff, and defendants appeal. Affirmed.

Rehearing denied; Shenk and Langdon, JJ., dissenting.

Jess E. Stephens, City Atty., W. B. Mathews and James G. Leovy, all of Los Angeles, James H. Howard, City Atty., of Pasadena, John J. O'Toole, City Atty., of San Francisco, and William Guthrie, City Atty., of San Bernardino, for appellants.

Chas. L. Childers, of Los Angeles, and A. C. Finney, of Brawley, for Imperial Irrigation District, amici curiæ in support of appeal.

Carroll Allen and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

CURTIS, J. This action was instituted by plaintiff, a taxpayer of the city of Los Angeles, against certain officers of said city to compel the repayment by said officers into the treasury of said city of certain sums of money which plaintiff alleges were illegally paid out by said officers. The defendants are the members of the board of public service commissioners, the controller of the public service department, the auditor, and treasurer, respectively, of the city of Los Angeles. The complaint sets forth that on the 14th day of May, 1923, the city council of said city of Los Angeles, by the passage of the resolution provided by law, called an election, at which there was submitted to the electors of said city the proposition of incurring a bonded indebtedness in the amount of \$35,000,000 for the purpose of the acquisition, construction, and completion by said city of certain municipal improvements, to wit, works for supplying the said city and its inhabitants with electric energy for the purpose of light, heat, and power, including the construction and acquisition of works for the development of electric energy and of substations, transmission lines, distributing lines, conduits, and

other works for transmitting said electric energy, and the acquisition of land, water rights, rights of way, machinery, apparatus, and other works and property necessary therefor. It is further alleged in said complaint that, after the passage of the resolution submitting said proposition to a vote of the electors of said city, there was filed with the said board of public service commissioners certain claims against said city of Los Angeles for labor performed, materials furnished, and services rendered said municipality and said department of public service, which claims were audited and approved by said board of public service commissioners, and by the said controller of said public service department, and thereafter audited and approved by the auditor of said city, after which they were paid by the treasurer of said city out of the public funds of said city then in said city treasury. The complaint and the amendment thereto subsequently filed (we will hereafter refer to both pleadings as the complaint) set forth that twenty-two of such claims were presented to said board, and by said board, said controller and said auditor, audited and approved, and thereafter paid by said treasurer from the funds of said municipality; that the aggregate amount of these claims was the sum of \$12,415.15. These several claims are separately set forth in twenty-two separate counts, and in the main were for printing cards, banners, automobile windshield stickers, automobile banners, labels, circulars, hand bills, dodgers, and postal cards; for distributing and circulating the same; for constructing a float; and for advertising in certain newspapers in said city; that all of the labor performed, the materials furnished, and the services rendered, which were the basis of said claims, were performed, furnished, and rendered to the said department of public service between the date of the resolution of said council calling said election and the date of said election, and that said department of public service purchased said cards, banners, and other materials, and used the same, and paid for the circulation thereof, and caused said advertising to be inserted in said newspapers for the purpose, and with the intent, of influencing the electors of said municipality to vote in favor of said bond issue. A further allegation of said complaint sets forth that plaintiff had notified said department and the said treasurer of said city after the auditing of each of said claims, and prior to its payment, that the same was an illegal charge against said city, and, in the event it was paid by said treasurer, plaintiff would institute proceedings in court to compel the repayment thereof; furthermore, that, after the payment of said several claims as aforesaid, plaintiff filed with the city council of said city a written request and demand that said city institute

proceedings against said defendants to recover from them, and to require them to pay into the city treasury, the sums of money paid out upon said claims, but that said city council had denied said request and demand, and refused to institute any action to recover said sums of money or any of them or any part thereof. The complaint also contains an allegation that plaintiff is the owner of property situated in said city, and that by reason of the acts of defendants in paying out said sums of money the burden of taxation will be materially increased upon his land and property within said city and upon the lands and property of other taxpayers in said municipality.

The defendants jointly answered said complaint, and denied that they had unlawfully approved, allowed, or ordered paid any claim against said city, or had unlawfully paid out of the treasury of said city any funds of said city upon any claim mentioned in said complaint. They also denied that, by reason of any action on their part as alleged in said complaint, the burden of taxation had been, or would be, materially or otherwise increased on the lands or property of plaintiff located in said city or upon any of the lands or property of the taxpayers therein. As a special defense defendants set up in their answer that the city of Los Angeles was then, and for more than five years prior thereto had been, the owner of, through the department of public service, of which the board of public service commissioners had charge and control, and during said time, through said department, had been and was then engaged in the business of operating, a system consisting of works and plants located inside and outside of said city for the generation of hydroelectric energy, lines for the transmission of such energy to and into said city, and lines and conduits and other structures and appliances for the delivery and distribution thereof to said city for the lighting of municipal public buildings, streets, and other public places in said city and to its inhabitants for the purpose of heat, light, and power; that, owing to the rapid and continued growth of said city, the plants and works had become, and were then, insufficient to meet the demand of its customers, and by reason thereof said city had been, and was then, compelled to purchase large and increasing amounts of electric energy at prices at least twice as great as the cost of the same would be if produced at plants built and operated by it; that the proposed bond issue of \$35,000,000 was for the purpose of providing funds with which to purchase and acquire property and construct works for the generation of additional electric energy and for the extension of the municipal distributing system of said city in order to supply the needs of said city and of its inhabitants for additional electric energy; that the territorial

extent of said city exceeded 350 square miles, its population had increased from 576,673, the number determined by the federal census in 1920, to approximately 900,000 at the time of said election, and there were within said city 851 election precincts and 272,848 registered voters entitled to vote at said election; that the proposition to create said bonded indebtedness and to issue said bonds was sharply contested, "some of the newspapers and some civic organizations of said city favored and some opposed the voting of said bonds, literature opposing said bonds was distributed or conspicuously posted throughout said city, speakers and workers acting in behalf of electric power companies operating in said city opposed the voting of said bonds, and large quantities of public printed matter containing misleading, deceptive, and untruthful reports against said bonds were circulated in the form of circulars, newspaper articles, and advertisements among the voters of said city"; that, by reason of the foregoing conditions, "it was necessary for the said board of public service commissioners, in order as far as practicable that the voters of said city might be informed of the pendency of said power bond proposition and correctly understand the objects and purposes of said proposed bonds and the benefits and advantages to accrue from authorizing the same to said city and its inhabitants, and in order to stimulate their interest in such proposition, and cause them to go to the polls and vote thereon, to" incur the indebtedness represented by said claims, and which were paid by the authorization of said board of public service commissioners from the funds belonging to said city. After the filing of the answer, the plaintiff moved the court for judgment upon the pleadings, which motion was granted by the trial court, and judgment was accordingly rendered against the defendants for the aggregate amount of said claims in favor of said city of Los Angeles and in favor of plaintiff for his costs. From this judgment the defendants have appealed.

[1] At the outset appellants contend that the judgment against them cannot stand, for the reason that the complaint, while alleging that respondent is a taxpayer, fails to show that he is a resident of the city of Los Angeles, and that an action of this character can only be maintained by a citizen and resident of the municipality in whose behalf the same is prosecuted. Appellants cite section 526a of the Code of Civil Procedure in support of this contention. This court has expressly ruled to the contrary. *Osburn v. Stone*, 170 Cal. 480, 482, 150 P. 367. See, also, *Crowe v. Boyle*, 184 Cal. 117, 152, 193 P. 111.

[2-5] The next ground advanced by appellants for a reversal of the judgment is that, as the answer contains denials putting in issue material allegations of the complaint, it

was error on the part of the trial court to grant respondent's motion for judgment on the pleadings. The only denials in appellants' answer are: (1) They deny that they unlawfully approved, allowed, or ordered paid or unlawfully paid any of the claims mentioned in the complaint; and (2) they deny that, by reason of any of the acts of appellants set forth in said complaint, the burden of taxation has been materially increased upon the property of respondent or upon any property in said city. As to the first of these denials we do not understand that appellants claim that it raises any issue of fact which requires or permits the introduction of evidence to sustain or disprove it. The other of the two denials of the answer likewise raises no issue of fact. If money belonging to the city is illegally paid out by its officers, the inevitable result would be a detriment to the taxpayers of said city, with a corresponding increase, either directly or indirectly, of the burden of taxation upon the property owners therein. The fact that the funds unlawfully withdrawn from the public treasury were not raised by direct taxation, but represented receipts from a public utility operated by the city, would not change this result. This is particularly so in the present instance by virtue of the provisions of the charter of said city relative to funds received as revenues of said city from the operation of its electric power plant. Besides, we think it doubtful whether the allegation of the complaint to which this denial was directed was necessary in an action of this character. Must a taxpayer, when he sees the money of the city being unlawfully applied and paid out for unlawful purposes, sit idly by, and is he without right either to stay the illegal expenditures or recover the same on behalf of the city after they are made, simply because he cannot show that he thereby sustained some special damage? This court has repeatedly held that he is not so helpless (*Crowe v. Boyle*, 184 Cal. 117, 193 P. 111, and citations found on page 152 thereof). The denials of the answer, therefore, raise no issue of fact, and the judgment upon the pleadings must be affirmed, unless the special defense set up in the answer constitutes a legal defense to respondent's action. This brings us to the real question presented on this appeal, that is, the legality of the expenditures incurred by the board of public service commissioners in carrying on a campaign in favor of the proposed bond issue.

This question is fairly and comprehensively stated by appellants as follows:

"The main, practical question, on the present controversy, is, whether the power revenue funds of the city may lawfully be expended upon publicity, in the form of newspaper ads, circulars, posters, banners and the like, addressed to the people of the city for the purpose of bringing about the approval of a popular bond issue de-

signed to enable the city to enlarge its electric system and extend its electric power business."

The city of Los Angeles at the time this controversy arose, and for some time prior thereto, was governed by a charter regularly adopted by the electors of said city and approved by the Legislature. Section 192 (g) of said charter provided in part that:

"The board of public service commissioners shall have power:

"To manage and control * * * all electric plants, works, systems and equipments, and all electric power belonging to the city.

"To construct, operate, maintain and extend * * * electric plants, works, systems and equipments, and other means for supplying the city and its inhabitants with electricity for light, power, heat and other purposes. * * *

Section 192 (h) of said charter empowers the board:

"To control and order the expenditure of all moneys received from the sale or use of electric power, or otherwise in connection with the operation and management of the electric power works and systems of said city; provided, that all such moneys shall be deposited in the treasury of the city, to the credit of a fund to be known as the 'Power Revenue Fund.' * * *

By the same section it is provided that:

"* * * none of the money in said power revenue fund, or coming under the control of said board in connection with the operation of electric power plants, works or systems of the city, shall be appropriated or used for any purpose or purposes other than the following, to wit: * * * For the necessary expense of conducting, operating and maintaining and extending the business of said department pertaining to electric power, of the electric power works, plants, systems and equipments and of making all current and ordinary extensions, betterments and repairs."

A further provision of the charter, subdivision 50 of section 2, it is claimed by appellants, has some bearing upon the solution of the question in controversy. This provision reads as follows:

"The city of Los Angeles shall have and it is hereby given and it hereby reserves unto itself, and the people of the city hereby reserve unto it, and the people of the state of California hereby grant unto it, and said city may hereafter exercise each and every of the powers which a municipal corporation might or could exercise under the constitution of the state of California. * * *

Under these provisions of the charter the appellants contend that the board of public service commissioners, in the management and operation of the city's electrical utilities, and in the expenditures of the revenues derived therefrom, is invested with as full and complete powers as are enjoyed by a board of directors of a private corporation operating a public utility.

[6, 7] The specific language relied upon by appellants in support of this claim and in

justification of said expenditure by said board of public service commissioners is that found in section 192 (g) of the charter whereby said board is given the power to manage and control all electric plants and works belonging to the city, and "to construct, operate, maintain, and extend * * * electric plants, works, systems and equipments, * * *" and by section 192 (h) of the charter whereby said board is empowered to expend and use money in the power revenue fund for the purpose of "conducting, operating, and maintaining and extending the business of said department pertaining to electric power," and particularly upon the words "extend electric plants, works," etc., and "extending the business of said department." It is argued by appellants that, as the charter expressly gives to said board the authority to extend the electrical plants and works under its charge, it is thereby given implied power to do all acts and things necessary to execute the power expressly given. The right to extend said system being expressly given, appellants contend that one of the necessary steps in the extension of said system is providing the funds with which to make said extension, and, as it is admitted the funds necessary for this purpose could only be raised by means of a bond issue, that said board was authorized to expend a reasonable amount of said funds to insure the success of said bond issue. The vice of this argument is in assuming that the raising of the necessary funds is any part of the power to extend said electrical system. We may all concede that the system cannot be extended without funds with which to carry on such extension. But the raising of the money to extend said system is one thing and the extension of it is an entirely different and distinct power. The provisions of the charter giving to the board of public service commissioners power to extend the electrical plants and works of said city and to expend the funds in the power fund for the purpose of extending said public utility in our opinion refer simply to the physical management of the same, and cannot be enlarged to include another and distinct power, that of raising money either directly or indirectly for the purpose of conducting and operating said utility, or for the purpose of extending the business thereof. The Municipal Bond Act (Stats. 1901, p. 27; Deering's General Laws of 1923, p. 1964), under which said election was held, gives the right and authority to determine the public interest and necessity which may demand or require an issue of bonds for the purpose of extending said public utility system, not to said board of public service commissioners, but to the city council of said city, and the entire proceeding for the issuance of bonds under said statute is committed to the control and direction of the said city council.

After the funds are received and placed in said fund, they then come under the jurisdiction of said board of public service commissioners, and are subject to the disposal of said board for the purpose designated in the charter.

Our attention has been directed to the recent case of *In re East Bay, etc., Water Bonds of 1925*, decided by this court and reported in 196 Cal. 725, 239 P. 38, in which there is to be found language to the effect that the ordinary newspaper notice is ineffective in notifying the electors of a city of an approaching bond election. Conceding this to be true, we do not understand that appellants are before this court simply contending that the expense incurred and paid out by them was for giving notice to the voters of said city of the approaching election. It is alleged in the complaint, and not denied by appellants, that said funds were used for the purpose and with the intent of influencing the voters of said city to vote in favor of said bond issue. In addition to the pleadings, appellants in their brief state that the practical question presented by this controversy is whether the power funds of the city may be lawfully expended for the purpose of bringing about the approval of a bond issue. We apprehend that, if the only payments made by appellants in connection with said bond campaign had been those which were incurred in giving what might be termed public notice of said election in addition to that provided by statute, this proceeding would not be before us, although we seriously question whether said board would have the power to expend the funds in the power fund for such purpose. But, be that as it may, the pleadings in this proceeding, as well as the admission of counsel for appellants, indicate without question that the appellants caused said funds to be paid from the public treasury for the purpose of inducing the electors of said city to vote in favor of said bond issue. Under this situation what was said by this court in *Re East Bay, etc., Water Bonds of 1925*, supra, can have no application to any issue in the present controversy.

As we have already observed, the sole reliance of appellants, in so far as the charter is concerned, is upon the words "extend" and "extending," used in said sections 192 (g) and 192 (h). The word "extension" in an action almost precisely the same as that in which the words "extend" and "extending" are used in said sections of the charter of Los Angeles has been the subject of judicial consideration by this court. By the charter of the city and county of San Francisco (section 16, art. 12), the board of supervisors are authorized to make appropriations from receipts of any public utility operated by said city for the purpose of "extensions and improvements." Said city was operating a municipal railway system. Under this provision of the charter the board of supervisors passed an ordinance

whereby it sought to appropriate a sum of money from the receipts of said municipal railway for the purpose of investigating the condition and availability of a privately owned railway system operated in said city, with a view of purchasing the whole or a part of said private system. A taxpayer of the city brought an action to enjoin the expenditure of the money so appropriated. The trial court gave judgment in favor of the plaintiff, and, on appeal, said judgment was affirmed by the District Court of Appeal. A petition to hear said cause in the Supreme Court was denied, and in denying the same this court said:

"Without regard to any other question discussed in the opinion of the District Court of Appeal, we are satisfied that the charter of San Francisco, as now written, does not authorize the payment of money from the funds of the municipal railway system for the purpose of investigating the condition and availability of a part or the whole of another street railway with a view to its purchase. The purposes for which expenditures from such fund can be made are carefully specified in section 16, article XII, of the charter, which, we think, excludes any such expenditure as here proposed. Such an investigation may not fairly be held to constitute an 'extension or improvement' of the municipal system." *Mobley v. Board of Public Works*, 44 Cal. App. 167, 173, 174, 186 P. 412, 415.

[8] If the power to expend the public funds of the city for the purpose of extending a public utility operated by said city cannot be used by the board in charge of said public utility for the purpose of investigating a privately owned utility with a view of purchasing the latter, surely the power could not be claimed for said board to expend such public money in an endeavor to induce the electors of said city to vote in favor of a bond issue, the proceeds of which were to be used to extend the public utility system under its charge. The last case referred to presents a situation so similar to that involved in the present controversy that we regard it as practically conclusive of the question involved in the present proceeding.

[9, 10] Aside from any provision of the city charter or of the statute authorizing the bond issue, appellants contend, as the city is operating, not in its governmental, but in its proprietary, character, a municipal system, whereby it supplies to its inhabitants electricity for light, power, heat, and other purposes, that it has all the powers of a private corporation engaged in like business. This assertion is supported by a formidable array of authorities from the various courts of this country, including our own, as well as extracts from leading text-writers upon the subject. But in all this array of authority appellants have not presented a single adjudicated case or a line from any text-writer which goes to the extent to which appellants are asking this court to go in holding legal the expenditures made by them from the public funds of said city. That the powers of a city of a pro-

prietary character are given a more liberal construction than those which are strictly governmental in character is settled beyond controversy by the decisions of our courts, and this rule is approved by our best text-writers. But, conceding this to be true, it does not follow that a municipality in exercising its powers in its proprietary capacity has the authority to do any act or thing which its officers may think necessary for the proper conduct or maintenance of the business in which it is engaged. Among the cases cited by appellants in support of their last contention is the case of *Miller v. City of Los Angeles*, 185 Cal. 440, 197 P. 342. In that case this court held that the city of Los Angeles, under the provisions of its charter giving it power to acquire by purchase or otherwise any and all property necessary or convenient to furnish the city and its inhabitants with light, heat, and power, had the authority to enter into a lease with a private corporation to furnish to said city electric energy to be used by it in supplying the needs of its consumers. It was contended by the appellant in said action that this charter provision gave to the city the power to acquire by purchase or otherwise the necessary works and plant for the production of electric energy, but not authority to purchase or acquire the manufactured article. This court ruled against said contention, and upheld the lease entered into by the city. Another case relied upon by appellants is the case of *Andrews v. City of South Haven*, 187 Mich. 294, 153 N. W. 827, L. R. A. 1916A, 908, Ann. Cas. 1918B, 100. The city of South Haven was empowered to operate an electric plant for supplying its inhabitants with electricity. In connection therewith it sought to carry on the business of selling and installing electrical fixtures. A taxpayer of said city brought an action to enjoin it from engaging in the business of selling and installing electric fixtures. The Supreme Court of Michigan held that "furnishing to customers taking electricity the necessary devices or equipment to produce heat, power, or light from the (electrical) current is naturally incidental to and an implied power connected with the business of operating an electric light plant." These two cases probably go as far as any of the authorities cited by appellants in supporting their contention that a liberal construction should be given to statutes or charter provisions conferring powers upon municipalities engaged in what might be termed business ventures as distinguished from their governmental functions. It would be an unreasonable and unwarranted extension of the principle enunciated in these and similar cases, because in the instances considered therein the several municipalities were found to be acting within the scope of their authority, to hold that a city or one of its governmental boards, authorized to maintain, conduct, and extend a public utility, could use the funds with which

It is intrusted for the purpose of conducting said public utility, for an entirely different and distinct purpose—that of carrying on a campaign for the purpose of influencing the voters of said city in favor of a bond issue.

[11-13] The pleadings herein, as well as the result of the election, show that the sentiment existing among the electors of said city as to the advisability of issuing said bonds was divided. While the proposition to issue bonds received a majority of the votes cast at the election, it did not receive a two-thirds favorable vote as required by the statute in order that the bonds might be issued. It must be conceded that the electors of said city opposing said bond issue had an equal right to and interest in the funds in said power fund as those who favored said bonds. To use said public funds to advocate the adoption of a proposition which was opposed by a large number of said electors would be manifestly unfair and unjust to the rights of said last-named electors, and the action of the board of public service commissioners in so doing cannot be sustained, unless the power to do so is given to said board in clear and unmistakable language. As already stated, we find nothing either in the charter of the city or in any statutory enactment or otherwise which confers such authority upon said board of public service commissioners. Appellants allege that the power companies, operating competing utilities in said city, formed a large part of the opposition to said bond issue, and that these power companies employed workers and speakers to oppose said bonds; furthermore, that large quantities of printed matter containing misleading, deceptive, and untruthful reports against said bond issue were disseminated among the voters of said city. Appellants therefore seek to justify the expenditures complained of herein by asserting that the same were necessary in view of and for the purpose of correcting the misinformation disseminated among the voters of said city. The possibility that these conditions might arise might well have been considered by the framers of the charter when defining and limiting the powers of the board of public service commissioners of said city, and provisions might have been made therein to meet such conditions. But, whether considered or not, it is apparent to us that the framers of said charter have made no such provision. Therefore these matters can have no controlling effect upon the court when endeavoring to construe the terms of said charter. It is sufficient to show that the authority claimed by the board of public service commissioners to make such expenditures was not given to them by any express provisions of the charter, nor can it be implied from any of the terms thereof. This being so, neither said board nor this court nor any other court can invest said board with the authority denied it by the charter, no matter how desirable or necessary it may be made to appear

that said board should be invested with such authority.

[14] Finally, appellants contend that, as the money was paid out honestly and in the belief that it was within the authority of the board of public service commissioners to use the funds of the city in payment of said expenditures, no recovery can be had against appellants. In support of this contention they cite the case of *Osburn v. Stone*, supra, and direct attention to the following language of this court used therein:

"It is proper in closing this discussion to say that the trial court will recognize the discretion which in many matters is and of necessity must be vested in public officials, and will recognize, moreover, that for an honest, even though mistaken, exercise of discretionary powers, no public officer is responsible."

There can be no question of the good faith and honest intention of the appellants. There is not the faintest suggestion that any of them acted in this matter with any other motive than a desire to faithfully and honestly execute the duties of their respective offices, and to preserve and protect the public trust committed to them by the people of said city. While this court approved the rule set forth in the above quotation from the case of *Osburn v. Stone*, supra, yet in the same decision is to be found the following language:

"The converse of the argument is that the powers of municipal officers are well defined. Their modes of procedure in all matters of expenditure are pointed out with particularity. They are given by law a legal adviser, and, if not, are fully empowered to employ one. There is no occasion whatsoever for their taking any step without such advice. There is no reason for their ever making any illegal expenditure of the public's moneys. To countenance the making by these officials of an illegal expenditure in one case, is to open wide the door for like expenditures in every case."

In that case, which was an action brought by a taxpayer against the mayor and common council to recover from them money illegally paid out of the public treasury, it was held that nine out of the ten counts of the complaint stated good causes of action against said defendants for the recovery of money so illegally paid out by them. What was meant—in fact, what was said—by the above quoted language from *Osburn v. Stone*, was that public officials are vested with certain discretion in the execution of their duties, and that they cannot be held responsible for an honest, even though it be a mistaken, exercise of their discretionary powers. Nothing can be found in that decision, or, for that matter, in any other of which we have any knowledge, which would justify the attempted exercise by an official of any power or authority not expressly or impliedly given to him, no matter how honest may be his intention or how upright his motives.

In a very recent case decided by us dur-

ing the present month (*Mahoney v. City and County of San Francisco et al.*, S. F. No. 11177, 257 P. 49), we held that, under the complaint therein, the auditor and treasurer of the city and county of San Francisco were liable for the repayment of moneys approved and paid out by them upon a contract entered into by the board of supervisors of said municipality, and which was beyond the powers of said board to make. There was no question of the good faith and honesty of intention of said officers in auditing and paying out said money, but, as the contract under which it was expended was not within the powers of the board, its payment was illegal and said officers were held liable for its repayment.

The case of *Osburn v. Stone*, supra, in so far as the legal principles therein decided, bears a striking similarity to the present action. The sum and substance of that decision is that public funds illegally or unlawfully paid out by a public official can, upon a suit by a taxpayer, be recovered, and the officer or officers responsible for said illegal or unlawful payment compelled to repay the same into the treasury of said city. Such in all its essential features is the present proceeding as presented by the complaint and answer thereto. The complaint under the authority of *Osburn v. Stone*, supra, states a good cause of action against appellants, and the answer thereto by appellants fails to state any legal defense to said cause of action. It was not error, therefore, for the trial court to grant the motion for judgment on the pleadings, and the judgment entered in accordance with the order granting said motion is valid and binding upon the appellants.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.

83 Cal. App. 666

CADWALLADER v. MARTIN et al.
(Civ. 5791.)

District Court of Appeal, First District, Division 2, California. June 8, 1927.

1. Pleading ⚡129(2)—Failure to deny allegations of verified complaint in action to foreclose mortgage held admission thereof.

In action to foreclose mortgage where allegations of verified complaint regarding execution of note and mortgage were expressly admitted, all other allegations were admitted by defendants' failure to deny them.

2. Judgment ⚡198—Findings held to support judgment foreclosing mortgage.

In action to foreclose mortgage where verified complaint was regular in form and sufficient in all respects and all its allegations were admitted either expressly or by failure to deny

its allegations, and allegations of substantive fraud in cross-complaint were found against defendants, findings for plaintiff which omitted no issue tendered by pleadings supported judgment of foreclosure.

3. Appeal and error ⚡1008(1)—In suit to foreclose mortgage, finding of lack of plaintiff's fraud in sale of vineyard held to prevent claim on appeal of constructive fraud in preventing examination.

In suit to foreclose mortgage where cross-complaint alleged false representations in sale of vineyard for which mortgage was given, in view of trial court's specific finding that plaintiff stated that he had overwatered certain spots, which was true, and that condition of vines in spots was due partly to overwatering, defense of plaintiff's constructive fraud in misleading defendants by such statement from examining vines, which were afflicted with phylloxera, is not available on appeal.

4. Trial ⚡47(2)—Excluding question as to how long vineyard would be productive in absence of certain disease held not to prevent proving damage in view of failure to renew offer of testimony.

In suit to foreclose mortgage in which defendants set up fraud in representation in sale of vineyard, for which mortgage was given, and contended that vines were infected with phylloxera, sustaining objection to question to witness as to how long vineyard would be productive if it had not been so infected was not error, in view of court's offer to admit such evidence if it later became material and fact that counsel did not renew offer of testimony.

5. Trial ⚡36—On issue arising on verified answer to cross-complaint where plaintiff had tendered no testimony, excluding evidence for defendants as to how vineyard had been cared for by them held not error.

In action to foreclose mortgage in which defendants in cross-complaint set up fraudulent representations in sale of vineyard for which mortgage was given, where issue on certain subject-matter arose by affirmative allegation in plaintiff's verified answer to cross-complaint and plaintiff had tendered no testimony, sustaining objection to question to witness by defendants' counsel as to how vineyard had been cared for by defendants was proper.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by John H. Cadwallader against Arthur W. Martin and another to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Affirmed.

U. Grant Hayden, of Fresno, for appellants.

Ernest Klette, of Fresno, for respondent.

STURTEVANT, J. The plaintiff and his wife were the owners of a vineyard in Fresno county; they exchanged it for lands owned by the defendants, which they took in part payment, and for the balance they took a

note and mortgage which was payable in installments; some of the installments being due and payable and not having been paid, the plaintiff commenced an action to foreclose the mortgage. The defendants appeared and answered, and also filed a cross-complaint. The cross-complaint was answered, and thereafter a trial was had before the trial court sitting without a jury. The trial court made findings of fact in favor of the plaintiff, and from a judgment entered thereon the defendants have appealed.

[1] Before proceeding further it will simplify the matter to state the condition of the pleadings. The plaintiff's complaint appears to be regular in all respects and to be entirely sufficient as a complaint to foreclose a mortgage. The defendants have not contended to the contrary. By their answer the defendants expressly admitted the allegations regarding the execution of the note and mortgage. By failing to deny they admitted all of the other allegations. In their answer they pleaded affirmatively an entire failure of consideration. They also pleaded false representations made by the plaintiff which induced them to enter into the exchange. In their cross-complaint they repeated the allegations regarding false representations and pleaded in detail a cause of action for rescission based on said alleged false representations. In his answer to the cross-complaint the plaintiff made certain admissions, but denied the alleged false representations and specifically denied every allegation in the cross-complaint which constituted a factor of the alleged cause of action as for false representations. The pleadings of both parties were verified. When the action was called for trial, the plaintiff rested and thereupon the defendants took up the burden of proof. The findings were drawn without regard to the admissions made by the pleadings. In other respects, with meticulous care, the findings are in favor of the plaintiff and against the defendants on all allegations touching the charge of fraud.

On this appeal the defendants contend (1) that the decision is not supported by the findings; (2) that the general findings in support of the decisions are not supported by the specific findings; (3) that the findings are not supported by the facts; and (4) that the court committed error in rejecting certain of defendants' evidence and in the admission of certain of plaintiff's evidence.

[2] Taking up these points in the order stated, it is patent that as the plaintiff's complaint was regular in form and sufficient in all respects, and as the allegations therein were admitted, the decision is to that extent supported by the findings. Turning to that part of the decision which is pertinent to the charge set forth in the cross-complaint, the allegations of substantive fraud were found against the defendants and no issue

tendered by the pleadings was omitted from the findings. It is clear, therefore, that the judgment is supported by the findings.

[3] The second point made by the defendants is that the general findings in support of the decision are not supported by the specific findings. The argument is to the effect that when the defendants made their initial examination of the property they noticed some spots in the vineyard where the vines did not appear to be thrifty. They called that matter to the attention of the plaintiff. The plaintiff stated to them that he had overwatered those spots. The defendants now claim that at said time and place the vines in those spots were infected with phylloxera, that the plaintiff knew it, that the vines were not suffering from being overwatered, that the plaintiff knew it and misrepresented the fact to their damage, etc. The vice in this position is that the contention of the defendants was fully presented to the trial court, and that the trial court found against them on each and every element that would go to constitute fraud. Addressing ourselves to the specific findings, it may be said that the trial court found the plaintiff represented he had overwatered certain spots; that in truth and in fact he had done so; and that the condition of the vines in those spots was due partly to overwatering. It is not contended that the parties at the time the exchange was being negotiated mentioned or discussed phylloxera. In the face of these facts the defendants now contend that the plaintiff committed constructive fraud in saying that he had overwatered—that the remark tended to divert the defendants from making the examination which they would have otherwise made. The record does not support the contention.

The third point made by the defendants, although it is stated in their brief, is not argued and no portion of the record is called to our attention as showing that any finding made by the trial court is not supported by the facts.

[4] The fourth point presented by the defendants involves rulings made by the trial court receiving or excluding evidence. The defendants contend that the trial court prevented them from offering evidence as to their damage and later made a finding to the effect that they had not been damaged. "The measure of damages for a fraud inducing the plaintiff to purchase property is the difference between the actual value of what he received and the value which it would have had if the fraudulent representations had been true." *Perry v. Ayers*, 159 Cal. 414, 418, 419, 114 P. 46, 48. The defendants have printed in their brief 23 pages of material copied from the transcript. An examination of all of it discloses that no question or answer was addressed to the subject of damage. It also discloses only two rulings against the

defendants. They asked their witness Mr. Schmidt:

"Q. Assuming that there was no phylloxera in that vineyard, and the vines had never been infected with phylloxera and that the vines are 25 years old, how long would that vineyard be a good productive vineyard?"

The plaintiff objected, and the trial court sustained the objection and remarked that if the proof thereafter became material counsel could later go into it. Thereafter counsel did not renew his offer.

[5] To the same witness the defendants propounded the question:

"What would you say, from your general observation there, as to how this vineyard had been taken care of (by the defendants)?"

An objection was interposed by the plaintiff and the objection was sustained. The ruling was clearly correct. The issue on the subject-matter arose by reason of an affirmative allegation in the plaintiff's answer to the cross-complaint of the defendants. The plaintiff had tendered no testimony. The trial court so held, and counsel for the defendants admitted the soundness of the ruling by remarking, "It would be out of the order of proof, possibly. Take the witness, then."

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; BARTLETT, Justice pro tem.

84 Cal. App. 28

IRILARRY v. BYERS, Sheriff, et al.★
(Civ. 4416.)

District Court of Appeal, Second District, Division 2, California. June 17, 1927.

Rehearing Denied July 15, 1927.

Hearing Denied by Supreme Court Aug. 15, 1927.

4. Attachment ⚡164—Service of writ on defendant is sufficient to maintain attachment of heavy and unmanageable articles (Code Civ. Proc. § 542, subd. 5).

There is no necessity for actual handling of heavy and unmanageable articles to levy or maintain attachment, but mere service of writ on defendant as in case of attachment of real estate is sufficient, in view of Code Civ. Proc. § 542, subd. 5.

2. Attachment ⚡184—One attaching contractor's machinery held not to have released attachment by refusal to continue paying keeper, where he deemed keeper unnecessary because of bulk of attached property.

Plaintiff who attached machinery of contractor constructing dam held not to have released attachment by refusal to continue paying keeper, where he deemed keeper unnecessary as to attached property because of its bulk, weight, and situation.

3. Attachment ⚡164—Attached property is presumably attached and held together, where under control of one keeper.

Where machinery, tools, implements, and paraphernalia of contractor constructing dam were attached, and all of such property was under control of one keeper, it was presumably attached and held together.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action in replevin by John T. Irilarry against James C. Byers, as Sheriff of the County of San Diego, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Wright & McKee, of San Diego, and P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

Eugene Daney, of San Francisco, and G. F. McCulloch, of Los Angeles, for respondents.

CRAIG, J. From the admitted facts in this case it appears that on and prior to May 3, 1918, the respondent James C. Byers was sheriff of San Diego county, and that one James Kennedy was a contractor engaged in the construction of the then uncompleted Otay dam across a certain gorge, in said county; that Kennedy was in possession of, and owned an interest in, a large quantity of machinery, tools, implements, and paraphernalia, including one Marion steam shovel, model 36, which were used in such construction work. On May 3, 1918, a writ of attachment issued out of the superior court of Los Angeles county in an action pending therein entitled P. R. Williams v. Kennedy and another, which writ was delivered to the respondent sheriff on May 4, 1918, and was levied upon all of the above-mentioned property on May 6, 1918. On the date last mentioned, but following the levy of the Williams attachment, the same officer levied upon said property a writ of attachment issued out of the superior court of the city and county of San Francisco, which latter writ was not received by the sheriff until the date of levy. The suit last mentioned was entitled Prosper Wolf v. James Kennedy. It was stipulated by the parties that as between these two the Williams attachment rightfully received priority when levied.

On or about June 26, 1918, Prosper Wolf assigned, transferred, and set over unto the appellant herein the cause of action upon which this suit was founded, and Irilarry instituted this action against the respondent sheriff for the sum of \$1,859.91, alleged that at all times since November 16, 1918, his attachment was a first lien upon the steam shovel, and that ever since the last-named date, to October 14, 1919, he had paid the entire expense of keeping and caring for said shovel, when and as such payment was de-

manded of him, in said action of Wolf v. Kennedy, and that on and prior to October 14, 1919, such expense was repaid in full by him to on or about November 9, 1919; that at all times from November 16, 1918, to October 14, 1919, the sheriff retained the custody of said shovel for the exclusive benefit of the plaintiff in said action of Wolf v. Kennedy. The respondents denied by their answer the foregoing allegations, and alleged that the levy of Irilarry's writ of attachment from May 6, 1918, to the 14th day of October, 1919, and the levy of the writ of execution from January 9, 1919, to October 14, 1919, was at all times subject to the prior lien, attachment, and execution of Williams.

At the trial appellant relied entirely upon the testimony of Byers and a deputy sheriff and correspondence between the sheriff and counsel for appellant, from which it appears that appellant's counsel denied any knowledge of the fact that the keeper's fees had been wholly assumed by Williams until the release of the property other than the steam shovel from the Williams writ.

From the 6th day of May, 1918, to the date of the sale under execution, a keeper was continuously in charge of the property, except such as was released upon third party claims. On November 13, 1918, the sheriff notified counsel for appellant in writing as follows:

"Referring again to the matter of keeper at the Otay dam, will say that the plaintiff, Williams, is in arrears for keeper's fees in the suit of Williams v. Ball and Kennedy, and I have notified him that unless fees were deposited immediately I would feel it my duty to dispense with the keeper on next Saturday. If you desire me to maintain the keeper please send me a deposit of \$150."

To this counsel replied by a letter dated November 19, 1918, in part:

"I understand, of course, that Williams not having kept up the payment of keeper's fees, the levy in Wolf v. Kennedy has now become a first lien on every part of the attached property."

Byers swore that he levied both attachments upon all of Kennedy's property; that the steam shovel was exceedingly large and cumbersome; that it was so situated that it could not well have been moved until completion of the dam; that "it was on the east side of the uncompleted dam, across the gorge," and "the only way it could finally be moved was to bring it out across the top of the dam"; that he did not deem it necessary that a keeper should be continued in charge of it, but that, if the parties desired that all of the property be kept in custody, he required a deposit; that he was instructed to and did release all except the shovel from the Williams attachment, but that this apparatus was never released therefrom; and that counsel for appellant paid all keeper's fees following such partial release, and

thereafter claimed priority of their levy as to all of the property, including the shovel. At the trial counsel for appellant stated their contention, which is here urged upon appeal, as follows:

"We are making no claim that the Williams attachment was not prior originally. It may be so stipulated. * * * There is no question but what Mr. Williams could abandon or release his attachment. Now he perhaps would be the only one in responsibility who could do that. The sheriff himself might cause the lien of that attachment to be lost by his improper action, or by his action whether proper or improper. In either event, if the lien was abandoned or released by Williams, or the lien of Williams' attachment was lost by reason of the sheriff's action, then the Irilarry attachment came in as the first attaching lien upon the steam shovel. * * * We contend that the correspondence shows that, by reason of the failure of Mr. Williams to pay any additional fee, the sheriff notified Irilarry that the property would be released unless on a certain date he (Irilarry) put up the fees. It is our contention that the only way in which the sheriff could keep the custody of this attached property was by having a keeper in charge; that is, taking it into his actual custody."

[1-3] As appears from the notice to appellant's counsel, the sheriff did not state that he would release the property from attachment, but that he would "dispense with the keeper," unless a deposit were immediately made. There is no necessity for an actual handling of heavy and unmanageable articles to levy or maintain an attachment. *Dreibach v. Braden*, 40 Cal. App. 407, 181 P. 262. The mere service of a writ upon the defendant, as in the case of attachment of real estate, is sufficient. *Rudolph v. Saunders*, 111 Cal. 233, 43 P. 619. It is not requisite to the attachment of personal property not capable of manual delivery that it be taken into custody by the sheriff, nor that, having been taken by him, his possession be retained. Code Civ. Proc., § 542, subd. 5. It is obvious that, as the evidence shows this steam shovel to have been situated, it was not then capable of manual delivery.

Appellant cites no authority holding contrary to this view. *O'Connor v. Blake*, 29 Cal. 313, merely held that the sheriff having custody of attached property, under one levy, need not make a second seizure under subsequently issued writs in order to establish valid liens thereunder. In *Smart v. Sosey*, 49 Cal. App. 232, 193 P. 167, the personal property was of a readily movable character. Also, in *Braden v. Cline*, 51 Cal. App. 424, 196 P. 913, it is not contended that the chattels were not readily movable and capable of manual delivery. Another case upon which appellant attempts to rely is *Cudahy v. Rhinehart*, 133 N. Y. 248, 30 N. E. 1004, wherein it was shown that the property which the sheriff was instructed to attach was not found; that subsequent attaching

creditors levied upon other property, and that, when asked to furnish an indemnity bond if the plaintiffs desired a lien upon the property last mentioned, they refused to do so, but they did furnish a bond with amended instructions supplementing the previous understanding that the bond was not to be treated as having any relation to the property previously seized under the several attachments, and that it was given for a specific and different purpose. It is not here contended that the Williams undertaking was ever in question. The property was first seized and a keeper placed in charge under his writ, and, having released his attachment as to all property other than the dredger, and deeming a keeper unnecessary as to that, because of its bulk, weight, and situation, his refusal to continue paying the keeper cannot be said to have constituted a release of his attachment upon that which remained. Since all of the property was under the control of one keeper, it was presumably attached and held together.

Hence, since Williams' lien of attachment was first received by the levying officer, all property other than the steam shovel having been released therefrom, and it having been held and sold under such lien for more than the amount of Williams' judgment interest, and costs, the balance was properly payable upon the Wolf judgment. Since, as we have seen, the Williams attachment was not released, the judgment of the lower court must be affirmed.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

84 Cal. App. 52

MILLS v. RICHARDS. (Civ. 3259.)

District Court of Appeal, Third District, California. June 18, 1927.

1. Appeal and error §1011(1)—Trial court's findings on conflicting evidence are binding on appeal.

Appellate court is bound by findings of trial court on substantially conflicting evidence.

2. Landlord and tenant §172(4)—Sublessee conducting hotel, ousted for unreasonable length of time for making repairs partly unnecessary, held entitled to damages for eviction.

Where sublessee conducting hotel was notified by lessee and lessor that building was unsafe for human habitation and immediately vacated for repairs which could have been made within two or three weeks, he was entitled to damages for eviction, where building was not repaired or unnecessary repairs made and possession withheld for ten weeks, which was an unreasonable time and resulted in destruction of plaintiff's business.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by J. K. Mills against A. A. Richards to recover damages for eviction. Judgment for plaintiff, and defendant appeals. Affirmed.

Cook & Nichols, of Turlock, for appellant.
A. J. Carlson, of Modesto, for respondent.

FINCH, P. J. The defendant is the lessee of a three-story brick building in the town of Turlock; the owner and lessor thereof being D. H. Arakelian. At the times mentioned herein, the ground floor was occupied by stores and a theater, the ceiling of the theater being higher than those of the other rooms. The second and third stories above the stores, containing two apartments and nineteen other rooms, were used as a hotel which was known as the Broadway Hotel. The defendant sublet the hotel, fully furnished, for a term of five years from the 1st day of July, 1920. The sublessee deposited \$1,000 with the defendant as security for the payment of installments of rent as they became due. Through various assignments, the plaintiff acquired the rights of the sublessee, including the latter's interest in the deposit of \$1,000, and went into possession of the hotel in January, 1923. On May 2, 1923, the plaintiff was informed by defendant and Arakelian that the building was unsafe for human habitation, and he and his guests immediately vacated the premises. On the following day he served the defendant with written notice of such removal and demanded payment of the amount of the deposit, less the sum of \$320 due for rent at the time of removal. Upon defendant's refusal to make such payment this action was commenced. In addition to denials of allegations of the complaint, the defendant filed a cross-complaint for rent alleged to be due for the months of April, May, June, and July, 1923. Judgment was entered in favor of the plaintiff for \$680, the amount demanded by him, and the defendant has appealed. In appellant's opening brief it is said:

"The question involved on this appeal is whether or not the plaintiff * * * was evicted from certain premises known as the Broadway Hotel."

[1] In determining this question, it will be sufficient to state the evidence which supports the findings and judgment, this court being bound by the findings of the trial court upon substantially conflicting evidence.

[2] The plaintiff testified that about the first of May, 1923, Arakelian informed him and other tenants "that the building was unsafe, and it would be necessary to make repairs, and, if we stayed in there, we were staying * * * at our own risk"; that "immediately after that we received that no-

tice from the city engineer * * * that the building was in an unsafe condition"; that he immediately moved out; that on May 9th he delivered the keys of the building to the defendant and stated that he "would not be responsible for it any longer"; that the defendant said, "All right"; that "he took the keys all right, and * * * he said I could leave the keys * * * and he would take care of them"; that the unsafe condition of the building "was the talk of the street generally" after May 2d. Mrs. Mills testified that "there were articles in the paper after we went out, concerning the condition of the building"; that "we had permanent guests in the house when the building was condemned, and we had to refund their money"; and that "it would require a large effort * * * to build up the patronage of the hotel again there as to permanent guests or either as to transient guests." Defendant's agent for the collection of rents testified that, in the presence of the defendant, he notified the tenants, including the plaintiff, "that I thought the building was in a dangerous condition and they might remain there or they might move out, and, if they stayed in there, they stayed at their own risk." The testimony of this witness stands uncontradicted. The city engineer testified that he told the plaintiff "to get out of there and get out of there quick, for I thought the building was liable to collapse"; that he inspected the building about May 1, 1923, and "I found that the roof was held up by six trusses, each approximately a 62-foot span, 6½-foot rise; the members of these trusses were built up of 7⁄8-inch boards; the lower chord of one truss had parted to the extent of 4 inches; the upper chord had sunk possibly 6 or 8 inches, and the ceiling attached to the lower chord had sunk several inches. The walls settled; the 12-inch brick wall had been kicked out of place by the expansion of the lower member of the truss;" that he later made a more thorough examination and "found that, while only one truss had broken, they were all built in a very defective manner * * * and were liable to go at any time"; that, if the roof collapsed, "this would undoubtedly bring down the walls on the whole building"; that the repairs of the building were completed "about the 1st of August, possibly a little before that"; that "the work dragged on a great deal longer than there was any occasion for it to have done"; that the hotel could have been occupied safely after the middle of July; that at that time "the hallways were full of dirt, lime, and plaster and all that sort of thing, but there was no reason why that could not have been cleaned out and the hotel building used." Several other competent witnesses gave testimony to the same effect. One of them testified that he found the roof in a "very poor condition. * * * One truss was broken and the next truss was sagging and part of the ceiling was going down, and

I didn't inspect it much more because I was afraid. I pulled out of there as fast as I could." The contractor who repaired the building testified that the repairs were completed July 26, but that the building was safe for occupancy about two weeks earlier. A witness for defendant, who prepared the plans for repairing the building, testified that he was engaged in preparing such plans before the broken truss was discovered; that "the design of the trusses of the building was not safe and not proper, and Mr. Arakelian had been told or had noticed himself that, I think immediately after the building. Had some trouble with it. I wasn't connected with that. * * * It was a very poor job."

It clearly appears from the uncontradicted evidence that, by reason of faulty construction, the building never was safe or fit for the occupation of human beings, and that the defendant's notice to the plaintiff to vacate the building or to remain at his own risk, as well as the similar notice given by Arakelian, was not for the purpose of enabling the owner to make ordinary repairs of dilapidations occurring subsequent to the execution of the lease or the sublease, but for the purpose of reconstructing the roof trusses, owing to original defects therein which rendered the building unsafe. The effect of the re-entry for that purpose was to oust plaintiff entirely from possession of the property leased to him for a period of at least ten weeks, which the testimony shows and the court found "was an unreasonable time," and it resulted in the destruction of the plaintiff's business. In *McDowell v. Hyman*, 117 Cal. 67, 69, 48 P. 984, 986, the plaintiff was conducting a lodging house in a part of a building leased from defendants. The defendants "conducted certain alterations and improvements on the second floor by tearing out partitions and walls, putting in new partitions, plastering, removing the front doors, etc., whereby plaintiff was damaged, and her quiet enjoyment of the premises as a tenant was interfered with." The court said:

"The principal covenant on the part of a landlord, which, if not expressed, is implied, is that his tenant shall have the quiet enjoyment and possession of the premises during the continuance of the term. 'This covenant, whether expressed or implied, means that the tenant shall not be evicted or disturbed by the lessor or by persons deriving title from him, or by virtue of a title paramount to his.' * * * 1 Taylor on Landlord and Tenant, § 305."

"The general rule, * * * relating to a constructive eviction, is that any disturbance of the tenant's possession by the landlord, whereby the premises are rendered unfit or unsuitable for occupancy in whole or in substantial part for the purposes for which they were leased, amounts to a constructive eviction, if the tenant so elects and surrenders his possession." *Veysey v. Moriyama*, 184 Cal. 802, 805, 195 P. 662, 663 (20 A. L. R. 1363); *Agar v. Winslow*, 123 Cal. 587, 593, 56 P. 422, 69 Am. St. Rep.

84; *Coen v. City of Los Angeles*, 70 Cal. App. 752, 765, 234 P. 426; *Kelley v. Long*, 18 Cal. App. 159, 163, 122 P. 832; *Agoure v. Lewis*, 15 Cal. App. 71, 76, 113 P. 882.

Appellant says: "The lack of safety might have been cured within two or three weeks, and no doubt was." The evidence shows that the building was not fit for occupancy prior to the middle of July. If, however, the building could have been made or was made safe for occupation within two or three weeks after plaintiff vacated the premises, then it was the duty of the defendant immediately to restore to the plaintiff the quiet possession thereof, without further delay for unnecessary repairs. *Dwyer v. Carroll*, 86 Cal. 298, 304, 24 P. 1015.

The judgment is affirmed.

We concur: THOMPSON, Justice pro tem.; PLUMMER, J.

84 Cal. App. 112

BLODGETT v. ELLIOTT. (Civ. 4762.)

District Court of Appeal, Second District, Division 1, California. June 21, 1927.

Trial ¶143—Nonsuit should not be granted if evidence tends to sustain plaintiff's action or in case conflicting evidence tends to sustain case.

Where there is any evidence tending to sustain plaintiff's action, a nonsuit should be denied without passing on sufficiency of such evidence; and where there is conflict in evidence, some of which tends to sustain plaintiff's case, a motion for nonsuit should not be granted.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by D. T. Blodgett against Frank C. Elliott. Judgment of nonsuit, and plaintiff appeals. Reversed.

D. T. Blodgett, in pro. per.

A. D. Mitchell and Pollock & Mitchell, all of Ontario, Cal., for respondent.

McLUCAS, Justice pro tem. This action is brought to recover commissions for procuring a purchaser of a stock of merchandise, tools, and implements, and for procuring a lessee for buildings and grounds. At the close of plaintiff's case defendant moved for a nonsuit on the ground that plaintiff had failed to prove a sufficient case. The motion was granted, and plaintiff appeals from the judgment.

Without reviewing the evidence in detail, we find upon examination of the record that there is some evidence tending to prove plaintiff's employment by defendant, and that the sale was consummated through the efforts of plaintiff, especially in view of the fact that defendant sold and leased the property to plaintiff's customer soon after the plaintiff

had called the attention of the customer to the property. There was also some evidence that the purchaser had received information concerning the property from sources other than plaintiff. In view of the conflict in the evidence, we think the case should more properly have been decided after defendant had put in his proof, rather than on a motion for nonsuit. If there is any evidence tending to sustain plaintiff's action, a nonsuit should be denied without passing upon the sufficiency of such evidence, and where there is a conflict in the evidence, some of which tends to sustain plaintiff's case, a motion for nonsuit should not be granted. *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 596, 112 P. 53. One of the grounds on which the trial court granted the motion for nonsuit was that the plaintiff was not the real party in interest. We find no evidence in the record sufficiently conclusive to justify a nonsuit on that ground. In our opinion the trial court erred in granting the motion for nonsuit.

It is ordered that plaintiff be granted leave to file his amendment to the complaint. The judgment is ordered reversed.

We concur: HOUSER, J.; YORK, J.

84 Cal. App. 96

PEOPLE v. STONE et al. (Cr. 1479.)

District Court of Appeal, Second District, Division 2, California. June 20, 1927.

1. Conspiracy ¶23—In prosecution for conspiracy to falsify election returns, specific intent to violate law or injure another need not be proved (Pen. Code, § 7, subd. 1, and § 51).

In prosecution for conspiracy to falsify election returns brought under Pen. Code, § 51, instruction that state need not prove specific intent as affecting result of election, or injuring any one, or of committing any crime, held proper in view of section 7, subd. 1.

2. Conspiracy ¶47—Evidence held to support conviction for conspiracy to falsify election returns (Pen. Code, § 51).

Evidence held sufficient to justify conviction for conspiracy to falsify election returns under Pen. Code, § 51, where defendant, who was judge of election, saw 98 of 137 votes cast and 30 ballots were erroneously reported, especially in view of his testimony that he saw some of such ballots and did not correct erroneous announcements of results by inspector.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

William B. Stone and another were convicted of conspiracy to falsify election returns, and named defendant appeals. Affirmed.

Walter C. Davison, of Riverside, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

WORKS, P. J. Defendants were charged with conspiring, as members of an election board, "willfully, unlawfully, and feloniously * * * to add to the votes cast in favor of" a proposition balloted upon at the election during which the board sat, and "to subtract from the votes cast against" the proposition, in the official returns of the election. The crime which it was alleged defendants conspired to commit is denounced by section 51 of the Penal Code. Defendant Emerich pleaded guilty, and defendant Stone was convicted after a plea of not guilty. The latter appeals from the judgment and from an order of the trial court denying his motion for a new trial.

Appellant contends that the trial court erred in giving to the jury an instruction which read, in part:

"In this case there is no specific intent involved, and it is not necessary for the state to prove that an act was done with the intent of affecting the result of the election or of injuring anyone, or of committing any crime. The charge against the defendants makes no mention of any particular intent. The use of the word 'willfully' implies simply a purpose or willingness to commit the act referred to, but it does not require any intention to violate the law or to injure another or to acquire any advantage."

[1] It is provided by section 51 of the Penal Code that "every person who willfully adds to, or subtracts from, the votes actually cast at an election, in any official or unofficial returns" is punishable in a certain manner. The assailed instruction was properly given, as it was practically in the language of subdivision 1 of section 7 of the Penal Code. See *People v. O'Brien*, 96 Cal. 171, 31 P. 45; *People v. Dillon*, 199 Cal. 1, 248 P. 230. Appellant relies on *People v. Eagan*, 116 Cal. 287, 48 P. 120, but that case is not in point.

Appellant insists that the evidence was insufficient to support the verdict returned against him. In the precinct in which sat the election board of which appellant was a member, 107 ballots were cast in favor of the proposition voted upon and 30 against it. The board returned that 137 votes were cast in favor of it, with no adverse votes. The board was composed of two clerks, besides defendant Emerich, who was an inspector, and appellant, who was a judge of election. Throughout the count the tally lists were handled by the clerks, and they each testified at the trial that they correctly tallied the votes as they were called to them. Emerich "called off" the ballots until only 20 to 30 remained, when appellant relieved him and

"called off" those that were left. Neither Emerich nor appellant called any votes in opposition to the proposition to which we have referred. While Emerich was announcing the result of the ballots "called off" by him, appellant was "stringing" them one by one as Emerich handed them to him after they had been tallied. Appellant testified that he had served on election boards before serving on the one whose operations are now in question, that he knew that it was his duty to examine the counted ballots as Emerich passed them to him in order to see that no mistakes were made, and that he did examine at least two-thirds of those which Emerich handed to him, before "stringing" them. He testified further:

"Q. Did any of those ballots that you looked at have 'No' votes registered? A. I think they did, the best I remember.

"Q. Did some of them have 'Yes' votes registered? A. Yes, sir."

[2] We think the evidence was sufficient to justify the verdict. Appellant "called off" at least 20 ballots. Of the remaining 117 he examined at least two-thirds, or 78. He saw, then, all told, what was on 98 of the 137 votes cast. It is inconceivable that he did not inspect any of the 30 ballots which registered "No" votes. In truth, he testified that he saw some such ballots. From the fact that appellant did not correct the erroneous announcements of the results of votes by Emerich, the jury was justified in concluding that there was an illicit concord—a conspiracy—between them. On this point, also, appellant relies on *People v. Eagan*, supra. The facts appearing here are quite different from those shown in that case.

Judgment and order affirmed.

We concur: CRAIG, J.; THOMPSON, J.

84 Cal. App. 1
HOLSTROM v. MULLEN et al. (Civ. No.
4533.)

District Court of Appeal, Second District, Division 2, California. June 15, 1927.

1. Trusts $\S$ 91—Constructive trusts are creatures of equity, formed to prevent fraud.

Constructive trusts are the creatures of equity, formed for the purpose of preventing the perpetration of fraud.

2. Pleading $\S$ 59—In equitable action, performance or willingness to perform must be alleged.

A failure to allege performance or willingness to perform is fatal to an equitable action.

3. Trusts 371(2)—Complaint in action to impress trust on lease, taken in defendants' name for joint use of plaintiff and defendants, held insufficient to state cause of action.

In suit to impress a constructive trust on a lease, complaint alleging that plaintiff and defendants had agreed that defendants should secure and take in their own names a lease on a storeroom for the joint use and benefit of plaintiff and defendants, that plaintiff should have and enjoy the use and possession of a half thereof, and that plaintiff placed special confidence in certain individual defendant, and that assignment of lease to corporate defendant was without consideration *held* insufficient to state a cause of action, there being no allegation that plaintiff had performed or was willing to perform, or that fixtures of special design and architecture had been ordered or installed with knowledge of defendants.

4. Frauds, statute of 149—Complaint in action for damages for breach of oral contract to take lease for joint use of plaintiff and defendants held to show part performance, taking contract out of statute.

In action for damages for breach of contract, complaint alleging that plaintiff and defendants had agreed that defendants should take in their own names a lease on a certain storeroom for the joint use and benefit of plaintiff and defendants, and that plaintiff should enjoy the use of a particular half thereof, and that plaintiff, with defendants' knowledge, took possession and equipped his half with special fixtures and stock of merchandise, that defendants ejected plaintiff, though he had fully performed on his part and was always ready, able, and willing to perform, *held* to sufficiently show part performance, taking agreement (concededly oral) out of statute of fraud, and hence sufficient to state a cause of action.

5. Joint adventures 5(2)—Complaint in action for breach of agreement to secure lease for joint use held to show joint venture, and sufficient without averment of agreement to pay half of rental.

Complaint in action for damages for breach of agreement between plaintiff and defendants to secure a lease for their joint use and benefit *held* to sufficiently show a joint venture, and hence not insufficient for want of allegation that plaintiff had agreed to pay his part of rental.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Two consolidated actions by A. A. Holstrom against Andrew Mullen and others. From a judgment for defendants, plaintiff appeals. Affirmed in part, and reversed in part.

Leo V. Youngworth and Harry J. McClean, both of Los Angeles, for appellant.

Dockweiler & Dockweiler & Finch, of Los Angeles, for respondents.

THOMPSON, J. Two actions were commenced by the plaintiff against the defendants, one seeking the recovery of damages for breach of contract and numbered in the supe-

rior court records 105266, and the second, designated by No. 105267, seeking to have a 10-year lease to a storeroom held by the defendants impressed with a trust in favor of the plaintiff. The complaint for damages alleges, in addition to the fact of damage in a definite amount, that on or about August 10, 1921, plaintiff and defendants agreed that defendants should secure and take in their own names a lease on a storeroom in the Pacific Mutual building for the joint use and benefit of plaintiff and defendants; that plaintiff should have and enjoy the use and possession of the west half thereof; that during the months of September and October the plaintiff took possession of the west half and equipped it with special fixtures and a stock of merchandise, all of which was well known to the defendants; that about November 10, 1921, the defendants ejected plaintiff, although he had fully performed on his part and has always been ready, able, and willing to perform. The second complaint alleges practically the same matters except that it fails to allege performance or willingness to perform, and does not allege that the installation of fixtures of special design and architecture and the stock of goods ordered and placed in one-half of the store were ordered and installed with the knowledge of the defendants. It does allege in more detail that the agreement was made with the defendant Andrew Mullen to secure the lease, the special confidence placed in Mullen by reason of a long acquaintance with him, and the assignment of the lease to the defendant Deane, a corporation, without consideration; that in all of the things done by Andrew Mullen he was acting not only for himself, but also as the representative of the defendants Mullen and Bluett and the Mullen Estate Company.

Upon stipulation of the parties, the two causes were consolidated for trial, and upon the trial objection was made to the introduction of any testimony on the ground that neither of the complaints stated facts sufficient to constitute a cause of action. Appellant's counsel stipulated that the agreement between plaintiff and defendants was not in writing, but oral, and, upon that stipulation being made, the objections were sustained and judgment was entered that plaintiff take nothing in either of the actions and that defendants should recover their costs. This appeal is from that judgment, and we must examine both the complaints to determine if they, or either of them, is sufficient against a general demurrer.

[1-3] It is apparent that the second complaint, the complaint to impress a trust upon the lease, does not state facts sufficient to constitute a cause of action for the reason that it alleges no facts to bring it within the doctrine of constructive trusts. Such trusts are the creatures of equity, formed for the

purpose of preventing the perpetration of fraud. *Teich v. San Jose Bank of Savings*, 8 Cal. App. 397, 97 P. 167; *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430; section 2224 Civ. Code. The absence of allegations that the fixtures of special design and architecture and the stock of goods were ordered and installed with the knowledge of the defendants renders the complaint fatally defective in this particular. A failure to allege performance or willingness to perform is also fatal in an equitable action. The allegations are therefore insufficient to bring the plaintiff within the protecting arm of equity.

[4] When we examine the other complaint we find the allegations just mentioned to have been supplied, and the question becomes one of whether the acts alleged to have been done were a sufficient part performance to take it out of the statute of frauds. Perhaps the question would be properly phrased if we said it was whether the plaintiff had suffered such a change of position that it would be inequitable for the defendants to be permitted to claim the protection of the statute. Strictly speaking, the things which plaintiff alleges were done, at least with the silent acquiescence of defendants were not done in the performance of the lease, but were done in preparation therefor. The rule is succinctly set forth in *Seymour v. Oelrichs*, 156 Cal. 782-795, 106 P. 88, 94 (134 Am. St. Rep. 154), as follows:

"The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' 2 Pomeroy's Equity Jurisprudence, § 921. It was said in *Glass v. Hulbert*, 102 Mass. 24, 35 [3 Am. Rep. 418]: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. See 5 Browne on Statute of Frauds, § 457a. In the section last cited, Mr. Browne says: 'A plaintiff

* * * must be able to show clearly * * * not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made.'"

The whole question is whether or not the rule thus announced is applicable to this situation. Unquestionably the allegations of the complaint show that by reason of defendants' acquiescence in the installation of special fixtures and stocking the store with goods ordered for that purpose, plaintiff would be seriously damaged if not permitted to proceed with the venture. The time for defendants to have spoken was when knowledge was first had. It would be unjust not to permit the plaintiff to litigate a claim founded upon his reliance upon the acts of the defendants. We are of the opinion that the rule is applicable to the present situation.

[5] It may be asserted that plaintiff has nowhere alleged an agreement on his part to pay one-half of the rental—but as against a general demurrer we think the allegation that plaintiff and defendants agreed to secure the lease for their joint use and benefit, and that plaintiff was to use the west half, necessarily implies that they were joint venturers in the undertaking, and each to pay one-half thereof.

The judgment is affirmed as to action No. 105267, and reversed as to action No. 105266.

We concur: WORKS, P. J.; MURPHEY, Justice pro tem.

84 Cal. App. 103

**GRISSE v. SUPERIOR COURT IN AND FOR
ALAMEDA COUNTY et al.***
(Civ. 5858.)

District Court of Appeal, First District, Division 1, California. June 21, 1927.

Rehearing Denied July 20, 1927. Hearing Denied by Supreme Court Aug. 19, 1927.

I. Mandamus ¶4(2)—After sustaining demurrer to petition for review of order revoking medical license and judgment of dismissal, former licensee was not entitled to mandamus to compel court to take jurisdiction (Medical Practice Act, § 14, as amended by St. 1925, p. 281; Code Civ. Proc. § 963, subd. 1).

After order of superior court sustaining demurrer to petition for writ of review of order of board of medical examiners, revoking license under Medical Practice Act (St. 1913, p.

722) § 14, as amended by St. 1925, p. 281, and judgment of dismissal, former licensee had an adequate remedy by appeal under Code Civ. Proc. § 963, subd. 1, and was not entitled to mandamus to compel court to take jurisdiction which in fact it had already done.

2. Mandamus ⇨4(1)—Court's exercise of jurisdiction, if erroneous, is reviewable, not by mandamus, but by appeal.

Where a court has exercised its jurisdiction either correctly or erroneously, the result of such exercise cannot be reviewed by mandamus, but only by appeal.

Application by Davis Grisso for a writ of mandate to be directed to the Superior Court of the State of California in and for Alameda County, T. W. Harris, Presiding Judge, to compel such court to take jurisdiction of and determine application of petitioner for review of an order of the Board of Medical Examiners revoking certificate. Writ denied.

Soren X. Christensen and J. C. Wood, both of San Francisco, for petitioner.

A. B. Bianchi, of San Francisco, for respondents.

KNIGHT, J. This is a proceeding in mandamus. The petitioner, as shown by the allegations of his petition, was engaged in the practice of medicine and surgery in Alameda county under a license issued to him on February 23, 1921, by the board of medical examiners of the state of California, and duly registered by petitioner, as required by the state Medical Practice Act (St. 1913, p. 722), in the office of the county clerk of said county. In July, 1922, charges of unprofessional conduct were preferred against petitioner, and on October 18, 1923, said board of medical examiners heard the same and determined that petitioner was guilty thereof; whereupon an order was made revoking his license. The board of medical examiners conducted the hearing and its order of revocation was made and entered in the city of Sacramento. Subsequently, the secretary of said board certified the order of revocation to the county clerk of Alameda county, who caused a written entry thereof to be made across the face of the registration record.

Thereafter, and on February 17, 1926, petitioner filed an application in the superior court in and for the county of Alameda for a writ of review, seeking to have reviewed the proceedings upon which the order of revocation was founded, and to have the latter annulled. The board of medical examiners appeared in the proceeding and contested the issuance of said writ by filing a demurrer to the petition. Thereafter, the allegations of the petition in the instant proceeding show, "said superior court * * * sustained said demurrer and declined and refused to take jurisdiction of said cause and declined and refused to re-

view the decision of said medical board. * * *" Petitioner then applied for and obtained from the Supreme Court an alternative writ of mandate directing said superior court and the Honorable T. W. Harris, judge thereof, to assume jurisdiction of said proceeding or to show cause, if any there was, for their refusal so to do; and thereupon said proceeding was transferred to this court for hearing and determination.

[1] The main legal contention urged by petitioner relates to the question of the unconstitutionality of that portion of section 14 of the state Medical Practice Act, as amended in 1925 (St. 1925, p. 281), which purports to restrict a licensee whose license has been suspended or revoked, in the exercise of his remedy for a review of the proceedings resulting in such suspension or revocation, to "the county, or the city and county in which such suspension or revocation has been made by the board of medical examiners." Whether or not the order of the superior court sustaining the demurrer to the petition for the writ of review was made with leave to amend does not appear from the record before us; but it is immaterial whether it was or was not, for if it was so made, and petitioner declined to amend, the proceeding necessarily would have terminated the same as if the order were made without leave to amend, in a judgment of dismissal; and therefore, in either event, petitioner was afforded a complete and effective remedy by appeal from such judgment (subdivision 1, § 963, Code Civ. Proc.) to correct any error which may have been committed by the court in sustaining the demurrer. That being so, petitioner is not entitled to invoke a proceeding in mandamus to serve the purpose of an appeal. *Montgomery v. Neilon*, 41 Cal. App. 184, 182 P. 456; *Oliver v. Superior Court*, 67 Cal. App. 358, 227 P. 647; *Petaluma Municipal Water District v. Superior Court*, 194 Cal. 183, 228 P. 24.

[2] Moreover, the action of the trial court in ruling upon the demurrer shows that it did not refuse to entertain jurisdiction of the certiorari proceeding, but, on the contrary, proves that it did assume jurisdiction thereof and, after having done so, acted judicially upon the matter before it. Therefore, since it exercised its jurisdictional powers, either correctly or erroneously, the result of such exercise cannot be reviewed in mandamus, but only by way of appeal. *Petaluma Municipal Water District v. Superior Court*, supra.

Aside from the facts alleged in the petition herein, however, it appears that prior to the application for the writ of review in Alameda county petitioner commenced a similar proceeding against the board of medical examiners in the superior court in and for the

city and county of San Francisco; and that there, as here, said medical board demurred to the petition upon general and special grounds. The demurrer was sustained, and upon entry of judgment of dismissal petitioner appealed. The trial court's ruling on demurrer was sustained (*Grisso v. Board of Medical Examiners* [Cal. App.] 242 P. 912), the court on appeal holding in effect that section 14 of the state Medical Practice Act made provision for the revocation by the board of medical examiners of licenses to practice, set forth the causes for revocation, and established the procedure to be followed in bringing charges to trial and for the determination thereof; that it appeared from the allegations of the petition for the writ of review therein that petitioner was a licensee of said board over whom it had jurisdiction, and that he had been regularly and legally brought before said board for trial; furthermore, that it appeared from said petition that evidence was adduced at said trial supporting the charges preferred against petitioner; and that therefore the court to which the application for the writ of review was made "need go no further," that its powers in certiorari were limited and did not permit interference with the exercise of the judgment of the medical board where it affirmatively appeared that the board had complied with the jurisdictional requirements of the statute, citing *Jordan v. Alderson*, 48 Cal. App. 547, 192 P. 170.

In the instant proceeding neither the contents of the petition for the writ of review filed in Alameda county, the demurrer thereto, nor the order sustaining the demurrer, were made part of the record; consequently, we are unable to say whether or not the petition filed in Alameda county was any different in its allegations of material facts from the one filed in the city and county of San Francisco, and if it was not, the demurrer in the Alameda county proceeding, like the one in the San Francisco proceeding, was rightly sustained upon the grounds stated by the District Court of Appeal in its judgment of affirmance. Therefore, even assuming that under any possible theory an erroneous ruling on demurrer may be corrected by the courts of appellate jurisdiction through the medium of a mandamus proceeding, and that irrespective of the provisions of section 14 of the state Medical Practice Act petitioner herein had the right to institute his proceeding for a review of the action of the medical board in Alameda county, it is clear that the writ of mandate herein applied for will not lie because there is no record before us upon which the determination can be based that the ruling of the superior court in Alameda county in sustaining the demurrer was erroneous.

For the foregoing reasons it is our opinion that the writ prayed for should be denied, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

84 Cal. App. 6

PEOPLE v. MUNOS et al. (Cr. 967.)

District Court of Appeal, Third District, California. June 15, 1927.

1. Criminal law §564(7)—Evidence held to show that intent to detain and conceal child was formed in county from which she was taken and venue laid (Pen. Code, § 21).

In prosecution for taking and enticing away a 15 year old girl with intent to detain and conceal her, evidence held sufficiently to show intention to detain and conceal her was formed in county from which she was taken and venue laid, in view of Pen. Code, § 21, providing intention is manifested by circumstances connected with offense, and sound mind and discretion of accused.

2. Criminal law §112(1)—As regards venue, crime of enticing child with intent to detain and conceal her was complete at time of taking.

As regards venue, crime of taking and enticing away 15 year old girl with intent to detain and conceal her was complete, when defendants enticed and took her away with such intent from her father, and their subsequent acts were important only as tending to establish such intent.

3. Parent and child §18—That girl voluntarily accompanied defendants, charged with taking and enticing her away, is immaterial.

In prosecution for taking and enticing away 15 year old girl with intent to detain and conceal her, the fact that girl accompanied defendants voluntarily is immaterial.

4. Parent and child §18—Error in refusing instruction requiring acquittal for taking and enticing girl in case of reasonable doubt of intention to both conceal and detain did not result in miscarriage of justice.

In prosecution for taking and enticing away 15 year old girl with intent to detain and conceal her, error in refusal of instruction to acquit in case of reasonable doubt as to intention to both conceal and detain held not to have resulted in a miscarriage of justice, in view of other instructions requiring finding of taking with intent to detain and conceal, and particularly in view of conclusive evidence thereof.

Appeal from Superior Court, Amador County; C. P. Vicini, Judge.

Luis Munos and another were convicted for taking and enticing away a 15 year old girl with intent to detain and conceal her from

her father having lawful charge of the child, and they appeal. Affirmed.

Raymond T. Coughlin, of Sacramento, and A. L. Pierovich, of Jackson, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants were convicted of the crime of taking and enticing away a girl 15 years of age with intent to detain and conceal the child from her father, who had the lawful charge of the child. This appeal is from the judgment and the order denying a new trial.

The girl testified that on August 29, 1926, the defendants took her and a Chinese girl out riding in Navarro's automobile; that on that day Navarro asked her to go with the defendants and the Chinese girl to Los Angeles, and "that they might go to Calexico"; that on the next day the defendants "begged me and coaxed me to go, so I went"; that they left Sutter Creek about 10:30 a. m. and traveled in a roundabout way in order to avoid the officers, who were watching the main roads; that they reached Placerville about 6:30 p. m. of that day, where Munos and the Chinese girl "went to the courthouse to get married, but it was already closed, so she couldn't"; that they then drove to Sacramento and thence to Stockton and from there to an automobile camp near Fresno, arriving at the camp about daylight, August 31; that they there slept in the automobile until about 5 p. m., when they drove to Bakersfield and thence to an automobile camp near San Fernando, arriving there in the nighttime; that they left this camp the following evening and drove all night and all the next day, reaching El Centro about 9 p. m.; that they stayed in a hotel there that night, Navarro and the girl occupying the same bed; that they drove to Calexico the next day, at which place they remained for several days, Navarro and the girl occupying a room together; and that the sheriff of Amador county took them all back to that county about the middle of September. The Chinese girl, who was 17 years of age, told a similar story and testified that she and Munos did not succeed in getting married, but that they slept together on the trip.

Navarro testified that he did not ask the prosecuting witness to go away with him; that it was his intention merely to take Munos and the Chinese girl "to Placerville to get married, and coming back here"; that, while he was in El Centro and Calexico with the girls and Munos, he did not, "at any time during the course of that trip, sleep with" the prosecuting witness. Munos gave similar testimony.

[1-3] Appellants contend that the evidence does not show that they formed the intent to detain and conceal the prosecuting witness while they were in Amador county. The contention is wholly without merit. "The intent

or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused." Pen. Code, § 21. The request that the girl accompany the defendants to Los Angeles and Calexico, made the day before the departure, is strong evidence that the intent to commit the crime was formed before leaving Amador county. Besides, the acts and conduct of the defendants subsequent to their departure from that county are amply sufficient to show what their intention was in the beginning. The crime was complete the moment the defendants enticed and took the child away with intent to detain and conceal her from her father, and their subsequent acts are important only as tending to establish such intent. It is wholly immaterial whether the defendants intended the place of detention and concealment to be in Amador county or elsewhere. The fact that the girl accompanied the defendants voluntarily is immaterial. *People v. Torres*, 48 Cal. App. 606, 192 P. 175.

[4] The court refused to give certain instructions requested by the defendants to the effect that, if the jurors entertained a reasonable doubt as to whether the defendants intended "to both conceal and detain" the child, they must return a verdict of not guilty. Under the decision in *People v. Black*, 147 Cal. 426, 81 P. 1099, the instruction should have been given. The court instructed the jury that the defendants were charged with taking and enticing away the child "with intent to detain and conceal such child" from her father; that "child stealing is defined as follows: Every person who maliciously, forcibly, or fraudulently takes or entices away any minor child with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable by imprisonment in the state prison"; that "if, after the entire comparison and consideration of all the evidence in the case, you are satisfied beyond and to the exclusion of a reasonable doubt that at the time and place mentioned in the information the defendants did commit the crime of child stealing, then your verdict should be guilty as charged in the information; but if, after such due and careful consideration of all the evidence in the case, you are not satisfied in every particular, you cannot convict them of the charge alleged in the information." By these instructions the jurors were told that to justify a verdict of guilty they must find that the defendants took the child with intent "to detain and conceal" her. While it may be said that the court should have given the proposed instructions in the interest of certainty, it is highly improbable that any juror was misled by the omission to give them. In any view of the case the evidence of the defendants' guilt is so conclusive that it cannot be said that the refusal to give the instructions has resulted in a miscarriage of justice. The defendants did "detain and

conceal" the child and it would require great credulity to believe that they did not intend to do so from the beginning.

The judgment and order are affirmed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

ADAMS v. SOUTHERN PAC. CO. et al.★
(Civ. 4647.)

District Court of Appeal, First District, Division 1, California. June 16, 1927.

Hearing Granted by Supreme Court Aug. 15, 1927.

1. Master and servant ☞30(4)—Railroad conductor's act in associating himself with illicit bar and permitting use of his houseboat for prostitution held to warrant dismissal.

Alleged action of railroad conductor in associating himself with illicit bar, where liquor was sold in violation of company's rules, and in permitting houseboat which he owned to be conducted for purpose of prostitution, held such as to warrant railroad in dismissing him for conduct unbecoming conductor.

2. Master and servant ☞43—Railroad employee held not entitled to have question of dismissal for infraction of rules submitted to jury.

Railroad employee is not entitled to have jury decide whether of not infraction of rules established by railroad warranted dismissal, where reason was from standpoint of employer, acting in good faith, wholly true.

3. Master and servant ☞32—Conductor could not recover against railroad for maintaining record showing discharge for unbecoming conduct, if record was true.

If former railroad conductor was in fact guilty of conduct unbecoming a conductor he could not recover against railroad for maintaining record showing such circumstance as reason for his discharge.

4. Master and servant ☞32—Railroad employee admitting ground for dismissal was not entitled to investigation.

In action by former railroad employee for damages resulting from record of discharge, open and fair investigation of complaint against employee, required by rule of railroad company, was not necessary under Civ. Code, § 3532, where employee admitted commission of acts complained of.

5. Judgment ☞631—Satisfaction of judgment for former conductor in libel suit against person complaining to railroad held bar to recovery against railroad for record showing alleged false reason for discharge.

In action by former railroad employee against railroad for damages for railroad's record of discharge showing discharge was for conduct unbecoming conductor, satisfaction of judgment in libel suit brought by conductor against person making complaint of his conduct to railroad held bar, where prior action adjudicated right of conductor to all damages sustained by reason of inability to secure em-

ployment as conductor arising out of statement made on his discharge.

6. Judgment ☞584—Bar from satisfaction of judgment arises from fact of compensation, not from particular form of action.

Bar arising from satisfaction of judgment proceeds not from any particular form in which action is brought, but arises from fact that party complaining has been compensated for his injury.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by James M. Adams against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Ford & Johnson, of San Francisco, for appellants.

E. S. Bell, of Oakland, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment in favor of respondent upon the verdict of the jury awarding respondent \$5,000 damages in an action in tort growing out of the alleged maintenance by appellants of a record showing an alleged false reason for the discharge of respondent from his position as conductor on a train of appellant corporation. The case is one of first impression in this state; other jurisdictions have adjudicated actions of a somewhat similar although not identical nature.

The facts about which there is no controversy are that respondent, James M. Adams, entered the employ of appellant Southern Pacific Company in 1891, as a brakeman, and through promotion became a conductor, continuing to work without interruption in those capacities until December 31, 1910, at which time he was discharged. It is the custom among railroads throughout the country to issue on demand of an employee leaving the service a statement showing the reason therefor. This statement is variously referred to in the record as a clearance, clearance card, service card, and service letter. The clearance card merely shows the date of entering the service of the employer, the capacities in which service was rendered, the date of leaving the employment, and the reason for the severance of relations between the employer and employee. A typical clearance is such as was used in this case, the part of the clearance objected to and forming the basis of the action reading, "Dismissed for conduct unbecoming a conductor." It is likewise a custom among the railroads in employing men with past railroad experience to require the presentation of a "clearance" from the last employer. For some time prior to December 31, 1910, the respondent had been passenger conductor on the branch line running generally between Vallejo and Sui-

sun. On that date he was relieved from duty, and in July of the following year at his own request was furnished with a clearance card which gave the reason of his discharge, "Dismissed for conduct unbecoming a conductor."

The complaint alleges that this entry in the clearance card regarding the reason for the dismissal is false and that a clearance of this character has prevented respondent from gaining railroad employment since the date of his dismissal and will continue to act as a bar so long as the record is maintained by the appellant railroad.

It appears from the record that on December 1, 1910, one W. H. Cameron, of Napa, wrote to Charles S. Fee, then general passenger agent of the Southern Pacific Company, complaining of the conduct of respondent in the course of his work on November 27, 1910. It was charged by Cameron that on that day respondent Adams was disorderly and intoxicated while on duty. Suit was instituted by Adams against Cameron, and Adams recovered judgment against Cameron for \$5,000 as damages for libel, the damage suffered being that he lost his position with the Southern Pacific Company and was permanently deprived from obtaining railroad employment. This judgment was settled in full by the Southern Pacific Company, the case being *Adams v. Cameron*, 27 Cal. App. 625, 150 P. 1005, 151 P. 286.

The issue most stressed at the trial was the truth or falsity of the charge contained in the letter from Cameron to the general agent of the company that appellant was on November 27, 1910, disorderly and intoxicated while on duty.

Appellants urge as ground for reversal: (1) That the evidence is insufficient to sustain the judgment in the following particulars: First, the evidence wholly fails to show that the entry on the records of the Southern Pacific or the clearance card itself prevented Adams from obtaining other railroad employment; second, that the entry on the records and on the clearance card is true and justifiable; third, that the judgment is in excess of any damages the plaintiff could possibly have sustained. (2) That the clearance card and record were privileged communications, made in good faith and not actionable. (3) That the satisfaction of judgment in the case of *Adams v. Cameron* included all damages which the plaintiff seeks in this action and is a bar to recovery. (4) The action is barred by the statute of limitations. (5) Errors of law consisting of numerous errors of court in rulings on the admission and rejection of evidence. (6) Errors of the court in its instructions to the jury.

The evidence is without dispute—in fact, it was admitted by respondent when testifying as a witness that he operated two business enterprises outside of his employment, one of which at least was in violation of the

company rules, one a stage line at Cement and the other a loan office in Oakland, where he loaned money to railroad employees at 5 per cent. interest per month; that he owned an ark or houseboat which was conducted as a house of prostitution and which he leased to a certain individual, and while he claims he did not know at the time of leasing the purpose for which it was to be used, he learned not long after that it was used for the purpose of prostitution; that he was treasurer and one of the organizers of an improvement club at Vallejo, which was nothing more than an illicit bar conducted for the sale of liquor contrary to law and which was closed by the chief of police of Vallejo for violation of the liquor laws, and that he frequented this club where liquor was sold in violation of the rules of the company. It is also a fact that the officers of appellant corporation knew of the ownership by respondent of the houseboat, of his connection with the Vallejo club and his frequenting this club where liquor was sold in violation of the company rules at the time the clearance card was issued.

[1] The railroad is not bound to retain in its service as a conductor a man who brought disrepute upon himself or his employer by association with an illicit bar and who visited such bar where liquor was sold in violation of its rules; it is not bound to retain an employee who owned and let an ark or houseboat which he had knowledge was being used for the purpose of prostitution nor a man who engaged in foreign business operations in violation of its rules.

The reason assigned for discharging respondent from his position is "dismissed for conduct unbecoming a conductor." If conducting an illicit bar which the chief of police found necessary to close and letting an ark or houseboat which he had knowledge was being conducted as a house of prostitution and receiving as rent money earned from such prostitution is not conduct unbecoming a conductor, it would be difficult to know what constitutes such unbecoming conduct. It would seem that such conduct is unbecoming in any self-respecting man of any walk of life or engaged in any occupation. If the fact be true that the party discharged had conducted himself in a manner unbecoming the position he occupied, he is no worse off if his discharge clearance is founded upon an offense of which he is not guilty, if in fact he be guilty of an offense equally flagrant known to his employer at the time and coming under the same general designation. Even if it be held that respondent was not guilty of the charge of disorderly conduct and being intoxicated while on duty, there is no question but that he was guilty of the other offenses mentioned, for he himself in this action so testified, and it further appears that the other offenses were known to appellants at the time of his discharge.

[2] The question arose as to who is to be the judge of what constitutes ground for dismissal—what constitutes conduct unbecoming a conductor. The court permitted the jury to decide this question. The court in instructing the jury with reference to respondent Adams' connection with the social and improvement club during his employment with the company charged, "and if you further believe that his connection with said club constituted conduct unbecoming a conductor, then your verdict must be for the defendants." And the court also in instructing the jury with reference to respondent Adams' ownership of the houseboat, which was used for the purpose of prostitution, concluded such instruction, "and if you further believe that such ownership of such houseboat, coupled with a knowledge by the plaintiff as to the purpose for which said boat was being used, constituted conduct unbecoming a conductor, then your verdict must be for the defendants." In other words, the jury was permitted to determine what acts in its judgment would constitute conduct unbecoming a conductor.

An employee is not entitled to have a jury decide whether or not his infraction of the rules established by his employer warrants dismissal. Where the reason was, from the standpoint of the railway company acting in good faith, wholly true, a judgment against such company should not stand. *St. Louis S. W. Ry. Co. v. Hixon*, 104 Tex. 267, 137 S. W. 343; *St. Louis S. F. Ry. Co. v. Inman* (Tex. Civ. App.) 137 S. W. 1153; *St. Louis S. W. Ry. Co. v. Griffin*, 106 Tex. 477, 171 S. W. 703, L. R. A. 1917B, 1108.

[3] In the instant case the undisputed testimony shows that respondent Adams was guilty of offenses which the company was amply justified in determining were such as would justify his discharge because of "conduct unbecoming a conductor," and that the true ground for his discharge operating upon the minds of the officials who discharged him was in fact that assigned on the clearance card. This being the case, a jury was not entitled to substitute its opinion in the place of the opinion of the employer. If respondent Adams was guilty of conduct unbecoming a conductor and his discharge was justified, it naturally follows that a recovery may not be had.

[4] Respondent urges that a reversal of the judgment will render the rule of the railroad company, under which it cannot discharge an employee except upon an open and fair investigation, a nullity. Answering this contention it is sufficient to say that the law does not require idle acts. Civ. Code, § 3532. As respondent admitted to the officers of the company before his discharge that he had committed the acts enumerated, an open investigation was not required, as it would be idle to investigate charges, the truth of which is admitted by the person charged.

[5] Appellants contend that the satisfaction of judgment in the case of *Adams v. Cameron* includes all damages which Adams as plaintiff seeks in this action, and is a bar to recovery here. An examination of the complaint in *Adams v. Cameron*, which was introduced in evidence in this case, shows that he attributes his discharge to the *Cameron* letter dated December 1, 1910. Paragraph VI of the complaint details the damage alleged to have been sustained. Included in this damage is the loss of wages and his permanent inability to again obtain employment as a railroad conductor, setting forth that he has no trade or occupation other than railroad brakeman and conductor and that by reason of his discharge on the ground of conduct unbecoming a conductor it will be impossible for him to secure employment with said railroad company or with any other railroad company; that the various railroads which operate in California have and maintain a system of exchange references through which each railroad company is apprised of the reason or cause of an employee's discharge; that no other railroad company will employ a man discharged for conduct unbecoming a conductor and that no railroad company will employ a new man either as a brakeman or conductor who has passed the age of 45 years; that he was then 47 years of age, and that this rule would therefore act as a permanent bar to new employment, "and that by reason of the premises and the said acts and words of defendant, this plaintiff has been permanently deprived of the income and earnings which would otherwise accrue to him from his employment as a railroad conductor in said state of California, to his damage," etc.

Paragraph XX of the complaint here sets forth that by reason of the issuance of the alleged false clearance, "plaintiff at all times since July 18, 1915, has been and will be, and will continue to be unable to obtain employment with the defendant corporation, or with any other railroad company operating its lines in the state of California, * * * and now is deprived thereby of the right and opportunity to pursue and follow his said calling."

In the *Cameron* Case respondent sought and received damages because of his inability to obtain work as a conductor in California by reason of the alleged false clearance, and here he seeks damages against appellants for the identical injury for which he was compensated in the former action. The judgment in the *Cameron* Case was satisfied. With the satisfaction of this judgment Adams was fully compensated for all damages sustained by him by reason of his inability to secure employment as a conductor arising out of the statement in his clearance. It is elementary that there can be but one satisfaction for any given wrong. If the *Cameron* letter was false

and the railroad acted upon this false letter in such a manner as to do injury to Adams, there was a choice open to him to sue one or all of the persons causing such injury. Adams elected to sue Cameron and obtained a judgment, which judgment was paid. In the present action he seeks to recover for a portion of the same injury from appellants. He is not entitled to be paid twice; there can be but one satisfaction.

Respondent urges that the action against Cameron was an action for libel committed by him in writing and publishing the letter known in this case as the "Cameron letter"; that appellants were not parties to that action and were not bound by it in any way and that therefore this action is not barred by the satisfaction of judgment in the Cameron case, and cites us to a number of authorities, both in this state and from other jurisdictions. We agree with the rule announced in these cases, but the facts are not similar to those presented here. The California cases cited are *De La Guerra v. Newhall*, 55 Cal. 21; *Owens v. McNally*, 124 Cal. 29, 56 P. 615, and *Curtin v. Salmon River Co.*, 141 Cal. 308, 74 P. 851, 99 Am. St. Rep. 75. In the *De La Guerra* Case the court held that a judgment for defendants in an action for the trespassing of defendants' cattle on the plaintiff's land was not a bar to a subsequent action for a similar trespass occurring prior to those alleged in the former action. In the *Owens* Case the court held that a former adjudication against the enforcement of a contract by the uncle to will property to the niece is not a bar to the enforcement of an executed gift of land made to her by her uncle in his lifetime, and in the *Curtin* Case the court held that a judgment in a former suit to foreclose an invalid mortgage, which failed because the security was held to be void, is not a bar to a subsequent action on the note, in which the note is shown to have been ratified by the conduct of the corporation. In these cases the subsequent actions were not predicated on the same acts complained of in the former actions and did not demand damages for the identical injury as here, and the damage demanded had not been adjudicated and fully satisfied.

[6] The authorities in this state and in other jurisdictions, as far as they have been brought to our attention, seem to be uniform to the effect that the bar arises not from any particular form in which the action is brought, but arises from the fact that the party complainant has been compensated for his injury.

The first decision in this state upon this question is *Tompkins v. Clay Street R. Co.*, 66 Cal. 163, 4 P. 1165, in which the court uses this language:

"Every party contributing to the injuries of plaintiff was liable to the full extent of the damages by her sustained. Her injuries gave her

but a single cause of action. If she had brought a separate action against the Sutter street company, and recovered a judgment therein, and such judgment had been satisfied, she could not subsequently have maintained another action for the same injuries against the Clay street company, inasmuch as the conclusive presumption would be that she had already received full compensation for all damages by her sustained. Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant. * * * It is to be observed, when the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more of the others, that the bar arises *not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent.*" (Italics ours.)

In *Butler v. Ashworth*, 110 Cal. 614, 43 P. 4, 386, the defense was set up that a judgment obtained prior to the action had been entered against the city and county of San Francisco. The first action against the city alleged damage from the overflow of sewage caused by a choked condition of the sewer. The second action was against Ashworth as superintendent of streets for damage due to the breaking of the sewer. In that case the court says:

"But the plaintiff in support of her appeal claims that this wholesome rule has no application to this case, for the reason, as she contends, that the cause of action stated in her suit against the city and that stated against these defendants are not the same, and that the defendants in the two actions are in no sense joint tort-feasors. That the act relied upon as producing the injury in the action against the city was the delay in making repairs to the sewer, * * * while these defendants are charged with an act of commission, the making of repairs in such a negligent manner as to directly conduce to the injury complained of. * * * It is nevertheless perfectly apparent that plaintiff's contention is more specious than sound, and that there exists in fact no real difference between the causes of action stated in the two actions. Formal differences there may be, but in matters of substance there are none. In both actions the inducing, proximate cause of the damage and injury alleged is the invasion of her premises by the overflowing sewage, caused by the broken and choked condition of the sewer. That is the essential fact alleged alike in both counts of her action against the city, and in the complaint in this case. That is the fact constituting the gist of the action in both cases, and, as we have seen, it was one and the same overflow—in other words, the same fact which produced the alleged damage in both cases. * * * This was the fault of the city and the defendants, her officers, alike. Whether it was caused by their joint or several acts is immaterial. It would be subordinating substance to mere form to say that these two actions do not under the circumstances rest upon one and the same cause. This being so, and it appearing that plaintiff had been once compensated for the injury suffered, the court

below was right in denying her a second award of damages for the same act."

In *Union Associated Press Co. v. Press Publishing Co.*, 24 Misc. Rep. 610, 54 N. Y. S. 183, in an action for libel founded upon the publication by defendant in its newspaper of an article charging plaintiffs with the execution of a fraudulent scheme whereby the news was intercepted during its transmission by means of wire-tapping, the court uses this language:

"Here the allegations of the defense disclose the fact that the plaintiff actually recovered damages in an action brought against the party then charged with being responsible for the publication, in this defendant's newspaper, of the libel in suit. Damages were recovered not merely for the act of the Associated Press in communicating the matter to this defendant, independently of the publication, but for the injury done by the publication itself, which was alleged to have been instigated by the Associated Press. This being the situation, there appears to be no escape from the conclusion that the plaintiffs, when prosecuting their actions against the latter corporation, elected to proceed, for the particular libel, against the party who was responsible, jointly with the present defendant, for the perpetration of the wrong, and, accordingly, that the satisfaction of the judgment then recovered operated to release this defendant, as a joint tort-feasor, from further liability."

It would serve no useful purpose to discuss the remaining assignments of error, as it follows from what has been said that the judgment must be reversed, and since the justification of the discharge upon facts herein enumerated, concerning which there is no dispute, is a question of law, and further as the satisfaction of judgment in the action of *James M. Adams v. W. H. Cameron* is a bar to the action, the cause is remanded, with directions to the trial court to enter judgment for the defendants.

We concur: KNIGHT, Acting P. J.; CASE, IN, J.

84 Cal. App. 10

PEOPLE v. MELSON. (Cr. 974.) ★

District Court of Appeal, Third District, California, June 15, 1927.

Rehearing Denied July 15, 1927. Hearing Denied by Supreme Court Aug. 11, 1927.

1. Criminal law ⇨511(6)—Circumstantial evidence as to possession and sale of property stolen in prosecution for larceny tended to connect defendant with larceny and was sufficient to corroborate testimony of accomplice (Pen. Code, § 1111).

In prosecution for larceny of copper wire, evidence of finding of part of wire in vicinity of defendant's residence, similarity of auto and shoe tracks found at scene of larceny with defendant's automobile tires and shoes, and sale

by defendant of wire similar to wire stolen, tended to connect defendant with larceny, and was sufficient to corroborate testimony of accomplice under Pen. Code, § 1111.

2. Criminal law ⇨511(2)—Corroborating testimony held required only to connect defendant with larceny, not to sustain conviction.

In prosecution for larceny, corroborating testimony need not have been sufficient to sustain conviction, but need only have been sufficient to connect defendant with commission of crime charged.

3. Larceny ⇨64(1)—Unexplained possession of stolen property shortly after larceny tends to connect possessor with larceny.

Unexplained possession of stolen property shortly after larceny is a circumstance tending to connect party in whose possession it is found with larceny.

4. Larceny ⇨64(6)—Defendant's explanation of possession of stolen property that it was left by unknown man named "John" held properly considered as no explanation.

In prosecution for larceny of copper wire, defendant's statement that wire was left by an unknown man named "John" held properly considered by jury as no explanation of possession of stolen property; improbable explanation being no explanation at all.

5. Criminal law ⇨829(1)—Requested instructions, substance of which was given in different form, held properly refused.

Requested instruction on presumption of innocence and burden of proof held properly refused, where court gave substance of requested instructions in different form.

6. Larceny ⇨40(2)—Failure to prove that person described in indictment owned concern from which property was stolen held not prejudicial to defendant, where offense was otherwise alleged and proved with sufficient certainty (Pen. Code, § 956).

In prosecution for larceny of copper wire, allegations and proof conclusively showing that property did not belong to defendant, that it was stolen and taken from possession of certain concern, was sufficient to enable defendant to effectively plead prosecution in bar of any other action seeking conviction, and omission to prove that witness named in indictment owned concern from which property was taken did not affect substantial rights of defendant, in view of Pen. Code, § 956, providing that erroneous allegation of person injured shall not be material if offense is otherwise sufficiently described.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Arthur Melson was convicted of petit larceny after two prior convictions of grand larceny, and he appeals. Affirmed.

George Stahlman, Jr., of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of the crime of petit larceny, after

having suffered two prior convictions for grand larceny. The information, among other things, alleges that on or about the 22d day of November, 1926, in the county of San Joaquin, the defendant did "willfully and unlawfully steal, take and carry away a quantity of copper wire of the value of \$195 in gold coin of the government of the United States, and the said property was then and there the personal property of William H. Ford, doing business under the firm name and style of River Rock & Gravel Company."

Upon this appeal, it is urged that the conviction of the defendant was had upon the testimony of an accomplice insufficiently corroborated; that there was no sufficient proof of ownership of the property alleged to have been stolen; that the court erred in its instructions to the jury; and that the district attorney was guilty of prejudicial misconduct in his argument to the jury.

The record shows that some time previous to the commission of the alleged offense, the defendant was living with his wife in a house situated on a small tract of land a short distance from the town of Tracy, in the county of San Joaquin, and that for a short period of time preceding the alleged offense one Glenn Duvalle, a boy of about the age of 19 years and a brother of the defendant's wife, had been stopping at the defendant's home; that on the 22d day of November, 1926, the defendant, accompanied by the said Glenn Duvalle, drove a Ford automobile from his place of residence to the premises used and occupied by the River Rock & Gravel Company, which premises were situate about 7 miles southwest of Tracy, and likewise in said county of San Joaquin, and took from the said premises about 60 feet of copper wire belonging to said company, described as 3 conductor electric cable. This cable was protected by what is called a steel armor. The cable and the armor were brought to the place of the defendant's residence the same night, the next morning the steel armor was removed from the electric cable and thrown over and found in an adjoining field near where the defendant resided. The insulation was then burned from the cable wire. After the insulation was burned off the defendant, accompanied by Duvalle, brought the cable wire in a sack to a junk dealer in Stockton, and there sold the same, together with sundry other articles of junk. The witness Duvalle testified that the sack contained the same wire that had been stolen the previous evening, the change being in taking off the armor and burning the insulation.

Upon the trial of the case a witness, E. E. Williams, who testified that he was the superintendent of the River Rock & Gravel Company, described the wire in question and produced in court a short piece of wire from

which the 60 feet of cable had been taken. In describing the wire, this witness spoke of it as 7 strand of 19 wires each. The witness Horowitz, connected with the junk company to which the copper wire was sold, described the wire as three strand wire. Upon this difference in the description of the wire it is strongly urged that the testimony does not show the sale and purchase of the stolen cable. The testimony, however, goes further than this. Shortly after missing the cable herein referred to, a piece of wire taken from the same strand and the one which was exhibited in court, was taken by an officer to the junk dealer and there compared with the stolen cable, and the witness, Horowitz, above referred to, testified that the wire purchased from him was the same kind of cable exhibited to him as a part of the cable from which the 60 feet of wire were alleged to have been stolen. The stolen wire was not exhibited in court, having been disposed of by the junk dealer prior to the trial. The testimony shows that the junk dealer paid the defendant the sum of \$9.70, no part of which was received by the witness Duvalle. There is also testimony in the record of an examination of the footprints where the Ford car was stopped by the defendant near the premises of the River Rock & Gravel Company, from which the copper wire was taken; that these footprints were made by shoes similar to shoes seen upon the defendant's feet shortly after the said 22d day of November, 1926. An examination was also made of the tracks of the automobile. It appears that the tracks where the automobile turned showed that the front tires were considerably worn. An examination of the Ford automobile owned by the defendant exhibited such a condition of the front tires thereon.

The testimony also shows that the armor herein referred to, used to protect the cable, was found in an adjoining field near the premises occupied by the defendant. The testimony of the defendant is to the effect that the armor was seen by him lying in the field referred to as early as August in 1926, and that he also saw wire lying in the field near the same place in August; that he took wire to Davidson's junk shop and sold it; that he obtained possession of the wire sold to Davidson in the following manner:

"Q. This wire you sold to Davidson's junk-shop, where did you get it? A. I got some of it over at the city dump, and there was Ed. Vergin and a fellow called John had the name of—well, I can't remember the name, but anyhow they was junking together, and they had some kind of a split-up, and when John went to take a load of junk he had down to Stockton here to somebody, I don't know where he sold it; there was a sack in this car that belonged to them, and this John said he was going to throw that stuff out of the car belonging to Ed. Vergin, so he threw it by the side of the fence, and it lay there for quite awhile. * * *

"Q. And the other wire, where did it come from? A. The other wire was wire John threw out of his car, said it belonged to Ed. Vergin. Afterwards, I heard this other fellow wouldn't come back any more; I says, 'I think I will sell that stuff he throwed out there;' take all this I could take to this junk company in Stockton; my wife went out there and helped me put it in the car; she was there when I put it in the car, also Glenn Duvalle; then we came to Stockton."

The defendant also testified that on the evening of the 22d of November he loaned his Ford automobile to the witness Duvalle; that the witness Duvalle left his house saying that he was going to town; that he came home about half past 10 that same evening; that the next morning the witness Duvalle told the defendant he had got some copper wire, whereupon the defendant told the witness to get it away from there.

[1] Relying upon section 1111 of the Penal Code it is urged that there is not sufficient corroboration of the testimony of the witness Duvalle, in that there is no testimony tending to connect the defendant with the commission of the offense. A resumé of the testimony which we have given appears to us a complete answer to this contention. While it might not be sufficient to convict, the finding of the armor in the vicinity of the defendant's residence, the similarity of the automobile and shoe tracks found at the scene of the larceny with the shoes worn by the defendant, and the tires with which the defendant's automobile was equipped, the sale of the wire by the defendant, identified as we have shown, as the same kind of wire taken from the premises of the River Rock & Gravel Company, all tend to connect the defendant with the larceny charged. The explanation given by the defendant on the witness stand really enforces the corroborative testimony instead of being a statement of exculpatory facts. The question of the sufficiency of corroborative testimony has so recently been before this court that we need really only refer to the cases. In the case of *People v. Viets et al.*, 250 P. 588, this court in considering the necessity of corroborative testimony, speaking through Mr. Justice Hart, used the following language:

"The corroborating evidence, however, need not, in degree, be such as to establish guilt, 'for, in that event, the testimony of the accomplice would not be needed.' *People v. Ames*, 39 Cal. 403, 404; *People v. Compton*, 123 Cal. 403, 56 P. 44. All that is required in such a case is that there be produced some testimony other than that of the accomplice which tends, in some slight degree at least, to implicate the defendant in the commission of the crime for which he is on trial. *People v. Clough*, 73 Cal. 348, 351, 15 P. 5; *People v. Wagner*, 36 Cal. App. 41, 171 P. 699."

[2-4] And, in *People v. Bargala* (Cal. App.) 253 P. 938, the same question was again presented. The *Bargala* Case is somewhat iden-

tical with the one we are now considering. In both cases stolen wire was involved. In the *Bargala* Case the defendant's claim was that he simply used his auto-truck to go and get the wire for a man by the name of Yarnell; that he hauled the wire to the city of Sacramento, where it was sold for the sum of \$92, out of which he was paid the sum of \$25. The money was collected by the defendant when the wire was sold to a junk dealer in the city of Sacramento, and, according to the defendant's testimony, \$25 retained by him. After the sale of the wire it appears that the two, the defendant and the man Yarnell, went to the city of Stockton and stopped at the same rooming house and remained there a short time. This, together with the testimony of employees of the Pacific Telephone & Telegraph Company, from whom the wire cable had been stolen, identifying the wire purchased by the junk dealer from the defendant and his associate Yarnell, was held sufficient to uphold the judgment of conviction. In the case at bar, we are not called upon to hold that the corroborating testimony referred to is sufficient to sustain a conviction. All that is necessary in this case is to find that there is sufficient testimony in the record which tends to connect the defendant with the commission of the crime charged. We do not need to cite authorities to the effect that unexplained possession of stolen property shortly after the larceny is a circumstance tending to connect the party in whose possession it is found with the larceny. We may also add that an improbable explanation stands on the same footing with no explanation. The jury, we think, had a right to consider that the statement of the defendant that the wire was left by an unknown man named "John" was, in fact, no explanation.

[5] To sustain his contention that the court erred in refusing to instruct the jury, as requested by the defendant, our attention is called to the following instruction asked for by the defendant and refused by the court:

"The legal presumption of innocence is a matter of evidence in his favor to the benefit of which a defendant in a criminal case is always entitled, and unless the jury are entirely satisfied that the defendant's guilt has been proved beyond all reasonable doubt and to a moral certainty, they must find a verdict of not guilty."

Without questioning the correctness of this proposed instruction, an examination of the record discloses that the real meat of the refused instruction is involved in the charge given to the jury by the court. The court, in its charge, instructed the jury:

"The defendant in a criminal case is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt

whether his guilt is satisfactorily shown, he is entitled to an acquittal."

And, also, the court instructed the jury as follows:

"The court instructs the jury that no presumption of the defendant's guilt should be indulged in by the jury from the fact that an information has been returned against him, or from the fact of his arrest, or that he is placed on his trial; on the contrary, every presumption except such as may arise from the evidence in the case, is in favor of the innocence of the defendant and the jury should be governed by that presumption of innocence during their entire deliberations, unless it be overcome by evidence that will fully satisfy the jury of the defendant's guilt, and if the jury are not entirely satisfied from the evidence of the defendant's guilt beyond a reasonable doubt and to a moral certainty, the jury should acquit the defendant."

From these instructions it appears that the defendant has suffered no prejudice by reason of the court refusing to reiterate in a different form the substance of instructions already given.

The objection that the prosecuting attorney, in his argument to the jury, was guilty of prejudicial misconduct has been examined and is so completely without merit as to require no further mention in this opinion.

The final objection to be considered is that there was no sufficient ownership proven of the property alleged to have been stolen to support the verdict in this case. The information, as we have said, charged the stealing of certain copper wire, the personal property of William H. Ford, doing business under the firm name and style of River Rock & Gravel Company. The record shows that E. E. Williams testified that he was the superintendent of the River Rock & Gravel Company; that on the 22d day of November, 1926, the company missed some of its property, which consisted of an electric cable about 60 feet long. The effect of this is to show that the company owned the property or that it belonged to the company. The authorities are uniform that under the common law this failure in the proof as to the ownership of William H. Ford would be fatal. To cover such technical defects in the testimony as to ownership of stolen property, the variance in the testimony from the allegation as to ownership of stolen property, the Legislature of this state adopted section 956 of the Penal Code, which reads:

"When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material."

Following this section and the interpretation placed thereon, we find in 14 Cal. Jur. 101, the text-writer summarizing the law as follows:

"Ownership may or may not be an essential matter of description according to the offense charged and the circumstances of its commission. The general rule is that ownership must be proved as alleged because it identifies the offense. This is the rule at common law. But under section 956 of the Penal Code, an erroneous allegation as to the person injured is not material, if the offense is described with sufficient certainty in other respects to identify it. This section applies to burglary, larceny, etc. The name of the owner of property affected is not a material part of a crime. It is only required to identify the transaction, so that the defendant, by a proper plea, may protect himself against another prosecution for the same offense. And if the property in question is otherwise sufficiently described, and there is no proof that there is other property answering the description, an averment of ownership is surplusage and need not be proved as alleged. So if a crime is identified with sufficient certainty to protect the defendant against another prosecution, the variance is not fatal where ownership of property in a particular person is alleged, and the proof is that other persons are also interested with the person named, or where ownership in several is alleged, and the evidence shows ownership in but one. * * * Likewise, there is no material variance where it is alleged that the property belongs to John Doe, whose real name is unknown, and the proof shows that it belongs to a woman, or where ownership in a man is alleged, and it is proved that the property belongs to his wife. * * * If, however, the only description of property is by the averment of ownership, the averment is a material part of the offense charged, and must be proved as alleged."

In support of his contention that the ownership in this case, as alleged, is an essential element to be proven, the appellant calls our attention to the case of *People v. Webber*, 138 Cal. 145, 70 P. 1089. In that case it is held that where the defendant was charged with burglary in entering a railroad car, the ownership must be proved, and when the proof shows ownership by a different railroad company from that alleged, the variance was fatal. The testimony in that case showed the burglarizing of one of the cars of a certain railroad train. The car was named in the information. The charge was that the defendant entered a certain railroad car and train, to wit, a railroad car and train owned by the Southern Pacific Company, with felonious intent, etc. The evidence was to the effect that the defendant entered a car marked "O. S. L.," the property of the Oregon Short Line Railway Company, numbered 14087, and that this company was distinct from the Southern Pacific Company. It was held in that case, citing other authorities to the same effect, that an allegation of entering a car belonging to one company cannot be sustained by proof of entering the car of a different and distinct company. The court also took the occasion to point out that a railroad train is made up of a number of distinct cars and that the identity and

ownership of the car entered was an essential ingredient of the offense to be alleged and proved, in order that a conviction on such a charge would be a complete bar to a further prosecution.

In the case of *People v. Hughes*, 41 Cal. 234, it is said, "An allegation of the ownership of the stolen property is essential in an indictment for larceny, unless the offense is otherwise sufficiently described," and the court also held, "if the variance between an allegation in an indictment and the proof be immaterial, it should be disregarded." The opinion of the court is to the effect that ownership of the property was an essential element in that case, and cites other cases to the effect that where ownership is a part of the necessary description of the property, it must be proven. That case turns upon the view of the court that, as stated, the allegation of ownership was a necessary part of the description of the offense.

The case of *People v. Wallace*, 94 Cal. 497, 29 P. 950, turns upon the question of a variance between the complaint filed in the justice court and the information upon which the defendant was tried and for that reason is not material here.

In the case of *People v. Reed*, 70 Cal. 529, 11 P. 676, upon an information charging the obtaining of money by false pretenses on a promissory note alleged to have been executed by the person defrauded, it was held that evidence showing the execution of a note executed by the person defrauded and another was insufficient, as the proofs established a separate and distinct offense from that charged.

In the case of *People v. Davis*, 97 Cal. 194, 31 P. 1109, the defendant was convicted of grand larceny upon a charge of taking the property belonging to one John Doe. The person from whom the property was taken did not appear as a witness. The testimony showed that the property was taken from the person of a woman by the appellant, while she was standing in a crowded street car. This was held sufficient to show ownership and to sustain a conviction.

In the case of *People v. Oldham*, 111 Cal. 648, 44 P. 312, in considering evidence relating to ownership and possession sufficient to sustain a conviction of grand larceny, the court used this language:

"The lawful possession of the money by Hart was the possession of Wells Fargo & Co., and likewise the actual lawful possession of it by the driver of the stage was the possession of the company. In the absence of evidence to the contrary, in larceny or robbery, possession of the stolen property is sufficient evidence of ownership. The criminal law of this state is not favorably disposed in allowing criminals to escape upon technicalities of this character; and, as supporting the principle here declared, we cite *People v. Nelson*, 56 Cal. 77; *People v. Davis*, 97 Cal. 194 [31 P. 1109]."

In that case, the judgment was reversed upon other grounds, but the comments of the court here quoted seem to us quite applicable.

In the case of *People v. Nunley*, 142 Cal. 105, 75 P. 676, the Supreme Court of this state had occasion to take up and consider at length practically all of the previous cases having to do with the question which we are now considering, and, also, of the intent and purpose of section 956 of the Penal Code. A number of cases are cited to the effect that the name of the owner of stolen property is not a material part of the offense charged. "It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense." And further, quoting with approval from *State v. Nelson*, 11 Nev. 339: "The only thing essential in either case (larceny or robbery) seems to be an averment which shall show conclusively that the property does not belong to defendant. And courts have shown a disposition to allow any sort of interest in or right to the custody of the property to be sufficient proof of ownership * * * because the protection of innocence can never by any possibility require any strictness of proof on this point." In the *Nunley* Case the information charged the ownership of a horse stolen as the property of J. Suey Lung. The testimony showed that Lung was what was called a "boss man"; that the horse was one of a number belonging to a company of Chinese called Fook Wah, composed of a number of people. This variance was held to be immaterial.

In the case of *People v. Sing*, 42 Cal. App. 385, 183 P. 865, the information charged the defendant with the larceny of 252 sacks of potatoes, the personal property of three Japanese. The appellant claimed that there was no evidence that the three Japanese owned the potatoes. N. Namekawa, one of the three Japanese named in the information as the owner of the potatoes, testified that he and two others were partners; that he was engaged in farming on a ranch near Anaheim; that his two partners were farming with him; that they were raising sweet potatoes; that he carried on all the negotiations for the sale of the potatoes, and spoke of them as "my potatoes."

The court, in considering the question of variance, stated:

"Moreover, the variance * * * was not fatal. It would have been fatal at common law; but in this state it is provided by statute—section 956 of the Penal Code—that 'when an offense involves the commission of * * * a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured * * * is not material.' In larceny the name of the owner of the stolen property is not a material part of the offense charged. It

is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. The essential thing is an averment which shall show conclusively that the property does not belong to the defendant."

In the case at bar there is no question but that both the allegations and the proof show conclusively that the property did not belong to the defendant; that certain property was stolen; that it was taken from the possession of a certain concern alleged to be owned by one William H. Ford.

[6] The testimony shows that it was taken from the possession of the concern doing business under the name of River Rock & Gravel Company, the name under which it is alleged William H. Ford was doing business. There appears to be no question as to the identity of the place from which the property was stolen, the place where the River Rock & Gravel Company was doing business. The testimony of the witness Williams is to the effect that at the time of the larceny he was the superintendent of the company, that as such superintendent he missed cable wire alleged to have been stolen by the defendant, taken from the premises of the River Rock & Gravel Company, the location of the premises being stated in the testimony. The testimony of the witness Duvall, who accompanied the defendant in the larcenous expedition, definitely locates the place of the theft and the articles taken. The only variance or failure in the testimony is the fact that no witness testified William H. Ford owns the River Rock & Gravel Company and does business in that name. It is evident that this bit of testimony would add nothing to nor take from the defendant's guilt. It is merely descriptive of the ownership of the property and does not affect a single substantial right of the defendant, if there is sufficient in the case to constitute a bar against another prosecution for the same offense. Taking the allegations of the complaint and the testimony of Williams, the superintendent of the River Rock & Gravel Company, it is evident that the record shows sufficient to enable the defendant to effectively plead this prosecution in bar of any other action seeking his conviction.

Under this state of facts, the language of the Supreme Court in the case of *People v. Nelson*, 56 Cal. 82, in considering a case where sufficient proof was not made of ownership, said:

"We are at a loss to discover in what manner the rights of the defendants in this case could have been affected by the alleged error in the charge of the court. The evidence was clear and convincing, and left no doubt upon the question of the defendants' guilt of the crime of grand larceny. But were the instructions of the court obnoxious to the objection presented by the learned counsel for the appellants? It is said that they 'misled the jury, and wholly

ignored the question of the ownership of the property taken. The money might have belonged to the defendants.' There was no question on the trial as to the ownership of the money. It was not pretended that it belonged to the defendants, or to any other person than Ah Chung. The money was in the possession of Ah Chung, and was taken from his person by the defendants. Therefore, it was presumptively his property, and that was sufficient proof of ownership."

The testimony in this case shows conclusively that the property in question was stolen from premises operated under the name of River Rock & Gravel Company; the premises operated under said name were also definitely located. There is no pretense in the testimony of their being other than the one place where such operations were being carried on.

In view of these facts and in view of section 956, Penal Code, we do not very well see how the defendant has been prejudiced by the omission of testimony which could have gone only to a possible further description of the property and not added any element affecting the defendant's guilt. We may add, however, that these technical omissions should be more scrupulously guarded against by prosecuting officers.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

83 Cal. App. 782

PRIOR et al. v. ANDREWS et al. ★
(Civ. 5846.)

District Court of Appeal, First District, Division 2, California. June 15, 1927.

Rehearing Denied July 14, 1927. Hearing Denied by Supreme Court Aug. 11, 1927.

1. Trusts $\S$ 43(3)—Evidence held to establish that devise to daughter was in trust for son.

Evidence held to show that devise of double portion of testator's property to particular daughter was on at least an implied promise that she would take and hold one-half of the devised property in trust for the use of a particular brother.

2. Trusts $\S$ 35(3)—Equity will enforce trust on devisee or legatee procuring legacy on promise to hold property for particular use.

A court of equity must impose and enforce a trust on a devisee or legatee who has procured a legacy to be given on a promise, express or implied, that the property devised would be taken and held for some particular purpose or use.

3. Trusts $\S$ 373—It is province of trial court to determine whether evidence is sufficiently clear, satisfactory, and convincing to establish secret trusts.

While evidence in actions to enforce secret trusts should be clear, satisfactory, and convincing, the duty of determining whether it sat-

isies such requirements is the province of the trial court.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action in partition by James K. Prior, Jr., and others against Matilda Andrews and others. From judgment for plaintiffs, first named defendant and one of the others appeal. Affirmed.

C. W. Durbrow and Corbet & Selby, all of San Francisco, and Eugene S. Selvage, of Eureka, for appellants.

Vogelsang & Brown and Bert Schlesinger, all of San Francisco, for respondents.

BARTLETT, Justice pro tem. This action was commenced by the filing of a complaint in the superior court of the city and county of San Francisco on May 22, 1924, the action being numbered in that court 146986, the relief sought being a partition of seventeen parcels of land situated in the counties of San Mateo, Santa Clara, Alameda, and the city and county of San Francisco, Cal. Plaintiffs James K. Prior, Jr., Toney Prior, and Josephine Metzner and defendants Matilda Andrews and Leland S. Prior are surviving children of James K. Prior, Sr., and Mary Prior; defendants Pearl Gladys Barnett and Fred E. Delger are surviving children of one Margaret Delger, a deceased daughter of James K. Prior, Sr., and Mary Prior; and defendant Lester F. Prior is a surviving son of a deceased son of James K. Prior, Sr., and Mary Prior.

James K. Prior, Sr., former record owner of these properties, died testate on March 22, 1905. By his will, executed February 19, 1903, he devised one-half of the community property of which he died possessed to his wife Mary Prior, bequeathed \$5,000 to Mary Prior in trust for Lester Francis Prior, a grandson; bequeathed \$200 and his watch and chain to his son Toney Prior, and devised and bequeathed the residue of his estate, consisting of one-half of the community property, and \$200,000, which he declared to be his separate property, to his other children in the following proportions: One-sixth to James K. Prior, Jr., one-sixth to Leland S. Prior, one-sixth to Josephine Metzner, one-sixth to Margaret E. Delger, and two-sixths to Matilda Andrews. This will was probated, and the estate was finally distributed on March 30, 1906. By the decree of distribution there was distributed to his wife, Mary Prior, the homestead (which is parcel 1 of the properties described in the complaint herein), certain specified personal property, and one-half of the \$200,000 claimed to be his separate estate. The devisees and legatees agreed out of court to the distribution to be made, and it is recited in the decree:

"Since said will was admitted to probate Matilda Andrews, Josephine Metzner, Margaret

Delger, James K. Prior, Jr., and Leland S. Prior have consented and agreed with Mary Prior and Lester Francis Prior that the net residue should be distributed on the following basis: One-half thereof to Mary Prior; one-fourteenth each to James K. Prior, Jr., Josephine Metzner, Margaret Delger, Leland S. Prior; two-fourteenths to Matilda Andrews; one-fourteenth to Mary Prior as trustee for the benefit of Lester Francis Prior."

There was distributed to Toney Prior \$200 and a gold watch and chain. Mary Prior died testate on October 14, 1922, leaving as part of her estate all of parcel No. 1 of the lands described in the complaint, and an undivided one-half interest in each and all of the other sixteen parcels of land. Her will was admitted to probate on November 20, 1922, and letters testamentary thereon were issued to James K. Prior, Jr., and Toney Prior, who were such executors when this action was begun.

On May 22, 1924, a decree of partial distribution was made in the estate of Mary Prior, distributing all her interest in the seventeen parcels of land as follows: One-seventh of parcel 1 and one-fourteenth of parcels 2 to 17, inclusive, to James K. Prior, Jr., a similar proportion to Toney Prior, Josephine Metzner, Matilda Andrews, Leland S. Prior, and Lester F. Prior, a one twenty-first of parcel 1, and one forty-second of parcels 2 to 17, inclusive, to Pearl Gladys Barnett, and a similar proportion to Fred E. Delger and to N. L. Barnard, as executrix of the will of Edward F. Delger, who was the father of Pearl Gladys Barnett and Fred E. Delger, they being the devisees of their father of his interest in these properties.

In the complaint it is alleged that the plaintiff Toney Prior has an estate of inheritance to the extent of an undivided one-seventh part in all of the properties, and that the defendant Matilda Andrews holds upon trust for his sole benefit the legal title to an undivided one-fourteenth part of parcels 2 to 17 of the properties, that is to say, one-half of the one-seventh interest of said Toney Prior in and to said parcels 2 to 17, inclusive; that the legal title to such undivided one-fourteenth part in these parcels of land came to her, was accepted by her, and stands in her name as a portion of a direct devise to her under the last will of James K. Prior, Sr., deceased, who was the father of said Toney Prior and Matilda Andrews, in trust for said Toney Prior, under an understanding and agreement with her father had before his death that she would hold the legal title to said properties in trust for her brother said Toney Prior; and that on the demand of said Toney Prior she would convey to him the legal title of the properties, so devised to her in trust. The complaint alleges the distribution of this one-fourteenth interest claimed to be held in trust to Matilda Andrews made in the matter of the estate of James K. Prior, Sr.,

on August 3, 1906, and that Matilda Andrews has never parted with such legal title. It is also alleged that Toney Prior, during the month of April, 1924, demanded from Matilda Andrews a transfer of the legal title to this one-fourteenth interest in parcels 2 to 17 of the properties involved to him, and that she refused to make such transfer. The demand for a transfer of the title and the failure to make the same are not denied. The defendant Matilda Andrews denied that she holds any of said properties in trust for the plaintiff Toney Prior, and asks that she be adjudged the owner in fee of an undivided three-fourteenths interest in the properties involved. She also asks that the action be dismissed, alleging as a ground for dismissal a claim that the complaint in this action was filed before the decree of partial distribution in the estate of Mary Prior, deceased, was signed by the court and filed with the clerk thereof or entered in the minutes of said court.

By its findings the trial court found in favor of the plaintiffs on all the material allegations of the complaint, and that this action was commenced and the complaint therein filed with the clerk after the decree of partial distribution in the estate of Mary Prior, deceased, was signed by the court, and after said decree was filed with the clerk of said court. The trial court also found that the partial decree of distribution in the Mary Prior estate was, on June 13, 1924, entered at length in the minute book of said court; that James K. Prior, Jr., and Toney Prior, in their representative capacities as executors of the last will of Mary Prior, were not, when the action was commenced, nor when the complaint was filed, in possession of any of the lands as such executors; that there are no liens or incumbrances on said lands of record or at all, and that no person or persons other than the plaintiffs and defendants in the action are interested in the properties as owners or otherwise. Partition and sale of the properties was ordered and directed and commissioners appointed to make such partition and sale. From this judgment and decree the defendants Matilda Andrews and Leland S. Prior have taken this appeal.

The claim of appellants that this action was prematurely instituted has been decided to be without merit by the decision of this court rendered in action No. 5792, wherein Matilda Andrews was appellant and Josephine Metzner et al. were respondents ([Cal. App.] 257 P. 203), and, for the reasons given in the opinion of this court rendered in that case, the action of the trial court in finding that this action was not prematurely instituted and in denying appellants' request for a dismissal thereof is approved and affirmed.

[1] This leaves for determination by this court the question of whether or not appellant holds in trust for the respondent Toney Prior the legal title to a one-half of one-

seventh of the properties distributed to her by the decree of distribution made and entered in the estate of James K. Prior, Sr., deceased, on March 30, 1906, which she has been found to so hold in trust by the trial court by its judgment and decree in this action.

Respondents claim that the constructive trust which the trial court has found to exist in favor of Toney Prior arises out of a secret understanding had between James K. Prior, Sr., and appellant Matilda Andrews prior to the death of James K. Prior, Sr., that said Matilda Andrews would hold in trust for the benefit of her brother Toney one-half of the properties bequeathed and devised to her in the last will of said James K. Prior, Sr., and that she would, on demand of Toney Prior, made at any time after the death of James K. Prior, Sr., transfer the legal title to such properties to Toney Prior. In this regard Toney Prior testifies that, prior to his father's death, his father told him that he would like to leave his share of the properties tied up with one of his sisters; that he (Toney) said this would be satisfactory; that he suggested that it go to Mrs. Andrews; that he afterwards discussed the matter with Mrs. Andrews; and that she said she would hold it for him; that this conversation with his father was about two weeks before his father's will was drawn; that his father told him to telephone Mr. Whittemore, an attorney at law, to come up and to tell him that his father wanted to prepare his will; and that his father told him, after he saw Mr. Whittemore, and after he had seen his sister, Mrs. Andrews, that he had left his (Toney's) portion with Mrs. Andrews; that his father also told him that he had approached Mrs. Metzner, a sister of Mrs. Andrews, on the subject, and that she stated she would willingly act, but that she thought he (Toney) was more favorably inclined towards Mrs. Andrews, and that he told his father he was so inclined; that his father in their conversations told him that half of what he left to Mrs. Andrews was his (Toney's); that, after his father's death and the probate of his will, his sister paid him various sums of money, dividends from stocks of corporations, proceeds of sales of properties and rentals from properties, and that she took receipts for all such payments made to him, and that these payments were always one-half of the moneys that came to the hands of Mrs. Andrews from the properties of his father distributed to her; and that this practice continued for some 18 years after his father's death. A large number of the receipts given to Mrs. Andrews were introduced in evidence, and are set out in full in the transcript filed in this court. Mrs. Andrews admitted having paid her brother Toney one-half of the dividends received from corporate stock of the James K. Prior estate properties and also one-half of the proceeds of sales of

certain properties, and that Toney had paid her in 1923 some \$348.42 income tax for 1922. She also testified that she paid Toney one-half of \$9,971.42, moneys distributed to her from her father's estate. She also testified that Toney paid her one-half of \$4,000 of a fund for building a structure on one of the properties that was distributed to her of her father's. Mrs. Andrews claims that all these payments were gifts to her brother, made because of her respect and loyalty and love for him.

There is a sharp conflict in the evidence as to what transpired at the opening of the will of James K. Prior, Sr., a short time after his death; all the members of the family being present. Some of those who were present claim that Mr. Whittemore told Mrs. Andrews that one of the two portions bequeathed to her in the will belonged to Toney, and that she acquiesced in the statement, while Mrs. Andrews and Mr. Whittemore deny that any such statement was made or assented to.

As a witness in her own behalf, Mrs. Andrews gave the following evidence of a conversation with her father concerning his will:

"Mr. Durbrow: Q. Mrs. Andrews, did you ever have any conversations with your father with reference to his making his will? A. Yes, sir.

"Q. When did you have a conversation with him relating to that matter? A. In, I think it was, 1902.

"Q. Do you know the month, Mrs. Andrews? A. No; I couldn't say just the month.

"Q. Was it before or after he made his will? A. Well, this was before he made his will, I think.

"Q. Where was this conversation held, Mrs. Andrews? A. On Twenty-Fifth street, near San Jose avenue.

"Q. Who was present? A. Just my father and myself.

"Q. What was that conversation? State it as nearly as you can. A. Well, I had been down town shopping, and I went to make the Valencia street car, and got off at Twenty-Fifth and Valencia streets, and I was walking up Twenty-Fifth street intending to go over and see my mother and father, as my father hadn't been very well for some time. And, as I neared San Jose avenue, my father turned the corner and came toward me. And I greeted him. He said, 'Well, hello, old woman, I am awfully glad to see you.' My father either called me 'old woman' or 'grandmother.' Rarely called me by my given name. He said, 'I have a little matter I would like to talk over with you.' He says, 'You know Toney has been a great disappointment to me. He has gotten into trouble. He has brought disgrace on the family. And it is undermining my health. I feel very miserable. He has married a woman that sued him for \$20,000 damages, claiming that he was the father of her child.' And all this had a tendency to upset my father. And he said, 'I have given you two portions of my estate for you to do with as you think best, and to dispose of as you think best, and for you not to mention this to anybody.'

"Q. Was that the extent of the conversation? A. That was the extent of the conversation, yes, sir.

"Q. At that time? A. Yes, sir.

"Q. Did you have any further conversations with your father? A. Not in regard to his will; no, sir.

"Q. Now, was that conversation had before or after he made his will? A. Well, it was after he had made his will, because he said that he had left me two portions.

"Q. Now, did you ever discuss that subject with your father again? A. No, sir; never."

That the relations between Mrs. Andrews and her brother Toney were not amicable or harmonious at the time of the trial, because of disagreements arising between them on account of property matters involved in their mother's estate, is plainly apparent from the record, but there is nothing therein tending to show that the relations between this brother and sister were not of a most kindly and affectionate character when their father made his will, and for many years thereafter.

There is sufficient evidence to sustain the judgment and decree of the trial court determining that one-half of the properties devised to Mrs. Andrews by her father was devised to her in trust for her brother Toney Prior. Her payment of one-half of the money legacy of \$9,971.42 from her father's estate to her brother, of one-half of all dividends received on corporate stock which came to her, of one-half of rentals and sale proceeds of real properties, her taking of receipts therefor, of repaying to him \$5.43 "for rebate McEnerney decree in Richmond properties," of accepting \$2,000 paid by a check on his personal account for a building fund for one of the properties, her collection from him of one-half of federal income tax on incomes from the properties, and the many other payments made to him, are not consistent with her claims that these payments, made during a period of 18 years, were voluntary gifts on her part. Her conversation with her father relative to his will and to her brother Toney's affairs, her dealings with her brother in relation to the properties and the income therefrom, cannot be regarded as other than proving that the devise given her by her father's will was given on an implied promise at the least that she would take and hold one-half of the devised properties in trust for the use of her brother.

[2] There is no question but what a court of equity must impose and enforce a trust upon a devisee or legatee who has procured a legacy to be given by a promise express or implied that the property devised would be taken or held for some particular purpose or use. *Brison v. Brison*, 75 Cal. 525, 17 P. 689, 7 Am. St. Rep. 189; *O'Donnell v. Murphy*, 17 Cal. App. 625, 120 P. 1076; *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430; *Cooney v. Glynn*, 157 Cal. 583, 108 P. 506; *Amherst College v. Ritch*, 151 N. Y. 323, 324, 45 N. E.

876, 37 L. R. A. 305; *Church v. Ruland*, 64 Pa. 432.

The reasons for this rule are clearly stated in *Amherst College v. Ritch*, 151 N. Y. 323, 324, 45 N. E. 687, 37 L. R. A. 305 where it is said:

"If the testator is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise. * * * The trust springs from the intention of the testator and the promise of the legatee. * * * The rule is founded on the principle that the legacy would not have been given, * * * unless the promise had been made, and, hence, the person promising is bound in equity to keep it, as to violate it would be fraud. While a promise is essential it need not be expressly made, for active co-operation or silent acquiescence may have the same effect as an express promise. If a legatee knows what the testator expects of him, and having an opportunity to speak, says nothing, it may be equivalent to a promise, provided the testator acts upon it. * * * The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing, but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee ex maleficio, to turn over the gift to them. The law, not the will, fastens the trust upon the fund by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the statute of frauds nor the statute of wills applies, because the will takes effect as written and proved, but to promote justice and prevent wrong, the courts compel the legatee to dispose of his gift in accordance with equity and good conscience."

[3] The evidence in this case, taken as a whole, supports and establishes the trust claimed. In some respects it is conflicting and contradictory. While in actions seeking the enforcing of secret trusts the evidence should be clear, satisfactory, and convincing the duty of determining whether it satisfies these requirements is the province of the trial court, and if there is sufficient evidence to sustain its findings, the judgment will be held to be conclusive. The trial court is in a position to best judge of the weight and value of the evidence and of the credibility of the witnesses.

In *Harris v. Harris*, 136 Cal. 379, 69 P. 23, it is said:

"The rule is well settled that one who would claim the ownership of property of which the legal title stands of record in another, or that the same is held by such person in trust for the one so claiming, must establish such claim by

evidence that is clear, satisfactory and convincing. * * * Whether the evidence in any particular case is of this character must be determined by the trial court, and its determination thereon will be accepted by this court as conclusive."

To the same effect are the decisions in *Sherman v. Sandell*, 106 Cal. 373, 39 P. 797; *Bollinger v. Bollinger*, 154 Cal. 695, 99 P. 196; *Brison v. Brison*, 90 Cal. 323, 27 P. 186; *McRae v. McRae*, 67 Cal. App. 480, 227 P. 933; *Stahl v. Stahl*, 214 Ill. 131, 73 N. E. 319, 68 L. R. A. 617, 105 Am. St. Rep. 101, 2 Ann. Cas. 774.

The decree and judgment appealed from are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

MOODY v. SHUFFLETON, County Auditor.★ (Civ. 3158.)

District Court of Appeal, Third District, California. June 18, 1927.

Hearing Granted by Supreme Court Aug. 15, 1927.

1. Officers ⇨103—No official acting judicially or quasi judicially can act in matter in which he has slightest interest.

A public official, acting in a judicial or in a quasi judicial capacity, is disqualified to act in any matter in which he has even the slightest interest, and this rule is strictly enforced and carried to extreme lengths.

2. Officers ⇨103—"Interest," disqualifying official acting judicially or quasi judicially, must be certain, demonstrable, capable of precise proof, pecuniary or proprietary, direct and personal, and, if collateral, remote, or consequential, proof that interest influenced decision is necessary.

The "interest" in a matter which will disqualify a public official acting in a judicial or quasi judicial capacity to act in such matter must be certain, visible, demonstrable, capable of precise proof, pecuniary or proprietary, direct and personal, not merely possible or contingent, or an interest in the question or general subject, or sentimental, or an interest in the facts which the issues render it necessary to determine, and, if collateral, remote, or consequential, proof that the interest influenced the decision is necessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest (In Suit or Action).]

3. Chattel mortgages ⇨129—Chattel mortgage conveys no title, but creates only lien (Civ. Code, § 2888).

A chattel mortgage conveys no title and gives the mortgagee no property interest, but creates only a lien for the payment of the indebtedness; the parties bearing the relation of debtor and creditor, under Civ. Code, § 2888.

4. Counties $\S$ 204(1)—That county supervisor was father of claimant and interested in seeing his business grow did not disqualify him to allow claim; "interest" (Pol. Code, $\S$ 920, 4322).

A member of a county board of supervisors held not to have an interest disqualifying him to allow a claim against the county by reason of the fact that he was the father of the claimant and interested in seeing him succeed and his business grow and improve, under Pol. Code, $\S$ 920 and 4322, providing that no member of the board must be interested in any purchase of property for the county or in a contract made on behalf of the county.

5. Counties $\S$ 204(1)—County supervisor, who had chattel mortgage on property and good will of printing business, held not disqualified to allow claim of owner for printing and materials; "interest" (Pol. Code, $\S$ 920, 4322).

Where a father sold his printing and supply business to his son and took back a chattel mortgage which created only a lien under Civ. Code, $\S$ 2888, and apparently did not create a lien upon certain printing materials under section 2955, and thereafter the various county officers had the son do printing, job work, and publishing under Pol. Code, $\S$ 4048, held that the father did not have an "interest" which disqualified him to allow the claim of the son, under sections 920 and 4322, providing no county supervisor may be interested in property purchased for county or in any contract on behalf of county, in view of Code Civ. Proc. $\S$ 144; benefit being merely consequential and collateral, and there being no proof that the sale was not actually made, that the father was to receive any of the proceeds of the claim, or that such proceeds would go into a fund from which the debt was to be paid or that the son was insolvent.

Appeal from Superior Court, Shasta County; J. B. Landis, Judge.

Action for a writ of mandamus to compel the drawing of a warrant for the payment of claims brought by H. G. Moody, transacting business under the name and style of the Searchlight, against H. H. Shuffleton, Jr., County Auditor of Shasta County. From a judgment for plaintiff, defendant appeals. Affirmed.

Jesse W. Carter, of Redding, for appellant. Chenoweth & Leininger, of Redding, for respondent.

SHIELDS, Justice pro tem. This is a proceeding in mandamus to compel the defendant, as auditor of the county of Shasta, to draw his warrant in favor of plaintiff in the amount of certain claims previously approved by the board of supervisors of that county.

The facts leading up to this proceeding and necessary to its understanding may be briefly stated. H. L. Moody, the father of the plaintiff, had been for many years prior to July 17, 1925, the owner and publisher of a newspaper known as "the Searchlight," published in Redding, Shasta county. In connection with the publication of this newspaper he conducted a

printing and jobbing business, and owned and operated a general printing plant.

On that day H. L. Moody sold "the Searchlight," together with the entire job printing business and plant to his son H. G. Moody, for a consideration stated to have been \$20,000.

H. G. Moody made no cash payment on account of this consideration, but gave in evidence of it certain promissory notes successively falling due. As security for the payment of these notes, H. G. Moody executed a chattel mortgage to H. L. Moody, by which he mortgaged all of the property conveyed to him, including the good will of the business, together with other newspaper property which need not here be described.

Prior to this sale, and on the 19th day of September, 1923, H. L. Moody became a member of the board of supervisors of Shasta county, and was and remained a duly elected and qualified member of such board up to the time of the trial of this proceeding, and was such a member at the time the work was done and the supplies furnished which are the subject of this action.

H. G. Moody conducted the business which he purchased from H. L. Moody under the name and style of "the Searchlight." After his said purchase, and between the 12th day of August, 1925, and the 16th day of October, 1925, the plaintiff under the name of "the Searchlight" did printing, job work, and publishing for various county officers of the county of Shasta, ordered by them under the provisions of section 4048 of the Political Code.

Claims for such work and supplies, duly approved by the several county officers ordering them, were thereafter presented to the board of supervisors by H. G. Moody, doing business under the name and style of "the Searchlight," and these claims were allowed on the 3d day of November by the board of which H. L. Moody was then a member.

These claims so allowed were transmitted to the defendant, auditor of Shasta county, with the request that he draw the usual warrant thereon, in favor of the plaintiff. The defendant was advised by the district attorney of Shasta county that the claims and their allowance were invalid, and that the same constituted no obligation against the county of Shasta because of the interest of H. L. Moody in such allowance, and thereupon and for that reason, on the 12th day of December, defendant refused, and has since continued to refuse, to draw his warrant therefor.

This action to compel him to issue such warrant thereupon followed. At the trial, judgment went for the plaintiff, and it is upon an appeal from that judgment that this matter now comes before this court.

[1] The principle of law invoked in this case is the very familiar one that no public official acting in a judicial or quasi judicial

capacity can act in a matter in which he is interested. "The plain principle of justice that no one can be a judge in his own cause pervades every branch of the law, and is as ancient as the law itself." Paley on Summary Convictions (7th Ed.) p. 43. A modern statement of this rule is admirably made in *Allinson v. General Council, etc.*, 1 Q. B. 750, where Lord Esher, M. R., at page 758, says:

"In the administration of justice whether by a recognized legal court, or by persons who, altogether not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it, should not be in such a position that he might be suspected of being biased."

In speaking of this principle, Justice Henshaw said:

"It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy. For it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of interest or the taint of partiality, or else public confidence will be destroyed and judicial usefulness gravely impaired." *Meyer v. City of San Diego*, 121 Cal. 104, 53 P. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22.

The rule is strictly enforced and carried to extreme lengths. Any interest, even the slightest, comes within the prohibition of its terms. "The minuteness of the interest won't relax the objection, for the degrees cannot be measured. No line can be drawn but that of a total exclusion of all degrees whatsoever." *Hesketh v. Braddock*, 3 Burr. 1856. "The law seeks to avoid situations where public officers are tempted to sacrifice the interests of the public to their own which destroy faithfulness and fidelity in public service." *Gillen v. City of Milwaukee*, 174 Wis. 362, 183 N. W. 679. "There should be no encouragement to seeking public office for private ends." *In re L'Abbé*, 7 Ontario Law Rep. 230. The courts should not seek excuses for such alleged offenders. *North Bloomfield v. Keyser*, 58 Cal. 315. The challenge to the courts has been frequently made that they should not relax this ancient rule of justice, and should take a leading part in forming public opinion in its support. *Dillon on Munic. Corp.* (5th Ed.) § 772. This principle has been very generally written into constitutions, charters, and statutes.

In California it is expressed in all of its common-law strength in section 920 of the Political Code. More particularly applicable to this case is section 4322, Political Code, which provides, in reference to boards of supervisors, that:

"No member of the board must be interested, directly or indirectly, in any property purchased for the use of the county, nor in any purchase or sale of property belonging to the county, nor in

any contract made by the board, or other person, on behalf of the county."

The courts of all common-law countries have vied with each other in the strictness with which the principle here involved, and such statutes as the above have been enforced. None of them has gone further than the courts of our own state. *Berka v. Woodward*, 125 Cal. 119, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; *Meyer v. City of San Diego*, 121 Cal. 102, 53 P. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22; *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 P. 1020; *Nielsen v. Richards* (Cal. App.) 243 P. 697; *City of Vallejo v. Superior Court*, 199 Cal. 408, 249 P. 1084; *Lindsay-Strathmore, etc.*, Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056; *Hall v. Superior Court*, 198 Cal. 373, 245 P. 814.

[2] The courts have very frequently defined the interest which they have held to be a disqualification. It must not be a mere possible contingent interest, not an interest in the question or general subject to which the matter requiring adjudication relates, but one that is visible, demonstrable, and capable of precise proof. It must be a pecuniary or proprietary interest, a relation by which, as debtor or creditor or otherwise, he will gain or lose something by the result of the proceedings. It must be direct and personal and not merely possible or contingent. *Northampton v. Smith*, 11 Metc. (Mass.) 390.

"Where a statute speaks of 'interest' or being 'interested,' it in general but not always means a pecuniary or proprietary interest, by which a person will gain or lose something, in contradiction to general sympathy, feeling or bias." *Dillon on Mun. Corp.* note, p. 1146. "A mere sentimental interest, or an interest in the facts which the issues make it necessary for him to determine, which may tend to induce him to give more weight to the evidence for one party than to the evidence for the other respecting such facts, is not the interest which will disqualify him." *Lassen Irrigation Co. v. Superior Court*, 151 Cal. 357, 90 P. 709; *Quatman v. Superior Court*, 64 Cal. App. 203, 221 P. 666; *Meyer v. City of San Diego*, 121 Cal. 102, 53 P. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22. Multitudes of cases have repeated these terms in varying forms, but, after reviewing them all, we find, as stated by Justice Henshaw, in the case last cited, that the statements are mere definitions, and they leave the necessity still with us to find, within such definitions, if H. L. Moody, by reason of being a mortgagee of the business of H. G. Moody had such an "interest" as prevented him from acting in the allowance of the claims, or made it unlawful for any contract for the sale to the county of the property covered by the claims to be made by any person. What was H. L. Moody's relationship to the transaction?

[3-5] Prior to the purchases covered by the

claims in question, H. L. Moody had sold his entire interest in "the Searchlight" and the printing and supply business to H. G. Moody. This sale was questioned in the pleadings, and some effort was made to reflect upon its bona fides at the trial, but the court found that the sale was actually made, and we will here treat it as so made and unimpeached. When, therefore, the claims came before the board of supervisors, H. L. Moody had no apparent or tangible interest in them. His chattel mortgage gave him none. In California, it is well established that such a mortgage conveys no title, nor gives its possessor any property interest in the subject of the mortgage. It creates only a lien on the mortgaged property for the payment of the indebtedness described in the mortgage. Section 2888, Civ. Code; 5 Cal. Jur. p. 41, § 2. The parties to the mortgage bore to each other simply the relation of debtor and creditor. H. L. Moody was not connected in business with H. G. Moody; the latter was to him a complete business stranger. The fact that H. G. Moody was his son did not disqualify him; nor that he was interested in seeing him succeed, and to see his business grow and improve. *Lewick v. Glazier*, 116 Mich. 493, 74 N. W. 717; *Gillen v. City of Milwaukee*, 174 Wis. 362, 183 N. W. 679; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768; *Devlin v. City of New York*, 4 Misc. Rep. 106, 23 N. Y. S. 888. H. L. Moody did not own the shop in which the work was done nor the tools nor presses through which it was done. He apparently did not even hold a mortgage lien upon the materials used in preparing the cards, pamphlets, and "scratch pads" which were sold by H. G. Moody. Section 2955, Civ. Code. H. L. Moody was neither to receive nor share in the price which was to be paid for the goods sold, nor was that price to go or be applied in any way to his benefit or advantage. These things appellant substantially does not dispute. But he does contend that, as a direct result of the vote of H. L. Moody, a sale made by H. G. Moody was approved; that that sale added to the volume of business of the latter; that such patronage or increased business added to the value of the good will of such business; that this good will was mortgaged to H. L. Moody; and that through thus adding to the value of his security, it added to the value of his debt; and that thus he had an interest in consummating the sale. There is no warrant for this contention in any of the adjudicated cases. It will be observed that the benefit which H. L. Moody was to receive, and we will assume that the value of the good will of the business mortgaged to him was appreciably increased, was collateral and merely incidental to the sales involved and the allowance of the claims based upon them. A benefit that is thus merely consequential does not constitute a disqualifying interest. In the matter of claims, the board of supervisors and H. L. Moody, one of their

members, were not dealing with the good will of H. L. Moody's printing business. The question before H. L. Moody, when he voted to approve the claims, was whether certain goods which he did not own and upon which he did not have even a lien should be purchased by the county, for a price which he was not to receive and upon which he had no claim. In this matter H. L. Moody had no direct or indirect interest. The fact that another property, the good will of H. G. Moody's business, was increased as a result of such sale, was a wholly collateral consequence. See *Newport, etc., Co. v. Drew*, 125 Cal. 585, 58 P. 187; *Beaudry v. Valdez*, 32 Cal. 269.

It will be recalled that section 4322 of the Political Code provides, not only that no member of the board of supervisors shall make any contract with the county, but that no other person may make any contract in which such supervisor is interested. Would H. L. Moody have been "interested" in a contract of sale by which the sheriff of the county had purchased the supplies in question from H. G. Moody, under an order from the judge of the superior court, under the provisions of section 144, Code of Civil Procedure?

Such a purchase would have been made by parties who were strangers to him. He would not have owned the goods sold or received the price paid for them, nor would the claim therefor have had to come before the board of supervisors. How can it be said that he would have been interested, in a prohibited way, in such a contract? If he would not have been interested in that contract, he was not interested in the one under review, because in legal effect they would have been identical. The fact that he voted to complete the contract before us would make no difference, as section 4322, Political Code, equally applies to contracts made by any "other person." If he was "interested" in the sale, the sheriff in the case suggested could no more have been a party to it than could H. L. Moody. But this discussion need not be continued. It is well established, as will hereafter appear, that such results as the increased value of the good will herein involved are collateral and incidental to such acts as the allowance of the claims before us, and that such probable increase does not of itself constitute a disqualifying interest; and, while it may be shown to be such by proper allegations and proof, no such additional facts were pleaded in this case, nor appeared in the evidence at the trial. Appellant cites the case of *Foster v. City of Cape May*, 60 N. J. Law, 78, 36 A. 1089, as supporting his contention. The decision in this case is rather loosely phrased, but can be distinguished by the very substantial considerations that the security there was a pledge and not a mortgage, and the pledgee in such a case "holds a special property" in the pledge, "not possessed by other lienors." 21 Cal. Juris. 290, § 2. The pledge holder thus had a "proprietary" in-

terest in the stock, and also had a direct financial interest in it, as any dividends which the corporation might be enabled to pay as a result of the contract he voted to them would be paid directly to him. In the English case of *Queen v. Rand*, 1 Law Rep. (Queen's Bench) 230, and the very ably presented Canadian case of *In re L'Abbé*, 7 Ontario Law Rep. 230, the disqualified party was voting directly on the subject-matter of the security, as H. L. Moody would have been doing if certain property mortgaged to him had, for example, been leased to the county and he voted to repair or improve it, or if he had voted to put money in a certain fund from which some claim of his own was to have been paid.

But in none of the multitude of cases dealing with disqualification has a single case been found where a judge has tried a case, or an official has acted upon a claim, which affected the general financial condition of a party who owed him money, or where the decision or allowance might contribute to the debtor's ability to pay such debt has it ever been held that the fact of such indebtedness, of itself, has disqualified such judge or officer.

The fact that by the decision or vote in such a case the ability of the debtor might be improved has always been held to be too remote an influence to constitute a disqualifying "interest." Other facts have to be shown tending to establish that such remote or collateral fact actually operated to prejudice the officer. Let us take the case of a judge or councilman who acts in the allowance of a demand in favor of one who owes him money. There is no difference between such a case and the case before us. The fact that the improvement in capacity to pay was in one case of an unsecured debt and in the other of a secured debt, where the proceeds of the judgment or claim is not in any way applied for the benefit of the security, does not affect the identity of principle. In each instance, the increased ability of the debtor to pay followed as a result of the judicial act of his creditor. Yet such a fact has never of itself been held to be a disqualification.

In an early case the distinguished Chief Justice Bell of New Hampshire discussed disqualification for interest as it existed at common law, and stated that "a creditor, lessee, or debtor, may be judge in the case of his debtor, landlord, or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit." *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. It will be noted that the mere fact of being a creditor does not disqualify—that depends upon other circumstances. *Conkling v. Crosby* (Ariz.) 239 P. 506.

In *Northport v. Northport T. Co.*, 27 Wash. 543, 68 P. 204, it was shown that the officer,

voting to allow the claims was not only a creditor of the claimant, but had an agreement with the latter by which he was to receive the very proceeds of the claim. By reason of this latter fact, and not because he was a creditor, the contract was avoided. But in the later case of *O'Neil v. Town of Auburn*, 76 Wash. 207, 135 P. 1000, where supplies were purchased by a contractor from a corporation in which the mayor and a councilman were stockholders, and were paid for in the ordinary course of business, and not from the proceeds of claims allowed by the city on account of the work, the allowance of the contractor's claim was held valid, and the advantage to the creditors through the allowance of claims which added to the ability of the debtor to discharge his debt was held remote and incidental and not to amount of itself to a disqualifying interest. In *Webb v. Town of Eutaw*, 9 Ala. App. 474, 63 So. 687, a bank had loaned a sum of money to the town to enable it to carry out a contract for street improvement. In an action against a property holder by the city to recover his share of the cost of such work, the trial judge was shown to have been a stockholder in the bank. The claim was made, as it is here, that the interest of the judge in the success of the city, which would thereby be better enabled to pay its debt to the bank, constituted a disqualification. The court held that this interest was too remote and contingent. In the absence of a showing that the bank was interested in the improvements made, or that the sum to be derived by the city from the success of its suit was to be applied to the payment of the bank's indebtedness, no disqualifying interest was shown. "The interest which will disqualify a judge must be direct and immediate" (Id.), and the court then say, as might with equal propriety be said here, "if the debtor is solvent, as, in the absence of any showing to the contrary, he is presumed to be (*Jones on Evidence*, § 57), his success in the suit," or in this case the allowance of the claims, "will not inure to the pecuniary gain of a creditor who is not a party to it, and his failure will not imperil or in any way impair the claim of such creditor."

In *Kansas City Ins. Co. v. Jinkens* (Tex. Civ. App.) 202 S. W. 772, a judge who held a policy of insurance in the insurance company was held competent to sit in the trial of an action against the company to recover on another of its policies. His interest in the financial success of the company in which he held a policy, in the absence of a showing that the company was a mutual one, or that some fund in which he was entitled to share might be depleted by the issue of the case, was held "remote."

A member of a council may allow claims or vote to award a contract to a party who leases premises from a corporation in which the councilman is a stockholder. The allowance of the claims or the award of the contract

undoubtedly added to the ability of the tenant to pay his rent, and the volume of business done on the leased premises through the allowance of the contract much more tangibly increased the rental value of the councilman's premises than did the sales in question in this case add to the value of the good will of H. G. Moody's business. But this collateral advantage to the councilman was held to be too remote to disqualify him, in the absence of proof that the lessee was insolvent, or that he had previously been unable to pay his rent, or that the premises could not have been let to some other person for an equal rental. *Gillen v. City of Milwaukee*, 174 Wis. 362, 183 N. W. 679.

These decisions sufficiently state the rule in such cases as this, which is that, where the interest is directly involved, no matter how small, it disqualifies the person affected by it; but that, where the benefit in question is collateral, remote or consequential, the interest will not be presumed to have influenced the decision, in the absence of proof that it did, or of additional facts from which that fact may be inferred.

There being no proof here that the sale to H. G. Moody was not actually made; that H. L. Moody was to receive any of the proceeds of the claims allowed; that such proceeds were to go into any fund out of which the debt was to be paid; or that H. G. Moody was insolvent—there was no showing of a disqualifying interest, and the judgment is, therefore, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

84 Cal. App. 33

ALECHOFF et ux. v. LOS ANGELES GAS & ELECTRIC CORPORATION. ★
(Civ. 4437.)

District Court of Appeal, Second District, Division 2, California. June 17, 1927.

Hearing Denied by Supreme Court Aug. 15, 1927.

1. Negligence ☞18—One burning trash must regulate magnitude of fire so as to extinguish it within time prescribed by ordinance.

Under ordinance prohibiting burning of trash except between hours of 5 and 9 o'clock a. m., it was duty of one burning trash to regulate magnitude of fire so as to control and extinguish it within time limit prescribed.

2. Evidence ☞8—It is common knowledge that sea winds increase in intensity after early morning hours in city of Vernon.

It is matter of common knowledge that, in city of Vernon, prevailing sea winds increase in intensity after early morning hours.

3. Negligence ☞62(1)—Wind spreading trash fire at hour fire was prohibited by ordinance held not "intervening agency."

Where ordinance prohibited burning of trash except between 5 and 9 o'clock a. m. in city

where increasing intensity of sea winds after 9 o'clock was common knowledge, wind which caused spread of fire from burning trash after 9 o'clock held not "intervening agency."

[Ed. Note.—For other definitions, see Words and Phrases, Intervening Agency.]

4. Negligence ☞18—Ordinance prohibiting trash fires may be invoked in aid of owner of property burned.

City ordinance prohibiting burning of trash except between 5 and 9 o'clock a. m., though enacted for protection of general public, may be invoked in aid of individuals whose property was burned by spreading of trash fire after 9 o'clock.

5. Municipal corporations ☞603—Ordinance prohibiting trash fires held not invalid for failure to prescribe penalty for violation.

City ordinance prohibiting burning of trash except between hours of 5 and 9 a. m. held not inoperative and invalid because no penalty was prescribed for violation.

6. Municipal corporations ☞122(2)—Defendant must show that no other provision in law outside ordinance imposed penalties for violation.

In action for destruction of plaintiff's property by spreading of trash fire after 9 o'clock a. m. in city where ordinance prohibited such fires except between hours of 5 and 9 without prescribing penalty, every intendment must be in favor of validity of such ordinance so that it was incumbent on defendant to affirmatively show that there was no other provision in law outside ordinance itself imposing penalties.

7. Municipal corporations ☞594(2)—Ordinance held not unintelligible where meaning could be gathered from context, notwithstanding inapt phrases.

Ordinance prohibiting burning of trash except between hours of 5 and 9 a. m. held not unintelligible, notwithstanding use of inapt, inaccurate, or improper terms or phrases, where real meaning could be gathered from context.

8. Appeal and error ☞181, 301—Specifications of error, not presented at trial or on motion for new trial, will not be reviewed.

Specifications of error, not presented to trial court either at trial or on motion for new trial, will not be reviewed.

9. Vendor and purchaser ☞218—Persons in possession of real property under executory sale contract may recover for destruction of buildings thereon.

Persons in possession of real property under purchase and sale agreement, who had been in such possession for several years before destruction of buildings located thereon by fire, may recover for such destruction, though sale contract was still executory.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Mike Alechoff and wife against the Los Angeles Gas & Electric Corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Paul Overton, S. W. Guthrie, Samuel Poorman, Jr., and Douglas Van Dyke, all of Los Angeles, for appellants.

William Lewis and Guy Lewis, both of Los Angeles, for respondents.

MURPHEY, Justice pro tem. This is an appeal by defendant from a judgment in favor of plaintiffs, in an action wherein they sought damages for the destruction of property by fire set out by defendant and which spread to the premises occupied by the plaintiffs. The property in question comprised personal property owned by plaintiffs and certain buildings occupied by them situated upon real property held by the plaintiffs under an executory sale contract. The facts as found by the court are substantially as follows: That on or about the 3d day of December, 1921, the defendant started a fire within the city limits of the city of Vernon, county of Los Angeles, about 5 o'clock a. m., in a pile of rubbish, deposited by it on a vacant lot, about 200 feet long and 10 to 25 feet wide and of considerable height, averaging about 8 feet; that while burning, the flames therefrom rose at times to as high as 40 feet in the air, and the smoke and sparks therefrom rose to a height of about 200 feet into the air; that about 25 feet directly south of and extending several hundred feet easterly and westerly from the spot where said rubbish pile was located the city of Los Angeles maintained a yard for the storage of power poles and fence posts, which, at the time of said fire, had several hundred poles distributed throughout said yard; that the burden of the burning of said rubbish was finished about 8:30 o'clock a. m., and at that time there were pieces of wood and refuse scattered over the area, which said pieces of wood and refuse were still burning and alive with fire; that about 9 o'clock of said day a strong wind arose and commenced to blow from the north-easterly direction and fanned the said burning pieces of wood and embers and scattered them over the said burning area and carried the sparks therefrom among the poles in the said yard, causing the fire to break out in various places in and about the said poleyard; that during the period of time, to wit, from 5 o'clock a. m. until 9 o'clock a. m., the defendant had no more than four employees engaged in watching said fire, and that from 8:30 a. m. until after said wind arose and swept said fire defendant's employees failed and neglected to extinguish the burning embers scattered throughout said burning area; that during all of said time the said employees were present at the scene of the conflagration; that after the fire spread to the city poleyard it was carried and spread to the premises of the plaintiffs, located at 2056 East Thirty-Seventh street, within the city limits of the city of Vernon, and burned, consumed, destroyed, and demolished certain personal

property belonging to the plaintiffs and three barns situated upon said premises; that at the time of said fire there was in full force and effect in the city of Vernon a city ordinance entitled "An ordinance regulating the hours in which animals may be driven through the city of Vernon, and fixing the hours in which 'trash' may be burned in said city," which said ordinance was duly passed by the board of trustees of the said city of Vernon and adopted on the 6th day of July, 1915, and numbered 158. That it was provided in the said ordinance that "It shall be unlawful for any person to dispose of garbage, paper, or other refuse ordinarily termed 'trash' by burning at any other time than between the hours of 5 o'clock a. m. and 9 o'clock a. m. of the same day. Such burning shall at all times be so confined or controlled that such pieces or particles as are alive with fire cannot fly 10 feet therefrom without 'dying' or 'going out' and such burning shall be done at all times in such a manner that it cannot and shall not cause property surrounding such fire to be ignited"; that the fire was caused to extend and spread to the plaintiffs' property through the carelessness and negligence of defendant's employees and through their failure and neglect to have the same wholly extinguished by the hour of 9 o'clock a. m.

No question is raised as to the amount of damages awarded by the court. The defendant attacks the judgment and refusal of the court to grant a motion for a new trial upon the following grounds: (1) That the wind was such as to constitute the resultant fire on adjoining property an act of God for which defendant is not liable; (2) that the violation of the city ordinance did not constitute negligence (a) because the ordinance was designed to protect the public at large and is of no evidentiary value upon the question of negligence, (b) because the ordinance is impotent, no penalty having been prescribed for its violation, (c) because the ordinance is unintelligible, and (d) because the ordinance cannot be construed as prohibiting the existence of live embers after 9 o'clock a. m.; (3) that the plaintiffs, as the vendees under an executory contract, cannot recover for damages to the realty.

[1-3] If this action were based entirely upon general statutory law without the interposition of a regulatory municipal ordinance, the question of plaintiffs' right of recovery would not be simple of solution. Nevertheless, even under those conditions, in view of the findings of the court that at 8:30 a. m. the burden of the burning was finished and at that time there were pieces of wood and refuse on the lot that were still smoking and alive with fire, and that the employees of the defendant during such time failed and neglected to extinguish the live embers scattered throughout the burning area, which findings

(257 P.)

are responsive to the evidence before the court, we are strongly inclined to the belief that this negligence might well be determined in law to be the proximate cause of the spreading of the flames to the adjoining property. However, in view of the fact that the findings show a clear violation of the city ordinance, it becomes unnecessary definitely to pass upon this phase of the case in sustaining the judgment. Under the ordinance it was clearly the duty of the defendant to regulate the magnitude of any fire it contemplated starting so as to control and extinguish it within the time limit prescribed by law. Having failed to do this it was negligence, and this negligence not only contributed to the burning of plaintiffs' property, but the failure to comply with the mandates of the law is the primary, if not the sole, reason for the destruction thereof. The evidence demonstrates, and it is a matter of common knowledge, that in the territory here involved the prevailing sea winds increase in intensity after the early morning hours, and, undoubtedly, the ordinance in question was adopted with this fact in mind and for the purpose of preventing the wind from carrying embers to adjoining property. This viewpoint disposes of the appellant's argument that the wind constituted an intervening agency.

[4] The defendant further contends that the ordinance is for the protection of the general public and may not be invoked in aid of individuals. In support of this contention it cites a Nebraska case, *Frontier Steam Laundry v. Connolly*, 72 Neb. 767, 101 N. W. 995, 68 L. R. A. 425, the opinion in which was rendered by three commissioners, which we do not deem applicable to the facts in the case at bar. In a very terse and logical dissenting opinion rendered by Justice Sedgwick of that court, the law is stated so clearly and concisely as to be in our judgment unanswerable. He states:

"It is said in the opinion: 'If the duty imposed by the ordinance is clearly intended for the protection and for the benefit of individuals or of their property, the violation of the rule prescribed tends to show negligence for which a recovery may be had, but where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment and a violation of the rule is of no evidential value upon the question of negligence.' It is also said: 'In some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence.' So that the holding in this case is that to protect the personal and property rights of individuals is no part of the object of the ordinance. To this proposition I cannot agree. The opinion finds the object of the ordinance to be 'for the benefit of the public at large,' that is, for the public safety, and it is directly stated in the opinion that 'the purpose of section 53 of the ordinance which requires the erection of fireproof doors and shutters upon brick buildings

within the city is to protect the general public against the spread of fire.' To protect the general public against the spread of fire is to protect the property of the people of the city generally from destruction by fire, and if the object is to protect the property of all of the people of the city, it certainly must be a part of the object to protect the property of each individual citizen."

We are not without authority on this question in our own state. In *Siemens v. Eisen*, 54 Cal. 418, the court says:

"The failure of any person to perform a duty imposed upon him by a statute or other legal authority should always be considered evidence of negligence, or something worse. Whether it constitutes such negligence as tended to cause the injury to the plaintiff, in any particular case, is another question, the principles governing which are stated elsewhere; but such an omission must constitute just cause for complaint on the part of the state, if not of individuals; and when no evil intent appears, the omission may properly be regarded as simple negligence. The omission to perform a legal duty being proved, the plaintiff ought not to be required to prove further that the act omitted was inherently essential to the exercise of due care by the defendant. * * * 'So, if a specific duty is imposed upon any person by law, or by legal authority, an action may be sustained against him by any person who is specially injured by his failure to perform that duty. * * * It is an axiomatic truth, that every person while violating an express statute is a wrongdoer, and as such is ex necessitate negligent in the eye of the law; and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have.'"

To the same effect is *King v. San Diego Electric Ry.*, 176 Cal. 266, 168 P. 131. In the case of *Mora v. Favilla*, 37 Cal. App. 164, 173 P. 770, the defendant unlawfully washed the sidewalk in front of his place of business at 10 a. m. in violation of a city ordinance prohibiting the washing of sidewalks between the hours of 8 a. m. and 6 p. m., and plaintiff, while passing, slipped, fell, and broke his leg. The defendant argued that there was no negligence by reason of the violation of the ordinance because it was enacted for the purpose of conserving water, a public benefit. The court, however, said:

"We think it clear that while the ordinance may have been designed also to conserve the water supply of the city, another purpose, and the principal purpose of the ordinance, obviously was that the sidewalks should not be made inconvenient, annoying, and dangerous to the pedestrian population of the city during the hours when most in use."

[5, 6] Defendant next contends that the ordinance is inoperative and invalid because no penalty is prescribed therein for its violation. The ordinance is prohibitory and the Supreme Court in this state, in *Richter v.*

Lightston, 161 Cal. 260, 118 P. 790, Ann. Cas. 1913B, 1028, says:

"There is no force to the argument that the ordinance as an attempted police regulation is futile in that it fixes no penalty for a violation of its terms. Its terms, it will be noted, are prohibitory. It forbids the issuance of a license within the inhibited district. It is the province of other ordinances to impose fines and penalties for the conduct of the prohibited business without a license, and in the case of the city of San Jose the charter itself makes such provision."

There may have been other ordinances of the city of Vernon prescribing penalties to cover this unlawful act. Every intendment must be in favor of the validity of the ordinance, and it was incumbent upon the defendant to affirmatively show that there was no other provision in law outside the ordinance itself imposing penalties. It failed to assume this burden.

[7] The objection that the ordinance was unintelligible we regard as an overindulgence in technical refinement. Respective counsel argue learnedly and elaborately on the meaning of the word "than" as used in the ordinance. The lower court supplied the word "other" in its construction of the ordinance, which without doubt expresses the legislative intent. This, however, we deem to have been entirely unnecessary. No unbiased person can read the context and have any rational doubt as to its purpose and intent. Black on Interpretation of Laws (2d Ed.) § 56, states:

"The use of inapt, inaccurate, or improper terms or phrases in a statute will not defeat the act, provided the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment. In such cases, the words in question will be interpreted according to that meaning which the Legislature actually intended to express, although this may involve a departure from their literal signification."

Furthermore, the same author, in section 47, says:

"It is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and to prevent persons from eluding or defeating them. Accordingly, in case of any doubt or obscurity, the construction will be such as to carry out these objects."

There is much discussion as to whether lighted coals and live embers constitute fire. This strikes us as being in the same category as an attempt to demonstrate an axiom, or to prove that black is black or fire is fire.

[8] Other specifications of error are made, but as they were not presented to the trial court, either at the trial or on the motion for a new trial, we shall not discuss them in view of the well-settled rule that questions not presented to the trial court in some appropriate manner will not be considered on the appeal.

[9] The next and last question presented by the defendant in opposition to the judgment of the trial court is that the plaintiff cannot recover for the destruction of buildings located on the premises described in the complaint. The evidence conclusively shows that the plaintiffs were in the possession of the property under a purchase and sale agreement, and that they had been in such possession for several years prior to the destruction caused by this fire. The case of Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093, definitely disposes of this matter adversely to the defendant's contention. The Supreme Court says:

"It is a well-settled proposition that the proper party plaintiff in an action for trespass to real property is the person in actual possession. No averment of title in plaintiff is necessary. 1 Chitty on Pleadings, 63; Heilbron v. Heinlen, 72 Cal. 371, 14 P. 22; Strohlburg v. Jones, 78 Cal. 383, 20 P. 705; Pollock v. Cummings, 38 Cal. 685; Uttendorfer v. Saegers, 50 Cal. 497; Raffetto v. Fiori, 50 Cal. 363; McDonald v. Bear River, etc., Co., 13 Cal. 230. The person in possession can recover no damages for injuries, 'except such as effect his own right, unless he holds in such relation to other parties interested that his recovery will bar their claim.' 4 Sutherland on Damages, § 1012. A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land. It is only where the trespasser claims title himself, or claims under the real owner, that he is allowed to attack the title of the plaintiff whose peaceable possession he has disturbed. 21 Ency. of Plead. & Prac. 834. One who is in possession under an agreement to convey giving him the right of possession, may maintain an action against a stranger to the title for a trespass which consists of the removal and conversion of the substance of the estate. Hunt v. Taylor, 22 Vt. 556; Miller v. Zufall, 113 Pa. 325, 6 A. 350; Interlief v. Whaley, 65 Hun. 407, 20 N. Y. S. 183; McFeters v. Pierson, 15 Colo. 201, 24 P. 1076, 22 Am. St. Rep. 388; Irvin [Irwin] v. Patchen, 164 P. 51 (30 A. 436). He may even recover of his vendor for injuries amounting to waste, committed upon the premises after such delivery of possession."

See, also, 27 R. C. L. § 291, Fouts v. Foudray, 31 Okl. 221, 120 P. 960, 38 L. R. A. (N. S.) 251, Ann. Cas 1913E, 301, and Estate of Dwyer, 159 Cal. 664, 115 P. 235, wherein the court says:

"When a contract for sale of real property binding on the parties is executed, an equitable conversion is worked; the purchaser of the land is deemed the equitable owner thereof and the seller is considered the owner of the purchase price."

From the foregoing it follows that the judgment of the lower court should be and is hereby affirmed.

We concur: CRAIG, Presiding Justice pro tem.; THOMPSON, J.

84 Cal. App. 72

MILLER & LUX, Inc., v. PINELLI et al.
(Civ. 3271.)District Court of Appeal, Third District,
California. June 17, 1927.**1. Animals** ⇨100(8)—Landowner may recover all damages caused by trespassing stock (Civ. Code, § 3333).

Under Civ. Code, § 3333, owner of pasture land is entitled to be reimbursed for all damages incurred by trespassing of stock thereon.

2. Damages ⇨112—Measure of damages for use or destruction of pasturage is different than for destruction of annual crops.

Measure of damages for use or destruction of pasturage is different from that for destruction of crops requiring annual planting, cultivation, harvesting, and marketing.

3. Damages ⇨112—Measure of damages for destruction of crops is market value of estimated crop in then condition of maturity.

Measure of damages for destruction of grains and other crops must be ascertained from market value of estimated crop, considering condition of maturity at time of injury; any other basis being too speculative and uncertain.

4. Trespass ⇨50—Compensation for trespass, suspending and impairing enjoyment of premises, may be based on rental value, in absence of, or in addition to, special damages.

Where trespass suspends and impairs enjoyment of premises, compensation may be given on basis of rental value, in absence of any ground for special damages, or in addition to such damages.

5. Damages ⇨112—Measure of damages to meadow land is cost of reproducing things readily replaceable and rental value as to things not restorable.

In measuring damage to meadow land, cost of reproducing things readily replaceable is proper basis of computation, while, as to things which cannot be restored, rental value must be taken as basis.

6. Evidence ⇨501(10)—Damages by destruction of pasture grass cannot be established by witness' lump sum conclusion without giving facts on which based.

Damages for destruction of grass growing on pasture land cannot be established by witness' mere conclusion as to lump sum, without giving facts on which based, though qualified witness may give opinion on question of value, when material.

7. Damages ⇨112—Measure of damages for destruction of pasturage is reasonable rental value in vicinity for pasture purposes.

Measure of damages for appropriation or destruction of pasturage, where grass cannot be reasonably severed and marketed separate from land, is reasonable rental value thereof in that vicinity for pasture purposes.

8. Evidence ⇨471(20, 35)—Witnesses' estimates of gross damages to growing crops and market value of grass destroyed held incompetent as mere conclusions and speculative.

In action for damages to pasture land by trespassing stock, witnesses' estimates of gross amount of damages to growing crops and market value of growing grass destroyed, *held* incompetent as mere conclusions and speculative.

9. Evidence ⇨501(10)—Witness' direct opinions as to amount of damages are generally inadmissible, in absence of evidence of facts on which based.

Direct opinions of witnesses as to amount of damages are generally inadmissible, in absence of evidence of facts on which such conclusions are based.

10. Evidence ⇨543(3)—Experienced stockmen, familiar with particular land and rental value of grazing lands, could testify as to value of pasture land damaged by trespassing stock.

Stockmen of some 30 years' experience, familiar with defendant's pasture land and local market rental value of grazing land *held* qualified to testify as to value of defendant's land, in action for damage thereto by trespassing stock.

11. Appeal and error ⇨1050(1)—Testimony as to gross damages to crops and market value of grass destroyed held harmless, in view of testimony as to facts showing damages greatly exceeding amount awarded.

Testimony as to gross amount of damages to growing crops and market value of growing grass destroyed by trespassing cattle *held* harmless, in view of witnesses' testimony as to all necessary facts, from which court could calculate actual damages sustained, which greatly exceeded aggregate amount awarded.

12. Animals ⇨100(4)—Finding of damages to land by destruction of hay and grass by trespassing stock sustained.

In action for damage to land by trespassing stock, court's finding that stock ate up, injured, and destroyed hay, grass, and verdure, to plaintiff's damage in sum of \$1000, *held* amply supported by evidence.

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Suit by Miller & Lux, Inc., against J. Pinelli and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Edward Bickmore and R. R. Sischo, both of Merced, for appellants.

J. E. Woolley, of San Francisco (Vincent J. McGovern, of San Francisco, of counsel), for respondent.

THOMPSON, Justice pro tem. In this suit for injunction, plaintiff recovered a judgment restraining defendants from permitting their stock to trespass upon his land, and awarding him damages in the sum of \$1,000. From this

award of damages alone, the defendants have appealed, claiming that the findings, in this respect, are not supported by the evidence.

During the years of 1922 and 1923 defendants owned a stock ranch in Merced county, consisting of 640 acres of land, which was entirely surrounded by grazing land belonging to plaintiff, known as the Los Banos farm. The ranches of the respective parties hereto were separated by wire fences. During the years mentioned the feed for stock was scarce. Defendants owned some 110 head of cattle and horses. In spite of the fence riders who patrolled the lines of plaintiff's land, the fence wires were frequently found cut, and the stock of defendants were found straying upon the land of plaintiffs, where the hay and grass were trampled down, eaten, and destroyed to a considerable extent. Upon the trial, plaintiff was granted an injunction restraining defendants from permitting their stock to trespass upon his land, and \$1,000 damages for loss of hay and feed was also awarded to plaintiff. The findings of the trial court supporting this award were as follows:

"The defendants above named caused certain animals belonging to them to run and trespass on the lands of plaintiff, * * * which animals ate up, injured and destroyed the hay, grass, and verdure being and growing thereon, to the damage of plaintiff in the sum of \$1,000. The amount which will compensate plaintiff for the detriment proximately caused by said animals so running and trespassing on said lands of plaintiff is said \$1,000. * * *

Appellants contend that these findings are not supported by the evidence, that there is absolutely no evidence of the quantity, or value of the hay, grass, or verdure which was eaten or destroyed by their stock, and that the only evidence of pecuniary damages sustained was remote, uncertain, and speculative. It is further contended by the defendants that this testimony of estimated damages was erroneously admitted over their objections on the grounds that it was incompetent, irrelevant, and immaterial, and that it was admitted without requiring a proper foundation for such testimony to be first proved.

Only two witnesses testify to the amount of damages. The first one was Mr. Mulkey, who testified that he had been a rancher for 30 years, and was formerly the superintendent of the Los Banos farm, and as such had charge of the grazing lands involved in this action. He said that during the years of 1922 and 1923 he had seen the stock of defendants on the Miller & Lux premises, "many times, almost every day for about two years," that he was acquainted with the land upon which the cattle trespassed, and was "familiar with the cost of feed." The evidence of this witness respecting the damage sustained to the growing hay and grass was as follows:

"Q. From your experience in this business, as you have related, what do you think was the market value of the growing grass destroyed each year by the defendants' cattle? * * *

"Mr. Bickmore: We object on the ground it is incompetent, irrelevant, and immaterial, and object further that there is no proper foundation laid.

"The Court: Q. Now what would you say would be the reasonable value, market value, that these cattle are alleged to have destroyed? A. It would be in the neighborhood of \$1,000 a year. * * * Q. I am asking you if you made any examination to see how much grass these cattle had eaten? A. Yes, sir. * * * Q. Upon what do you base your estimate of the damage, now, that was done there, how do you calculate that? A. Well, I know what feed will grow on that land, and I know what was there, and I know how much of it that Miller & Lux got. * * * Q. What did you see? A. I saw the land was trampled and the feed ate off the pasture land. Q. About how many acres were there; about what would you say was the pasture land or wild land these cattle were on? A. That (which) they damaged, was about 240 or 250 acres. * * * They were on the pasture land and farming land long enough to get all the feed they lived on. * * * They had no feed anywhere else. * * * Q. You say that you estimate this damage that these cattle did to be the sum of \$1,000? A. On the pasture and farming land. Q. How would you * * * itemize it; in what way was the damage? A. It would be about \$300 on the pasture land, and the balance would be on the farming land. * * * Q. And 260 acres? A. On the pasture land. * * * Q. Could you say what proportion these cattle ate up on that? A. Two-thirds of it. Q. And did Miller & Lux have any cattle on that land during that time? A. A very few head at that time, in that small field, it was used mostly for work horses from the Ortigalita ranch. Q. You turned the work horses out on it? A. Saturday nights, as a rule, we had to feed them hay, then, as there was no feed for them. Q. You go over to the cultivated land; you estimate \$700 damages—now, what is the nature of that damage? A. It was a grain field, and they trampled it all up and ate the grain off of it. Q. How many acres did they have? A. Something over one section. * * * Sometimes I would see about 30 head of stock on there, * * * and sometimes I would see about 80 cattle and 30 horses. * * * Sometimes we cut over some of (that land) * * * but not in the immediate vicinity of Fava and Pinelli's place; they ate it off, and there was nothing there to cut. * * * At that time the pasture there was \$2 per month, for the same kind of pasture; * * * I was renting the same kind of land for \$8 an acre a year. * * * The standard market value, at that time, was \$7 or \$8 an acre."

Likewise, the witness Simmons testified that he had been engaged in the stock business for 29 years; that he was employed by plaintiff during the years of the alleged trespass, and knew the land in question, the value of pasturage, and the cost of feed. He was then asked:

"What would you say was the market value of the feed destroyed by the defendant's cattle during the year 1924?"

The same objection on the part of defendants above mentioned was made to this question and overruled. The witness then answered:

"Approximately \$1,000 I would say. Q. How much per head was feed worth during the year 1924? A. Around \$2.

"The Court: Q. I suppose you have had occasion to buy feed? A. Yes sir. Q. For stock during that time? A. Yes, sir. Q. Have you had occasion both to feed stock upon the premises and also to run them on grazing land? A. I have. Q. For how many years? A. For a little better than five years for Miller & Lux.

"Mr. Bickmore: I am not objecting to the man's qualifications, no doubt he is properly qualified. * * *

"Q. That land of this nature, how much per head, per month, would it cost to feed on that kind of land, during the year 1924? A. I don't think that you could get that kind of land * * * during the year 1924 to graze cattle for less than \$2.50 an acre, per head, per month. * * * It was a very poor year, a poor and bad year."

Two questions are presented on this appeal: (1) Is the rental value of pasture land a proper measure of damages for the destruction of grass, caused by trespassing stock? (2) Is it reversible error to admit testimony of the gross amount of estimated damages, where such evidence is subsequently supplemented by competent testimony of all necessary facts upon which the court can compute the damages?

[1] There can be no question that the owner of pasture land will be entitled to be reimbursed for all damages incurred by the trespassing of stock. "For the breach of an obligation not arising from contract, the measure of damages * * * is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civ. Code, § 3333.

[2, 3] The customary method of estimating the value of pasturage in a stock country is to determine the number of head of stock per acre which the ordinary natural growth of grass will sustain. Well-considered cases have held that it is a reasonable rule to estimate damages for the use or destruction of pasturage, from evidence of the reasonable rental value of such grazing land per month or season, per acre, according to the number of head of stock to be pastured thereon. There is a clear distinction between the value of the use of grazing land for pasturage, under which circumstances the grass roots remain in the soil, and from the natural reseeding of which a volunteer perennial crop is reproduced successively, and the measure of damages resulting from the destruction of such crops as vegetables and grain, which require annual planting, cultivation, harvesting,

and marketing. Verdure used for grazing purposes cannot be cut, stacked, and marketed by the ton or bale. It has no such market value. It is essentially a part of the realty. As the stock consumes the grass, the shoots spring up repeatedly, and the crop is thus renewed. One may estimate with reasonable accuracy the number of bushels of corn or grain, or the number of pounds, bushels, or crates of vegetables which may be produced per acre, but it is absurd to talk of measuring the market value of mere pasturage in this same fashion. With relation to such crops of fruit, vegetables, and grains, there is no question as to the reasonableness of the well-settled rule which requires the ascertaining of the measure of damages from the market value of the estimated crop, taking into consideration the condition of maturity of the product at the time of the injury complained of. 4 Sutherland on Damages (3d Ed.) 2997, § 1023; 17 C. J. 891; Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 P. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779; Seid Pak Sing v. Barker, 197 Cal. 321, 240 P. 765. Any other basis is too speculative and uncertain. Western B. & S. Co. v. Jevne, 179 Ill. 71, 53 N. E. 565; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405; Eno v. Christ, 25 Misc. Rep. 24, 54 N. Y. S. 400.

But with respect to the market value of pasturage a different rule prevails. In *Hanson v. Seawell*, 35 Idaho, 92, 204 P. 660, it is said:

"Ordinarily, the rental value of the land would not be proof of the value of the crops. However, where it is shown, as in the present case, that the land was used for pasture and that this was the use to which it would ordinarily and reasonably be put, proof of its rental value as pasture is a proper method of showing the value of the grass. In fact, it seems to be the only method which could be adopted."

See *Boggs v. Seawell*, 35 Idaho, 132, 205 P. 262; *Kellar v. Sproat*, 35 Idaho, 273, 205 P. 894. In the last case cited the value of the pasturage was estimated at \$15 per head per season.

[4] "Where the trespass suspends or impairs the enjoyment of the premises, compensation may be given on the basis of the rental value, in the absence of any ground for special damages, or in addition to such damages." 4 Sutherland on Damages, p. 2966, § 1015. In 26 R. C. L. 972, § 50, the court says:

"For the destruction of pasture by flood, evidence of the value of the pasturage destroyed is at least prima facie evidence of the damage to the plaintiff."

And in the case of *Buttles v. Chicago, Santa Fé & Cal. Ry. Co.*, 43 Mo. App. 280, in which an action was brought for damages for the loss of a growing crop of grass trampled down and consumed by trespassing stock, the court says:

"The plaintiff sought to prove the value of his grass by showing what the pasture was reasonably worth. * * * The law aims at compensation, and we can conceive of no other way that would be more satisfactory or fair. In explanation of the value placed on the pasture for the time, the witnesses stated how many head of cattle could be grazed on the land during the time, and what it was worth per month. If the damage had been done to a crop of growing corn, then the authorities relied on by the defendant would be applicable. It was held in those cases that the landowner ought not to recover the full value of a growing crop of corn or like crops, as if it was fully matured and gathered; that, in arriving at its true value at the time of its destruction, the cost of additional cultivation (if any was needed), and the expense of gathering and fitting for market, should be considered. This would be equitable and right. But any one with the slightest knowledge on the subject knows that such a rule is entirely inapplicable, when the court is seeking to ascertain the correct value of grasses intended for grazing purposes."

[5] Where the roots of the grass in a pasture have been destroyed by water or fire so as to prevent the matured stocks from automatically reseeding the field, the measure of damages includes not only the rental value of the pasture, but also the additional cost of reseeding the field. 4 *Sutherland on Damages*, 3001, § 1023; *Chapple v. St. Louis & H. R. Co.* (Mo. App.) 284 S. W. 863; *Couch v. Kansas City So. Ry. Co.*, 252 Mo. 34, 158 S. W. 347, 46 L. R. A. (N. S.) 555; *Crouch v. Kansas City So. Ry. Co.*, 141 Mo. App. 256, 124 S. W. 1077. "Where the land has been appropriated to a particular use, as by converting it into a meadow, * * * in measuring the loss a distinction must be drawn, of course, between those things which can readily be replaced and those things concerning which restoration is impossible. As to the former, the cost of reproduction is regarded as the proper basis of computation; while, as to the latter, rental value must be taken as the basis. It is to be remarked, however, that the term 'rental value,' as applied to lands covered with a growing crop, means not what the lands may be rented for in the vicinity for ordinary purposes, but the value of the use of the lands for the purpose of maturing and harvesting the crop." *Blunck v. Chicago & N. W. Ry. Co.*, 142 Iowa, 157, 120 N. W. at page 741.

[6] The appellant in the instant case relies chiefly for reversal upon the cases of *Cox v. Crane Creek Sheep Co.*, 34 Idaho, 327, 200 P. 678; *Cleary v. Shand*, 48 Utah, 640, 161 P. 453; *Pacific Live Stock Co. v. Murray*, 45 Or. 103, 76 P. 1079; and *Fremont, etc., v. Marley*, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482. None of these cases holds that the reasonable rental value of pasture land is not the proper measure of damages for the destruction of the grass growing thereon. But these cases do quite properly announce the rule that such damages could not be estab-

lished by the mere conclusion of a witness as to a lump sum which he estimates as damages, without giving the facts upon which his conclusion is based. In the *Cox Case*, it is said:

"They [the witnesses] were permitted to testify to lump sums as such damages without stating any facts upon which such estimates were based. * * * The jury were not informed what was the condition of the pasturage before the sheep grazed over it, nor the extent of the territory grazed over, nor the reasonable value of such pasturage at that time and place."

In the case of *Cleary v. Shand*, above cited, damages were awarded for trespass in driving some 2,500 sheep over plaintiff's land to the damage of his rye and timothy hay which was planted there. The sheep remained on the pasture only about four hours. In that case it was held to be error for the witness to be permitted to testify as follows: "I would judge the damage would be \$500" on account of the sheep crossing the premises. And again: "The damages that I placed at \$350 would be covered by the clover and the rye that was eaten off and tramped out, * * * I would judge," etc. There was no attempt to show the reasonable rental value of the pasture land.

In the case of *Pacific Live Stock Co. v. Murray*, 45 Or. 103, 76 P. 1079, the only witness who testified to the damages incurred on account of trespassing sheep on an uninclosed pasture, said:

"Well, it would be owing to the way—if I owned it, I would not have had them on there for \$700 or \$800."

The court properly said:

"A witness may state the facts upon which the damages are predicated, and in a proper case, if qualified, may give his opinion upon a question of value, when material; but he cannot express an opinion as to the amount of damages * * * because that is exclusively within the province of the jury."

But the court also used this significant language in that case:

"It would have been competent for a qualified witness to give his opinion as to the value of the grass or pasturage eaten or destroyed. *Woodbeck & Matter v. Wilders*, 18 Cal. 131; *Lommeland v. St. P., Minn. & Manitoba Ry. Co.*, 35 Minn. 412, 29 N. W. 119."

And in the *Fremont v. Marley Case*, above cited, where plaintiff sought damages for the destruction of his crops caused by an overflow of the land because of water ditches which were constructed and maintained by the defendant, the court announced the same general rule above mentioned, and properly concluded that:

"A witness who possesses the requisite knowledge may testify as to the value of the crops destroyed, * * * but he cannot be

permitted to testify directly as to the amount of the damages sustained."

In this case there was no effort to prove the reasonable value of the pasturage.

[7] We are cited to no authority which directly holds that it is not competent to prove the damages sustained to pasture land by showing the reasonable rental value thereof. Upon the foregoing authorities, and upon good reason, we conclude that the measure of damages for the appropriation or destruction of pasturage, which is used for grazing purposes, where the grass cannot be reasonably severed and marketed separate from the land, is the reasonable rental value thereof in that vicinity for pasture purposes.

[8, 9] In the instant case, over the objection of defendants, two witnesses were permitted to testify to their estimate of the gross amount of damages to the growing crops, on account of the trespass of defendant's stock, without first stating the facts upon which the court could calculate such damages. In substance, these questions were: "What is the market value of the growing grass which was destroyed by defendant's cattle?" The objection upon the grounds that this question was incompetent, irrelevant, and immaterial, and that no foundation for such testimony had been laid, was overruled. The witnesses then answered: "Approximately \$1,000." These answers were, of course, a mere conclusion and were speculative. Direct opinions of witnesses as to the amount of damages are generally inadmissible, in the absence of evidence of facts upon which such conclusions are based. 3 Jones Comm. on Ev. 2502, § 1367; 22 C. J. 204, § 598; 4 Enc. of Ev. 12; Cox v. Crane Creek Sheep Co., 34 Idaho, 327, 200 P. 678; Cleary v. Shand, 48 Utah, 640, 161 P. 453; Pacific Live Stock Co. v. Murray, 45 Or. 103, 76 P. 1079; Fremont, etc. v. Marley, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482.

[10, 11] These witnesses were, however, qualified to testify as to the value of pasture land, being stockmen with some 30 years' experience, and familiar with the land in question, and the local market rental value of grazing land. The objectionable answers were also supplemented by testimony on the part of both witnesses of all necessary facts from which the court could make its own calculation as to actual damages sustained. From this evidence it appears that from 240 to 260 acres of pasture land was entirely eaten off or trampled down and destroyed; that 80 cattle and 30 horses were seen on said land "every day for about 2 years," and grazed there "long enough to get all the feed they lived on"; that the stock "ate it (the grass) off, and there was nothing there to cut"; that the market rental value of similar pasture land in that vicinity, at that time, was from \$2 to \$2.50 per head, per acre, for

each month, or from \$7 to \$8 per head, per acre, for the grazing season. This leaves a mere matter of computation to ascertain the aggregate amount of damages. It is apparent that the minimum figures given would greatly exceed the aggregate amount of damages awarded by the court. The objectionable questions and answers above quoted are therefore harmless and do not constitute reversible error.

[12] The finding of the court that the defendant's stock "ate up, injured, and destroyed the hay, grass, and verdure * * * to the damage of plaintiff in the sum of \$1,000" is amply supported by the evidence.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

SMITH v. HOLLANDER et ux. (Civ. 5797.)★

District Court of Appeal, First District, Division 2, California. June 22, 1927.

Rehearing Granted July 21, 1927.

1. Municipal corporations ⇨706(6)—Negligence in not giving warning signal held for jury, where pedestrian was injured by automobile skidding onto sidewalk.

Plaintiff's evidence that before defendant's car skidding on slippery street struck him on sidewalk he did not hear warning signal warranted submission of case to jury on issue of negligence in not giving signal, irrespective of the doctrine of res ipsa loquitur.

2. Municipal corporations ⇨706(3)—Doctrine of res ipsa loquitur held applicable where skidding automobile struck pedestrian on sidewalk.

The doctrine of res ipsa loquitur applies where an automobile skidded on wet street, running on sidewalk and striking a pedestrian, so as to show driver's negligence, unless the driver points out some cause of coming upon the sidewalk which could not have been guarded against by ordinary care under the circumstances.

3. Municipal corporations ⇨706(3)—Burden of proving negligence of driver of automobile, skidding on slippery street and striking pedestrian on sidewalk, is on pedestrian.

The burden of proving driver's negligence is on a pedestrian, in suit for injury from being struck by automobile skidding on slippery street and striking him on sidewalk.

4. Municipal corporations ⇨706(3)—Jury may infer negligence, unless driver of automobile skidding and striking pedestrian on sidewalk proves accident unavoidable by ordinary care.

Jury may infer driver's negligence under the doctrine of res ipsa loquitur, where automobile skidding on slippery pavement struck pedestrian on sidewalk without proof of precise act or omission constituting negligence,

unless the driver proves that the cause of injury was one not avoidable by ordinary care.

5. Municipal corporations $\S$ 706(3)—*Prima facie* showing of negligence from proof automobile skidded against sidewalk pedestrian is overcome by evidence balancing, though not preponderating against, it.

Defendant overcomes plaintiff's *prima facie* showing of negligence arising on proof that defendant's automobile, skidding on wet street, struck plaintiff on sidewalk, by proof evenly balancing it, without proving absence of negligence by a preponderance of the evidence.

6. Evidence $\S$ 90—"Burden of proof" and "burden of producing evidence" are not same.

"Burden of proof" and "burden of producing evidence" are not the same, even though the use of the one expression instead of the other has been held not to be error.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Burden of Proof.]

7. Municipal corporations $\S$ 706(6)—Evidence that skidding of automobile striking pedestrian on sidewalk was unavoidable held to present question for jury.

Automobile driver's evidence that skidding of car on wet pavement striking pedestrian on sidewalk was unavoidable accident held to present question of driver's negligence for jury.

8. Trial $\S$ 296(9)—Instructions assuming facts in issue held error, where omission of qualification as to truth must have influenced the verdict.

Instructions assuming facts in issue as to worry and disability of plaintiff by omitting the qualification "if any" held error, in personal injury suit where, notwithstanding cautionary instruction relating to damages generally, the omissions must have influenced the verdict.

9. Trial $\S$ 253(4)—Instruction in personal injury suit, omitting element of certainty as lack of capacity to work in future, held error (Civ. Code, $\S$ 3283).

Instruction that damages include permanent lack of capacity for work in the future, sustained by reason of injuries, held erroneous as lacking the element of certainty required by Civ. Code, $\S$ 3283, providing that damages may be awarded for detriment certain to result.

10. Trial $\S$ 296(3)—Instruction on degree of care overcome, in personal injury suit, objections to expressions "proper care" and "due care."

In pedestrian's suit for injuries, instructions on degree of care required of defendant held to overcome objections to expression "proper care" and "due care" in other instructions.

11. Evidence $\S$ 148—Proof that witness called defendant's number, and person answering said she was defendant, held sufficient foundation for telephone conversation.

Proof that witness called defendant's telephone number, and a person answered saying she was defendant, held sufficient foundation for testimony of telephone conversation, where

defendant did not deny having had a telephone conversation.

12. Damages $\S$ 143—Complaint for injuries held not demurrable, where it sufficiently advised defendant of character of proof of injuries.

Complaint for damages for personal injuries by pedestrian struck by automobile was not demurrable, where it pleaded negligence in general terms, and detailed injuries sufficiently to advise defendant of the character of proof to expect.

13. Pleading $\S$ 192(2)—Demurrer for uncertainty to complaint for injuries lies for what is said with uncertain meaning, not for matter omitted.

A demurrer to a complaint for damages for injuries for uncertainty lies for what is said with an uncertain meaning, not for what is omitted, since no description of injuries can be exhaustive.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for damages for personal injuries by F. H. Smith against Arthur Hollander and Hattie Hollander, his wife. Judgment for the defendant first named and for plaintiff and against the defendant second named, and the latter alone appeals. Reversed, and a new trial ordered.

Cooley & Gallagher, of San Francisco, for appellant.

Henry Eickhoff, Jr., and Gregory A. Harrison, both of San Francisco, for respondent.

KOFORD, P. J. Appellant, Hattie Hollander, appeals from a judgment awarding damages for personal injuries sustained by plaintiff in being struck by said appellant's automobile. Her codefendant, Arthur Hollander, was granted a nonsuit.

The proof offered by the plaintiff was as follows: While walking westerly on the south sidewalk of Post street, plaintiff was struck and injured by appellant's automobile, which ran up onto the sidewalk unawares from behind him. He did not see it approach nor hear any horn or warning signal. The only eyewitness for the plaintiff testified:

"I saw (the) automobile coming down Post street going west, and I saw it suddenly skid completely around and go right on the sidewalk and knock (plaintiff) down, and back up across the street and go on the other sidewalk and stop. A building stopped it. * * * The street was wet."

[1] Plaintiff's wife testified to a telephone conversation with appellant, in which the latter said that she had lost control of her machine from Van Ness avenue to Buchanan street. This was all the testimony offered by plaintiff in chief concerning the manner of

the accident. A motion for a nonsuit by appellant was denied. Apart from the application of the doctrine of *res ipsa loquitur*, the evidence warranted the submission of the case to the jury upon the question of whether defendant was negligent in not giving a suitable warning signal.

Defendant Arthur Hollander testified on behalf of appellant and himself that a misty rain had fallen for a period of about 15 minutes, and that the street was still wet at the time of the accident; that appellant's automobile was traveling on Post street from Van Ness avenue at a speed of not more than 15 miles per hour in a straight course and in second gear; that about 100 feet east of Buchanan street the forward end of the automobile suddenly skidded towards the left, ran up onto the south or his left-hand sidewalk, and struck the plaintiff. Appellant's testimony was substantially the same. She was the driver, and testified that, when the skidding commenced, there was nothing for her to do to bring the car back into control; that all she did was to hold onto the steering wheel. This was all the testimony for the defendants and appellant concerning the cause of the accident. There is therefore no direct proof of what particular act or omission on the part of the appellant, driver of the car, caused it to skid and run upon the sidewalk.

[2] No contributory negligence was pleaded. Negligence was pleaded generally, and the plaintiff relied on the doctrine of *res ipsa loquitur*. The court instructed the jury upon this doctrine. Some of the instructions given, when read together, inform the jury that it may infer negligence by means of this doctrine without knowing the specific act or omission which constituted the negligence, if it should find from the evidence that defendant's automobile ran upon the sidewalk and struck plaintiff unawares from behind. Appellant urges that, conceding the doctrine to apply to such facts, nevertheless we have here the additional fact of skidding on a wet street, which appears both from the case as a whole and from plaintiff's testimony in chief. It is said that skidding may or may not be negligent, and for that reason skidding in and by itself furnishes no evidence or at least that the fact of skidding is a sufficient explanation for running upon the sidewalk so as to take the case out of the doctrine of *res ipsa loquitur*. Appellant cites authorities, including *Berry on Automobiles* (4th Ed.) § 231, to the effect that mere skidding is not evidence of negligence, and *Bloom v. Allen*, 61 Cal. App. 28, 214 P. 481, to the effect that skidding may or may not be negligent. This case also states, however, that skidding is not a defense.

That certain acts may or may not be negligent, however, is not determinative of the application of this doctrine. When an automobile leaves its accustomed place in the

street, runs upon the sidewalk, and strikes a pedestrian, this, too, may or may not be negligent, depending upon the circumstances, and yet the doctrine has been held generally to apply under such facts (*Berry on Automobiles* [4th Ed.] § 405; *Huddy on Automobiles* [7th Ed.] § 512), and to similar situations (*Bauhofer v. Crawford*, 16 Cal. App. 676, 117 P. 931; *Onell v. Chappell*, 38 Cal. App. 375, 176 P. 370; *Scheuermann v. Kuete-meyer*, 186 Cal. 225, 199 P. 13). The test is not whether certain facts show that negligence exists in every such case or as a matter of law, but whether they show negligence ordinarily. The reason for the doctrine is also important. The one injured is from the nature of the case not in a position to know or prove the precise cause of the accident, whereas the defendant operating the thing causing the injury is in a position to know and should know or be able to explain it. 19 Cal. Jur. 704, § 123, "Negligence."

[3-7] If mere skidding is not evidence of negligence, but running up onto the sidewalk is, then what is to be said of the two combined? Here the appellant's automobile skidded diagonally across Post street, proceeding about 50 or 60 feet, and then up onto the sidewalk to where plaintiff was walking, striking him unseen from behind. It would be unusual if a person so injured would be in a position to prove the precise act or omission constituting the negligence causing the injury, and yet such occurrences do not usually take place in the absence of the driver's negligence. One is compelled to conclude that, if the driver does not point out some cause of the injury and of the coming upon the sidewalk even by skidding which could not have been guarded against by the exercise of ordinary care under all the then known driving conditions, then the injuries in all probability resulted from negligence in handling the car. The burden of proving negligence is upon the plaintiff throughout the case. The doctrine of *res ipsa loquitur* assists him in carrying this burden by means of an inference founded on common knowledge and experience. From the nature and circumstances of the mishap, the jury may infer, where it applies, that the injuries were caused by some negligent act or omission of the driver, without proof of the precise act or omission constituting the negligence. *Shearman & Redfield on Negligence*, §§ 58, 58a. It was proper for the court to instruct the jury upon the inference which might be drawn by means of this principle, for without it the jury would not be advised that the defendant was under the obligation of explaining the occurrence. For the same reason it was proper for the court to refuse defendant's requested instructions VIII and IX upon the presumption of defendant's freedom from negligence. The instructions should not have the effect, however, of informing the jury that the defendant is ob-

liged to prove her freedom of negligence by a preponderance of evidence. The giving of instructions XV and XXI without giving defendant's requested instruction No. III had this effect. "Burden of proof" and "burden of producing evidence" are not the same, although the use of the one expression instead of the other has been held not to be error. *Cody v. Market Street Ry. Co.*, 148 Cal. 90, 82 P. 666; *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 155 P. 839. The defendant meets and therefore overcomes plaintiff's prima facie case when she balances it evenly without proving absence of negligence by a preponderance of the evidence. *Rathbun v. White*, 157 Cal. 252, 107 P. 309; *Scarborough v. Urgo*, 191 Cal. 346, 347, 216 P. 584. One way for defendant to meet plaintiff's prima facie case is to offer evidence tending to show that plaintiff's injuries were the result of an unavoidable accident. While the evidence for defendant tending to show the accident unavoidable may be said to be weak, it is a case where reasonable minds might arrive at different conclusions, and it would not have been improper for the court to have given defendant's requested instruction V.

[8] The instructions given contain several indirect assumptions of fact which are assigned as error. This arises from expressions used without conditional qualification such as the usual "if any." One such expression is "caused by the negligence of the defendant" (in instruction XXII) and several such assumptions of fact are used in instruction XXIII, where the jury is instructed that "such damages include:

"Subdivision 1. The pain and suffering endured by the plaintiff, etc.

"Subdivision 2. Any loss sustained by plaintiff by reason of the fact that he has been unable to work up to the present time.

"Subdivision 3. All charges incurred and paid by the plaintiff by reason of the injury; * * * and as well as such charges certain to be reasonably incurred in the future by reason of said injuries."

"Subdivision 6. The mental worry endured by the plaintiff up to the present time, due to his reasonable apprehension of future disability, which reasonable apprehension was the proximate result of his injuries.

"Subdivision 7. The permanent disability or lack of capacity for work in the future of the said plaintiff sustained by reason of his said injuries."

Where the fact can be said to be undisputed in the evidence, such assumption has been held not to constitute error. 24 Cal. Jur. 843, cases cited in notes 18 and 19. In

several decisions it has been held that, where the assumption of fact is indirect and inferential, it may be considered as cured by other proper instructions, leaving the question to the jury. *Ingalls v. Monte Cristo Oil Co.*, 23 Cal. App. 652, 656, 139 P. 97; *Brinck v. Bradbury*, 179 Cal. 376, 176 P. 690; *Dawson v. Pacific Electric Ry. Co.*, 177 Cal. 268, 170 P. 603; *Anderson v. Seropian*, 147 Cal. 201, 216, 81 P. 521.

[9] Under the facts proven and instructions given in this case, we perhaps could pass the assumption of fact in instruction XXII as cured by other instructions; and those in XXIII, subs. 1, 2 and 3, as being either not in dispute or as doubtful assumptions grammatically; but the facts assumed in subdivisions 6 and 7 are in dispute and are not cured by any other instruction given. The cautionary instruction on damages relates to damages in general and as a whole. Subdivision 7, besides assuming the disputed fact of permanent incapacity for work, is also erroneous for lacking the element of certainty of future detriment as required by Civil Code, § 3283. From an examination of the entire cause and evidence we are of the opinion that these errors must have influenced the determination of damages and is therefore reversible error.

[10] The other grounds of appeal are not well taken. Some of the instructions use the expression "proper care" and "due care," but the instructions elsewhere, XII and XIV, instruct on the degree of care required of defendant and this overcomes the objection.

[11] There was sufficient foundation for the telephone conversation with defendant. The witness testified that she called defendant's telephone number and a person answered saying that she was the defendant. 22 Cor. Jur. 302. The defendant did not deny having had a telephone conversation, although she denied any admission.

[12, 13] Defendant's demurrer to the complaint was properly overruled. The injuries detailed in the complaint were specific and detailed enough to advise the defendant of the character of proof to expect. *Kuhns v. Marshall*, 44 Cal. App. 588, 186 P. 632. A demurrer for uncertainty lies for what is said with an uncertain meaning and not for what is omitted. *Callahan v. Broderick*, 124 Cal. 83, 56 P. 782. No description of injuries can be so complete that nothing more can be added.

The judgment is reversed, and a new trial ordered.

We concur: NOURSE, J.; STURTEVANT, J.

84 Cal. App. 90

SMITH et al. v. BUTLER. (Civ. 4906.)

District Court of Appeal, Second District, Division 2, California. June 20, 1927.

1. Deeds $\hookrightarrow$ 17(1)—Purchaser's quitclaim deed to vendor to secure release from conditional sales contract held supported by consideration.

Where purchaser, under conditional sales contract, in order to be released from further obligation by provisions of such contract, executed quitclaim deed to vendor, and assigned contract to him, such deed and assignment held supported by consideration.

2. Appeal and error $\hookrightarrow$ 1011(1)—Findings on conflicting evidence will not be disturbed.

Where evidence is conflicting, it is not province of Appellate Court to attempt to reconcile divergent statements or draw conclusions therefrom at variance with those reached by trial judge.

3. Trusts $\hookrightarrow$ 633 $\frac{1}{4}$ —Purchaser's quitclaim deed to secure release from conditional sales contract held not to create trust in his favor by implication of law.

Where purchaser gave vendor quitclaim deed to secure release from conditional sales contract, no trust was created in favor of grantor by implication of law, since even want or failure of consideration would not raise resulting trust in such case.

Appeal from Superior Court, San Bernardino County; Frank B. Daley, Judge.

Action by J. Walter Smith and another against A. G. Butler. Judgment for defendant, and plaintiffs appeal. Affirmed.

Pollock & Mitchell, of Ontario, Cal., for appellants.

E. H. Jolliffe, of Ontario, Cal., for respondent.

MURPHEY, Justice pro tem. This is an action by the plaintiffs to declare a trust and to compel the defendant to restore plaintiffs to their rights under a conditional sales contract for the purchase of real estate. In the month of April, 1920, plaintiffs and defendant entered into a contract for the purchase and sale of certain real property in the town of Ontario, county of San Bernardino. Under the terms of the contract plaintiffs made an initial payment of \$1,350, and subsequently made two semiannual payments of \$881 each, together with interest as prescribed by the contract. The total purchase price of the property was fixed at \$12,000. The third payment of \$881 and interest was about to become due in October, 1921, when the plaintiffs informed the defendant that they would be unable to make said payment on account of financial difficulties, and requested an extension of time. It is plaintiffs' contention that the defendant then proposed that, if the plaintiffs would execute a quitclaim deed to

the premises, assign their contract of purchase, and would within six months pay to the defendant the October payment of \$881, together with an additional 1 per cent. interest thereon, and pay rental for the stores located on the real property during the extended period, he (defendant) would restore the contract of purchase, and restore plaintiffs to all their rights and interest in the real property. Plaintiffs further contend that, in pursuance of this proposal, they did execute and deliver to defendant a quitclaim deed to said property, together with an assignment of the contract, which deed was recorded in the office of the county recorder of San Bernardino county; that thereafter plaintiffs paid the rental on the stores located on said property, and within six months tendered to the defendant the amount of the October payment with interest and additional interest, and the further sum of \$662 with interest, being the amount they claimed due, less rental payments, on the fourth semiannual payment, and demanded the restoration of the contract of purchase to them; that defendant thereupon failed, neglected, and refused to recognize the rights of said plaintiffs in and to said property under said contract, and refused to accept said money, and refused to restore to plaintiffs their rights and interest in said property under the contract.

Plaintiffs further allege that thereafter they made further tender of the succeeding semiannual payments, which were by the defendants refused, and that on the 6th day of April, 1922, they deposited all of said sums of money in escrow with the First National Bank of Ontario to be delivered to defendant upon the delivery to said bank of a reassignment of the original contract of purchase. The defendant denies that he made any such proposition to plaintiffs, and denied that he ever agreed to reconvey the property or reassign the contract to plaintiffs. The record discloses that there was no written agreement on the part of the defendant to reconvey the property nor to reassign the contract, and it is an admitted fact that no such writing was ever made by the defendant or ever existed.

The findings of the court are in favor of the defendant, and, in so far as material to this issue, are substantially as follows: The court found that it is not true that the defendant, prior to the delivery of said deed last aforesaid or at any time, proposed to said plaintiffs or any one else that, if they would execute a quitclaim deed conveying all their right, title, and interest in and to the land described in the complaint, and would thereafter within six months pay to the defendant the sum of \$881.25 due on October 6, 1921, together with an additional 1 per cent. interest thereon, and would pay the sum of \$52 rent for the stores located on said lot during the period of said extension, he, the defendant, would restore said contract, and would

restore plaintiffs to all of their right, title, and interest in and to said property; that no such proposition was ever made by said defendant to said plaintiffs at any time; that said quitclaim deed and said assignment were executed and delivered to defendant by plaintiffs for the consideration that said plaintiffs would then and there be released from all further obligation imposed on them by the provisions of said contract of purchase and sale; that the plaintiffs nor either of them paid to said defendant \$52 rental for the month of October, 1921, and each succeeding month up to October, 1922, or any other sum as rental of said real property, except the sum of \$12 per month for the months aforementioned, which was paid by plaintiffs to defendant as rental of one building situated on said premises and occupied by said plaintiff; that it is not true that the plaintiffs deposited in the First National Bank of Ontario any sum of money or any money at all to be delivered to the defendant when the latter should deliver to said bank a reassignment of said contract, and it is not true that the said plaintiffs or either of them deposited in said bank or any bank, or any other place, any money to be delivered to said defendant; that the plaintiffs were in default in the performance of the agreements and conditions set forth in said contract; that they failed to keep said property insured, and failed to pay the taxes thereon, and were unable to meet the payments provided for in said contract.

[1,2] Notwithstanding the statement of facts as above set forth, contained in the findings of the court, it is the plaintiffs' contention, first, that there was no consideration for the quitclaim deed and the assignment of the contract, and, second, that a trust is created in their favor by implication of law—neither of which positions can be sustained. There was evidence to support every finding made by the court. It is true that the testimony is conflicting, but it is not the province or the disposition of this court to attempt to reconcile divergent statements or to draw therefrom conclusions at variance with those reached by the trial judge. He saw and heard the witnesses, and should be able to determine the truth. One circumstance relied upon by plaintiffs to discredit the testimony given by the defendant upon which the findings of the court are based may be worthy of comment. In the early stages of the negotiations between the parties, and prior to the signing of the quitclaim deed and assignment, at the time when the plaintiffs informed the defendant that they would be unable to make the October payment and requested an extension, the defendant intimated that he would entertain such a proposition, but before any papers were signed he testified that one of the plaintiffs, who at the time were in financial difficulties, and had made an assignment for the benefit of their creditors to the Los Angeles Board of Trade, came to him, and

said that he had been advised by an attorney that they could enter into no binding agreement with reference to his retaining any interest in the property. This, of course, could have but one meaning—that no agreement could be made that would preserve the property for plaintiffs in derogation of the rights of their creditors. In response to this request defendant testified that he stated that there would be no agreement, and that there was no agreement, and that that was the status of the situation when the papers were actually signed. There was ample consideration for the signing of the papers, as set out in the findings of the court, if consideration other than that implied by law may be deemed to be necessary.

[3] The law of the case is clearly expressed, not only in Code section, but by all the text-writers and numerous decisions of the Supreme Court of this state. In the case of *Tillaux v. Tillaux*, 115 Cal. 668, 47 P. 691, the Supreme Court says:

"A deed by the owner of land duly signed and acknowledged by him and delivered to the grantee, conveying the land to the latter in fee simple, is one of the most solemn of civil acts. It is not a thing to be played with, or reclaimed at pleasure, as a hawk in falconry. It is not void on account of either want or failure of consideration; nor does want or failure of consideration raise a resulting trust. Leading authorities declaring this principle are cited in the opinion of the Supreme Court of Michigan in *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266. The court, among other things, say: 'A voluntary deed, which purports to be for the beneficial use of the grantee, and which was made deliberately and without mistake or contrivance, does not differ from any other deed in binding the grantor, and can only be attacked by those having superior equities which the grantor had no right to cut off—as creditors and the like. * * * This doctrine of resulting trusts has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these.' * * * 'A court of chancery has never ventured, against the expressed will of the donor appearing on the face of the deed, "to take the use from the donee, and give it back to the donor."' In *Devlin on Deeds*, section 1189, the author says: 'It is now settled law that a trust does not result to the grantor merely because there was no consideration for the conveyance'—citing a number of authorities.

And the same author says (section 834):

"But parol declarations cannot be received with this object, for these cases there exists no resulting or presumptive trust, and the admission of such evidence would be for the purpose of contradicting the written instrument, and establishing a trust in the very teeth of the statute of frauds."

In the case last above cited, an action between husband and wife, the element of confidential relationship was involved, which is absent from the instant case. It may be also said in passing that there is no allegation of

fraud, which on the record disclosed would appear to be a necessary element to successfully attack the deed and assignment disclosed by this litigation.

In the case of *Feeney v. Howard*, 79 Cal. 525, at page 528, 21 P. 984, 985 (4 L. R. A. 826, 12 Am. St. Rep. 162) the Supreme Court says:

"The counsel for the defendant is in error when he contends that the case presents features of actual or constructive fraud. No actual fraud was alleged. A material ingredient of actual fraud is the fraudulent intent, and this must be alleged as one of the facts constituting the fraud. * * * No actual fraud is alleged, found, or shown by the evidence. For all that appears to the contrary, Michael Feeney's deed may have been given and received in entire good faith. The mere failure to perform a parol agreement which was made in good faith is not fraud."

Plaintiffs in their brief have cited innumerable authorities with no effort on their part to distinguish them or to apply them to the facts of the case. Their entire argument is predicated upon a state of facts that does not exist. They have assumed from the beginning that a contract was entered into which had no existence in fact and is contrary to the express findings and conclusions of the court. The inevitable result of this is that the authorities cited have no application whatever to the issue to be determined.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

84 Cal. App. 99

PEOPLE v. STOLL. (Cr. 1484.)

District Court of Appeal, Second District, Division 2, California. June 20, 1927.

1. Incest § 13—Generally, proof of girl's pregnancy is competent to establish corpus delicti.

In prosecution for incest, evidence to effect that girl was pregnant is generally competent and relevant to establish corpus delicti.

2. Criminal law § 563—Evidence tending to prove corpus delicti need not connect defendant with offense.

Evidence to sustain corpus delicti need not even tend to connect defendant with commission of the offense.

3. Criminal law § 696(3) — Incest § 14 — Pregnancy at time not corresponding to alleged incest did not establish corpus delicti, and evidence should have been stricken.

Where, in prosecution for incest, testimony relative to girl's pregnancy established that intercourse could not have occurred so as to correspond with time and place of commission of alleged offense, it cannot be said that such fact tended to prove corpus delicti, and motion to strike should have been granted, or jury directed to disregard such evidence.

4. Criminal law § 1169(8)—Admitting evidence of girl's pregnancy at time not coinciding with her version of time and place of alleged offense held harmless.

In prosecution for incest, admitting evidence of girl's pregnancy at such time that it did not coincide with her version of time and place of alleged offense held harmless, in that such testimony was clearly in defendant's favor as suggesting some one other than defendant had intercourse with prosecuting witness, thus furnishing possible motive for unfounded charge.

5. Criminal law § 507(7)—Fourteen year old prosecuting witness in prosecution for incest held not accomplice (Pen. Code, §§ 26, 261, subd. 1, and § 285).

Fourteen year old prosecuting witness in a prosecution for incest held not an accomplice, in view of Pen. Code, § 261, subd. 1, providing age of 18 years at which unmarried female can consent to such act, notwithstanding that under section 26 those over 14 years are capable of committing crime, and that under section 285 no exception is made as to children over 14 committing fornication with person within degree of consanguinity making marriage incestuous.

Appeal from Superior Court, San Diego County; Edwin P. Hahn, Judge.

Lewis M. Stoll was convicted of incest, and he appeals. Affirmed.

A. T. Johnson, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

CRAIG, J. The appellant was accused by information of the crime of rape and incest. During the trial, on motion of the district attorney, the charge of rape was dismissed. The defendant was found guilty of the crime of incest. This appeal is taken from the judgment and the order denying his motion for a new trial.

The only points argued by the appellant in his brief are that the court erred in refusing to give an instruction to the jury that the complaining witness was an accomplice, and that it was error to admit evidence showing her pregnancy.

[1-4] It appears that the prosecutrix is the daughter of the defendant, and was between 14 and 15 years of age at the time the act constituting the crime was charged to have been committed. The district attorney on direct examination drew from a physician that the prosecuting witness was pregnant on the 5th day of October, 1926. On cross-examination this witness testified that the pregnancy was only 6 to 8 weeks advanced. The case was tried on November 17, 1926. The information alleged that the act of incest occurred on or about April 10, 1926. Appellant argues that it is obvious that, if the girl was pregnant, this cannot be charged to the de-

fendant, and that his motion to strike this evidence should have been granted. That proof of this character is generally competent and relevant and admissible cannot be doubted. Its purpose is to establish the corpus delicti of the charge. *People v. Soto*, 11 Cal. App. 431, 105 P. 420. In this connection it must be remembered that evidence which tends to prove the corpus delicti need not even tend to connect the defendant with the commission of the offense. *People v. Tarbox*, 115 Cal. 57, 46 P. 896. Hence this evidence was properly received. However, since from the testimony of the physician on cross-examination it was established that the intercourse resulting in the pregnancy of the prosecuting witness could not have so occurred as to coincide with the latter's version of the time and place of the commission of the alleged offense, it cannot be said that the fact of her pregnancy tended to prove the corpus delicti of the crime charged. The court should have granted the motion to strike or have directed the jury to disregard this evidence. 16 Cor. Jur. p. 897, § 2203, 2; *Dossett v. State*, 19 Ala. App. 496, 98 So. 359; *Beaudette v. Gagne*, 87 Me. 534, 33 A. 23. However, we have no hesitation in holding that in this instance the error neither injuriously affected the rights of the defendant nor prejudiced him in the minds of the jury. In fact, it would appear that this testimony was clearly in his favor, strongly suggesting that some one other than the defendant had had intercourse with the prosecuting witness, thus furnishing a possible motive for an unfounded charge.

[5] The prosecuting witness was not an accomplice. Both appellant and respondent rely upon *People v. Stratton*, 141 Cal. 604, 75 P. 166. In that case, referring to the crime of incest, it is said, at page 609 (75 P. 168):

"If the prosecutrix, being of the legal age of consent, consents to the incestuous intercourse, unquestionably she is particeps criminis, and her testimony, like that of any other accomplice, uncorroborated, is insufficient to uphold a conviction. *Schoenfeldt v. State*, 30 Tex. App. 695 [18 S. W. 640]. But if, upon the other hand, she is the victim of force, or fraud, or undue influence, or is too young to be able to give legal assent, so that she does not willfully and willingly join in the incestuous act, she cannot be regarded as an accomplice. *Porath v. State*, 90 Wis. 527 [63 N. W. 1061] 48 Am. St. Rep. 954."

Of course, the incestuous act referred to is an act of sexual intercourse. The age at which an unmarried female is able to give legal assent to such an act is 18 years. Pen. Code, § 261, subd. 1. Appellant insists that, since under section 26 of the Penal Code those over 14 years of age are capable of committing crime, and that under section 285 no exception is made of children above the age of 14 years, a girl under 18 and over 14 who com-

mits fornication with a person within the degrees of consanguinity within which marriage is declared by law to be incestuous is guilty of incest, and therefore would be an accomplice in a case wherein the other party to the act was a defendant. This argument overlooks the fact that, if the female is the victim, and has not willfully and willingly joined in the act, she is not an accomplice, and that under our statutes, being under the age of legal consent to such an act, regardless of her actual assent thereto, she cannot be said as a matter of law to have willfully and willingly joined in the intercourse.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

84 Cal. App. 211 URTON v. OUSDAL. (Civ. 4807.)

District Court of Appeal, Second District, Division 1, California. June 28, 1927.

1. Appeal and error §1011(1)—Findings on conflicting evidence are conclusive on appeal.

Findings on conflicting evidence are conclusive on appeal, since appellate court cannot rule on question of preponderance of evidence, but is bound if any evidence supports findings of trial court.

2. Trial §28(2)—Whether court should view premises in action on construction contract is within its discretion.

In action on construction contract and for extra work, whether court should view premises is question entirely within its discretion.

3. Appeal and error §690(5)—In action on construction contract, exclusion of chemist's testimony of analysis of concrete to show proportion of cement held not shown to be error, in view of unsatisfactory record.

In action on construction contract and for extra work, exclusion of chemist's testimony as to result of analysis of concrete used to ascertain proportion of cement held not shown to be error, in view of unsatisfactory condition of record which did not show what portion of cement was analyzed and from what portion of structure it was removed.

4. Appeal and error §989—Reviewing court will consider entire evidence in determining whether there was error in findings.

In determining whether trial court erred in making findings, reviewing court will consider entire evidence, not limiting itself to portions referred to in appellant's brief.

Appeal from Superior Court, Santa Barbara County; S. E. Crow Judge.

Action by Charles M. Urton against Asbjorn P. Ousdal for a balance claimed to be due under a contract and for extra work. Judgment for plaintiff, and defendant appeals. Affirmed.

S. J. Bingham, of Santa Barbara, for appellant.

Mygatt & Crawford and Wm. G. Griffith, all of Santa Barbara, for respondent.

YORK, J. This is an action brought by plaintiff to recover a balance claimed to be due on a contract and for extra work. Plaintiff alleges the contract and specifications for the work in his complaint, and alleges performance of the same. Defendant admits the contract, but denies that the work was performed according to the terms of the contract and the specifications, and by cross-complaint alleges that different material was substituted for those called for in the specifications. Judgment was rendered for plaintiff, and defendant on this appeal urges three grounds for reversal.

"First. That the plaintiff admitted the substitution of poorer and cheaper materials in his contract for the foundation of the house he contracted to build, and that he showed no valid reason for said substitution.

"That the evidence shows conclusively that said poorer and cheaper materials were used, but notwithstanding the court found that said substitutions were not made.

"Second. That the court ruled erroneously in refusing to view the premises and in refusing to allow defendants to show the proportion of cement used in said concrete.

"Third. That the judgment and findings of an open book account and an account stated were based upon the erroneous rulings of the trial court."

[1] As to the first ground raised by appellant, an examination of the transcript discloses the fact that there was conflict in the evidence as to whether admission was made or not as to such substitution, and the court upon evidence found that poorer and cheaper materials were not substituted. We cannot, of course, rule on the question of preponderance of evidence. If there is any evidence to support the findings of the trial court, we are bound thereby.

[2, 3] As to the second ground of appeal, or really two grounds designated by appellant as his second ground, we hold that the question as to whether the court should or should not view the premises is one entirely within the discretion of the trial court. If the appellant was prejudiced or surprised by the failure of the court to view the premises after stating that he intended to do so, he had sufficient opportunity to supply any deficiency in the evidence that he might have allowed to exist by reason of his belief that the court was going to make such inspection. The record does not disclose any attempt on the part of appellant to introduce further evidence when the court stated that he did not make such personal inspection. As to the latter part of the second point made by appellant, the record is not in a very satis-

factory condition. Just as to what part or portion of the cement had been analyzed by the chemist, and exactly from what portion of the structure the same was removed, was not very clearly in evidence. Therefore we cannot disturb the rule of the trial court in excluding the chemist's testimony as to the result of his analysis. As to whether the chemist tested a portion or sample of the entire concrete body, including gravel, or whether he tested only the mixture of cement and sand which was binding the gravel together, or a pocket of gravel *only*, is not clearly in evidence.

[4] As to the third point, the evidence is in a somewhat chaotic state, and, taking the portions referred to in the brief of appellant alone, it would be hard to determine how the trial court could have found on the open book account and an account stated, as the record discloses he did find. But, of course, the entire record is what the court had before it, and a perusal of the entire evidence discloses the fact that there was sufficient evidence in the record upon which the court could make its findings. As to any other charges of error that are made, they are charged by appellant in his brief in such general terms that, other than the matters hereinbefore referred to, we have nothing called to our attention which we feel called upon to discuss.

The judgment of the trial court is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

84 Cal. App. 24

Ex parte SHAW. (Cr. 1413.)

District Court of Appeal, First District, Division 1, California. June 16, 1927.

Habeas corpus §41—Court may not interfere by habeas corpus with exercise by another court of jurisdiction previously acquired in habeas corpus proceeding.

Court has no jurisdiction to interfere by habeas corpus with exercise by another court of jurisdiction which it previously acquired in habeas corpus proceeding, unless prior jurisdiction of other court has been terminated.

Application by George K. Shaw for writ of habeas corpus. Application denied.

J. A. Tracy, of San Francisco, for petitioner.

PER CURIAM. Petition for habeas corpus. It appears affirmatively from the petition that the applicant has heretofore applied to the superior court of the city and county of San Francisco for a writ of habeas corpus and that this proceeding is still pending and undetermined. It is a general rule of wide application that a court is without jurisdic-

tion where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired in a habeas corpus proceeding, unless the prior jurisdiction has been terminated.

The application is denied.

84 Cal. App. 153

Ex parte SHAW. (Cr. 1415.)

District Court of Appeal, First District, Division 1, California. June 24, 1927.

Habeas corpus ¶30(2)—Habeas corpus will not issue to secure release from custody of one held under warrant based on information containing evidence of guilt.

Where information contains positive evidence of facts tending to show guilt and is sufficient to support warrant, person arrested and held in custody by virtue of such warrant is not entitled to writ of habeas corpus for his release.

Application by George K. Shaw for a writ of habeas corpus, prayed to be directed to the Chief of Police of the City and County of San Francisco to secure petitioner's release from custody, in which he is held for extradition. Writ denied.

J. A. Tracy, of San Francisco, for petitioner.

Edward M. Leonard, Asst. Dist. Atty., of San Francisco, for respondent.

TYLER, P. J. Habeas corpus. Petitioner alleges that he is imprisoned by the acting chief of police of the city and county of San Francisco without authority or warrant. It appears from the return that petitioner is detained in custody under and by virtue of a warrant of arrest issued out of the police court of the city and county of San Francisco, which warrant is annexed to such return. It also appears that the warrant was issued upon the complaint of one George Richards charging petitioner under two counts with the crime of felony, to wit, grand larceny, committed in the state of Washington, and with being a fugitive from justice. Certified copies of the original information filed in the superior court of the county of Pierce, state of Washington, and the warrant of arrest, are also attached to the return. At the hearing it was contended that the warrant was issued without any evidence tending to show the guilt of petitioner. There is no merit in the contention. The information contains positive evidence of facts tending to show guilt, and it is sufficient to support a warrant. *Ex parte Dimmig*, 74 Cal. 164, 15 P. 619. Such being the case, the writ is discharged and the prisoner remanded to the custody of respondent as acting chief of police to be held by him under the authority of the warrant until such charge shall be

heard in the manner provided by law, or until he shall be legally delivered unto the custody of the agent of the state of Washington.

We concur: KNIGHT, J.; CASHIN, J.

84 Cal. App. 130

BENNETT v. NORTHWESTERN NAT. INS. CO. (Civ. 5383.)

District Court of Appeal, First District, Division 1, California. June 23, 1927.

1. Evidence ¶413—Parol evidence held admissible to explain transaction by which insured obtained loan and signed purported contract for sale to him of automobile, in action on fire and theft policy not covering car if incumbered (Code Civ. Proc. § 1856).

In action on policy of insurance covering automobile against fire or theft, and providing company should not be liable if property was incumbered by lien or mortgage, parol evidence of parties held admissible to explain transaction by which insured secured loan and signed document purporting to be contract for sale to him of automobile, withholding title in seller, under Code Civ. Proc. § 1856, where document was apparently unsigned by party named as seller.

2. Contracts ¶14—Law does not make contract, where party intended none.

Where parties did not intend to enter into contract, contract will not be implied by law.

3. Insurance ¶550—Statement in proof of loss that automobile was subject to lease contract held not to estop insured from showing legal effect of transaction under policy providing against incumbrance.

In action on fire and theft policy covering automobile, statement of insured in proof of loss that automobile was subject to lease contract held not to estop insured from showing legal effect of transaction referred to under policy which prevented recovery in case of lien or mortgage on car.

4. Insurance ¶668(5)—Question whether insured borrowing money and, signing, as buyer, purported conditional sale contract, created lien on car preventing recovery on fire and theft policy, held question of fact.

In action on policy of fire and theft insurance covering automobile, to which defense was that automobile was incumbered by lien or mortgage preventing recovery under terms of policy, evidence as to whether purported conditional sale contract, signed by insured as buyer on obtaining loan, constituted lien or mortgage, held issue of fact for trial court, where contract was apparently unsigned by person named as seller.

5. Insurance ¶268—Affirmative warranty is condition precedent, breach of which avoids policy (Civ. Code, §§ 2611, 2612).

Affirmative warranty is in nature of condition precedent to validity of policy, which, if broken, prevents policy from attaching to risk which it purports to cover, regardless of

materiality of facts warranted, under Civ. Code, § 2612, subject to provisions of section 2611, requiring provision for avoidance of policy in case of breach of immaterial provision.

6. Insurance ⇐280—Representation that car insured was 1921 model constituted misrepresentation of material fact, avoiding policy if model was in fact that of year 1920, where higher premium rate was charged for older car (Civ. Code, §§ 2565, 2581).

Representation that model of car sought to be insured against fire and theft was of year 1921, if in fact car was 1920 model, constituted misrepresentation of fact material to risk, which would avoid policy, as affecting rate of premium or influencing accepting or rejecting of risk, under Civ. Code, §§ 2565, 2581, where higher premium rate was charged for 1920 models than for models of 1921.

7. Evidence ⇐265(2)—Statements of insured in certificate of registration as to year of model of automobile insured held not conclusive in action on policy.

In action on policy of fire and theft insurance, in which defense was that car was falsely represented as 1921 model, instead of 1920 model, statements contained in certificate of registration, signed by insured, though admissible in evidence, held not conclusive as to year of model of automobile.

8. Appeal and error ⇐994(3), 996, 1012(1)—Credibility of witnesses, weight of testimony, and inferences are for trial court sitting as jury (Code Civ. Proc. § 1847).

Credibility of witnesses, weight to be given witnesses' testimony, and inference to be drawn from conflicting statements, are questions for trial court, under Code Civ. Proc. § 1847, where trial court sits as jury.

9. Evidence ⇐96(1)—Defendant has burden of proof on issue presented as affirmative defense (Code Civ. Proc. § 1981).

Defendant has burden of proving issue presented as affirmative defense by preponderance of evidence, under Code Civ. Proc. § 1981.

10. Insurance ⇐665(3)—Finding that model of car insured was not misrepresented held not against evidence in action on fire and theft policy.

In action on policy of fire and theft insurance covering automobile, in which defense was that model of car, represented as being for year 1921, was in fact that of year 1920, finding of court that model was not in fact misrepresented, so as to avoid policy, held not against evidence.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by W. F. Bennett against the Northwestern National Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Orwitz and Frank J. Fontes, both of San Francisco, for appellant.

John Francis Neylan, J. Paul Miller, and Bartley C. Crum, all of San Francisco, for respondent.

CASHIN, J. An action to recover on a policy issued by appellant corporation upon an automobile by which respondent was insured for the term of one year against direct loss or damage caused by fire or theft. During the term of the policy the automobile was stolen and destroyed by fire, its value at the time of its destruction being in excess of the amount for which it was insured. The action was tried by the court, and upon its findings judgment was entered for respondent in the sum of \$1,000, the amount of the policy.

As defenses to the action it was alleged that the automobile at the time of the loss was, without the permission of the insurer, incumbered by a lien, and that at the time of the execution of the policy the insured warranted the automobile to be a 1921 model, when in fact it was a model of the year 1920. The policy contained the following clause:

"Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage to any property insured hereunder * * * while incumbered by any lien or mortgage."

The evidence shows that respondent, on or about November 5, 1923, arranged with one Turner for a loan from the latter in the sum of \$338.50, to be repaid in installments, with interest. Respondent testified that the conversation between the two as to the manner in which the loan should be evidenced was as follows:

"I asked Turner to make a regular form, a regular monthly payment, that I should pay him back that money with interest, and to make it just like he was selling an automobile; that I would sign it, which I did. * * * Turner and I were friends of long standing and I told him I wanted to pay him back. I would accept the money if he would make out a document, such as the one that was presented here, that I would pay him back each month, with interest. * * * I requested that he make a regular form, so that I would know what to pay each month."

He further testified that, after signing the writing alleged by appellant to have created a lien on the car, he was told by Turner that the money loaned had been borrowed from E. F. Hillman and should be repaid to him; that installment payments were made to Hillman, but that no transfer of the title or possession of the car was made to either Turner or Hillman, it being testified by the latter that the document was not signed by him; that he never considered respondent responsible to him for the advances made to Turner; that he had not received or seen the

document previous to the trial; and that Turner was not his agent at the time of the transaction and was not authorized to sign on his behalf.

The document in question was a printed form purporting to be a contract for the sale of the automobile by Hillman to respondent upon the payment in installments as therein provided of an amount equal to the loan. A description of the automobile and the amounts of the monthly payments were typewritten therein, and, according to the printed terms of the instrument, the title to the car was to be retained by the seller until all the payments were made, whereupon a bill of sale was to be executed to the purchaser. The original was not introduced in evidence, and, while the name of Hillman appears in the copy as the seller, it does not purport to have been signed by him or on his behalf. It appears from the testimony that on November 6, 1923, an entry was made in the records of the state motor vehicle department of a change in the legal ownership of the car from R. A. Roberts Company, the concern with which respondent had previously entered into a contract for its purchase, to E. F. Hillman; the latter in this connection testifying that the entry was not procured by him and that he was not a party to the transaction. It was further shown that on November 8, 1923, a bond was issued by the Fidelity & Deposit Company of Maryland, by its terms indemnifying Hillman against loss which might be sustained in the event of the seizure of the car by the federal authorities; it being recited therein that the car had been sold by Hillman under a conditional sale contract to respondent, and an employee of a firm of insurance brokers testified that a request for the issuance of the bond was telephoned from Hillman's office, and that the premium was remitted therefrom.

As to the latter transaction, Hillman denied that the bond was issued at his request or with his knowledge, and it was testified by his bookkeeper that she at the request of Turner procured the issuance of the bond mentioned. It further appears that a proof of loss signed by respondent contained, under the printed requirement that if, during the currency of the policy, any other person or persons had any interest, mortgage or otherwise, in the automobile, the fact should be stated, the following: "Lease contract E. F. Hillman \$300." Respondent testified that, when the proof of loss was verified and delivered to the insurer, the words and figures quoted, which, according to the testimony, are typewritten in type differing in color from the other typewritten portions of the document, did not appear therein; that on the occasion of its delivery a conversation occurred with the agent of the insurer which was as follows:

"We had a conversation about some money, a sum of money that was due Mr. Hillman. He said, 'You haven't anything in here about a mortgage or lien on the car.' I said, 'There isn't a mortgage or lien on the car.' He said, 'Well, you owe Mr. Hillman \$300.' I said, 'Yes; I do owe him \$300; I owe him a sum of money yet.' He said, 'Well, that should be put in here.' I said, 'Well, it isn't a lien or a mortgage, but, if you want to put something in, why, you can put what you want.' I said, 'If you want to put something in you can put lease contract E. F. Hillman, \$300,' and Mr. Dubinske took it to a stenographer and had her type 'Lease contract E. F. Hillman, \$300.'"

[1-4] While the acts of the parties to the lien transaction were sufficient unexplained to support the conclusion that they intended to create a lien enforceable in equity (*Hall v. Cayot*, 141 Cal. 13, 18, 74 P. 299), the circumstances were equivocal, and as between appellant and the parties thereto parol evidence was admissible to explain the transaction and show that such was not their intention (*Code Civ. Proc.*, § 1856; *Smith v. Moynihan*, 44 Cal. 53; *Dunn v. Price*, 112 Cal. 46, 44 P. 354; *Shattuck, etc., Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 P. 348; *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 183 P. 178; *Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591). The law does not make a contract when the parties intended none (*Central Bitulithic Paving Co. v. Highland Park*, 164 Mich. 223, 129 N. W. 46, Ann. Cas. 1912B, 719; *Thruston v. Thornton*, 1 Cush. [Mass.] 89), nor was the respondent estopped by the statement in the proof of loss from showing the legal effect of the transaction referred to therein (*McMaster v. Ins. Co.*, 55 N. Y. 222, 14 Am. Rep. 239). The question was thus one of fact (*Kinneberg v. Firemen's Ins. Co.*, 65 Cal. App. 107, 223 P. 81), and we cannot say that the inference drawn by the trial court from the circumstances shown and the testimony of the parties, which it believed, that it was not the intention to create a lien or other incumbrance is not reasonably supported.

The application for the insurance was made by a broker, who, so far as shown, was not a representative of the insurer, and while it was testified by respondent that, not being certain as to the model of the car, he referred the broker for information to a policy previously written thereon, which contained the same description as that in the policy issued by appellant, as was held in *Solomon v. Federal Insurance Co.*, 176 Cal. 133, 167 P. 859, the broker was the agent for respondent, who was responsible for any misrepresentation in the application. In the instant case the policy contained a warranty clause the material portions of which are as follows:

"The following are statements of facts known to and warranted by the assured to be true and this policy is issued by the company relying upon the truth thereof: * * *

"3. The following is the description of the automobile: Model year: 1921. Trade-name: Haynes. Type of body (if truck factory number state tonnage): Suburban. M 38313."

It was further provided that:

"This entire policy shall be void if the assured had concealed or misrepresented any material fact concerning this insurance or the subject thereof. * * *"

[5] Respondent contends that the statement as to the model of the car, if untrue, was not a misrepresentation of a material fact, and further that, it being incumbent on appellant to prove its falsity, this burden was not sustained, and the finding of the trial court, which was adverse to appellant's contention, cannot be disturbed. It is the general rule that an affirmative warranty is in the nature of a condition precedent to the validity of the policy, and, if broken in its inception, the policy never attaches to the risk which it purports to cover (Civ. Code, § 2612; *Roberts v. Aetna Insurance Co.*, 58 Cal. 83; *McKenzie v. Scottish Union, etc., Ins. Co.*, 112 Cal. 548, 555, 44 P. 922; *Wolverine Brass Works v. Pacific Coast Casualty Co.*, 26 Cal. App. 183, 146 P. 184) and this without regard to the materiality of the facts warranted (*McEwen v. New York Life Insurance Co.*, 42 Cal. App. 133, 183 P. 373). The extent to which the general rule is modified by the provisions of section 2611 of the Civil Code we need not consider, as it is conceded by appellant that the clause of the policy last quoted above refers to the facts affirmatively warranted.

[6] The evidence shows without contradiction that a higher premium rate was charged for insurance on 1920 models than on those of the year 1921, and in view of the rule that a misrepresentation is material which would affect the rate of premium or influence the insurer in accepting or rejecting the risk (Civ. Code, §§ 2565, 2581; 26 Cor. Jur., *Fire Insurance*, § 190, p. 155, and cases there cited; *Richards on Insurance Law*, § 99), the model of the car was a fact material to the risk, and the warranty, if untrue, would avoid the policy.

Appellant, in support of its defense that the car was a 1920 model, introduced in evi-

dence two registration certificates, signed by respondent and filed with the motor vehicle department, in which the car was so described, and it was testified by a witness called by appellant that the original writing signed by respondent to evidence the loan from Turner was shown by the latter to the witness and contained a like description. A copy of this writing which was introduced in evidence by respondent, tended, however, to contradict the testimony of this witness, as the model of the car was not stated therein. With the exception of the testimony of respondent that he never was sure as to the model of the automobile which was purchased by him as a secondhand car, the foregoing comprises the evidence on this issue.

[7, 8] The credibility of the witness and the weight to be given his testimony were questions for the trial court (Code Civ. Proc. § 1847); and while the statements contained in the certificates of registration were relevant and admissible as evidence of the fact in issue, they were not conclusive and their weight as evidence was also a matter for its determination (*Smith v. Whittier*, 95 Cal. 279, 30 P. 529; *Bush v. Barnett*, 96 Cal. 202, 31 P. 2). As the rule is stated by Chamberlayne, *The Modern Law of Evidence*, § 1390:

"The substantive or procedural law prescribes no predetermined weight for extrajudicial admissions, whether oral or in writing. It leaves the question of weight and construction of an admission, verbal or written, to the jury, entirely unaffected by specific rules as to weight."

[9] The issue was presented as an affirmative defense, which appellant had the burden of proving (Code Civ. Proc. § 1981) by a preponderance of evidence.

[10] No direct evidence as to the model of the car was adduced, and it was for the trial court to determine both the weight of the testimony and the inferences to be drawn from the conflicting statements of the respondent, and we cannot fairly hold, in view of the evidence, that the trial court was not justified in concluding that the proof was insufficient to support the allegations of the special defense.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 137

KOEPPLE v. MORRISON, Justice of the Peace. (Civ. 5392.)

District Court of Appeal, Second District, Division 2, California. June 23, 1927.

1. Mandamus ☞174—Finding that assignment of claim to disbarred attorney for collection was to evade disbarment judgment held surplusage, and will be disregarded.

In mandamus to compel justice of peace to permit disbarred attorney to prosecute action on claim assigned to him for collection, finding that claim was assigned for purpose of evading, nullifying, or escaping effect of disbarment judgment, and that petitioner was agent of assignor, *held* surplusage, and will be disregarded, where unsupported except for facts that petitioner had been disbarred and assignment was for collection only.

2. Attorney and client ☞60—Statute prohibiting disbarred attorney from prosecuting action before justice of peace on claim assigned for collection held valid (Code Civ. Proc. § 299, as amended by St. 1921, p. 100, § 4; § 300, as amended by St. 1923, p. 746).

Code Civ. Proc. § 299, as amended by St. 1921, p. 100, § 4, and section 300, as amended by St. 1923, p. 746, prohibiting disbarred attorney from appearing in propria persona in action before justice of the peace, foundation of which is claim assigned solely for purpose of collection, *held* valid.

3. Evidence ☞20(1)—It is common knowledge that collection agencies take assignments of claims for purpose of bringing action; their only interest being percentage as compensation.

It is common knowledge that collection agencies pursue policy of taking assignments of claims for purpose of bringing action; only interest of assignee being percentage as compensation for doing those things ordinarily performed by attorney at law.

4. Constitutional law ☞70(3)—Courts will not interfere with statute prohibiting disbarred attorney from bringing action in justice court on assigned claim unless unreasonable or arbitrary (Code Civ. Proc. § 299, as amended by St. 1921, p. 100, § 4; § 300, as amended by St. 1923, p. 746).

Legislature is vested with large discretionary power in determining those matters which are for protection of public, such as Code Civ. Proc. § 299, as amended by St. 1921, p. 100, § 4, and section 300, as amended by St. 1923, p. 746, prohibiting disbarred attorney appearing in justice court on assigned claim, and, unless measure is unreasonable or discretion arbitrarily exercised, courts will not interfere.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Petition for writ of mandate by S. Koepple to compel Kenneth E. Morrison, as Justice of the Peace in and for the Township of Santa Ana, Orange County, to permit the petitioner, a disbarred attorney, to prosecute an

action upon an assigned claim. From a judgment denying the writ, petitioner appeals. Affirmed.

S. Koepple in pro. per.

Bishop & Wellington, of Santa Ana, for respondent.

THOMPSON, J. The petitioner and appellant, a former member of the legal profession who was disbarred on February 24, 1925, brought an action upon a claim assigned to him for the purpose of collection only in the justices' court of Santa Ana township, where he stipulated to the fact that judgment of disbarment had been entered against him, and that the chose in action was assigned to him solely for the purpose of collection. Upon that stipulation the respondent, justice of the peace, refused to permit the petitioner to proceed with the trial and declined to hear him further. whereupon he filed a petition for the writ of mandate in the superior court. After hearing, judgment was entered denying the writ. This appeal is from that judgment.

Subsequent to the decision of *In re Hittson*, 39 Cal. App. 91, 178 P. 149, in which it was held that one who had been disbarred had the same right to practice in the justices' court as one who had not been admitted to the bar, and quite evidently in response to the suggestion therein contained that the Legislature had the undisputed right to prevent a person who had been disbarred from appearing in a justices' court, the Legislature amended sections 299 and 300 of the Code of Civil Procedure (St. 1921, p. 100, § 4; St. 1923, p. 746) so that the material portions read as follows:

Section 299:

"* * * During such suspension or disbarment the attorney shall be precluded from practicing as an attorney at law or as an attorney or agent of another in and before all courts, commissions and tribunals in the state, including justice courts, recorder's courts and police courts, and from practicing as attorney or counselor at law in any manner and from holding himself out to the public as an attorney or counselor at law."

Section 300:

"No person who has been an attorney and counselor shall, while a judgment of disbarment or suspension is in force, appear on his own behalf as plaintiff in the prosecution of any action where the subject of said action has been assigned to him subsequent to the entry of the judgment of disbarment or suspension."

[1] The appellant attacks that portion of the findings of fact which says that the claim was "assigned to the petitioner for the purpose of evading, nullifying, or escaping the effect of said judgment of disbarment," and that he "was the agent of the person who

had assigned said claim to him." He also asserts that the conclusions of law to the same effect are without justification. It must be conceded that the findings just quoted are without other support than the fact that petitioner had been disbarred previous to the assignment, and that the assignment to him was made solely for the purpose of collection. In so far as the findings go beyond this, we deem them surplusage, immaterial, and unnecessary to determine the issue presented to the court, and they may therefore be disregarded. To determine, therefore, whether the rights of petitioner have been prejudiced, our consideration of the problem must be conducted without regard to the conclusions of the court upon these facts to which the parties stipulated.

[2, 3] The question then frames itself in this manner: Has the Legislature the authority to prevent one who has been disbarred from appearing in *propria persona* in an action, the foundation of which is a claim assigned to him, solely for the purpose of collection? It is obvious, from a reading of sections 299 and 300 of the Code of Civil Procedure, heretofore quoted, that the Legislature intended to erect such a barrier, and, if such intent is consistent with constitutional guaranties (the petitioner asserts that it is not), we ought to give it effect. We do not need to concern ourselves with the right of the Legislature to prevent any person or class of persons from appearing in *propria persona* to assert or protect a right—provided there be a substantial distinction between an outright assignment of a chose in action and one for collection purposes only. That there is a marked and vital difference seems to admit of little argument. It is common knowledge that collection agencies pursue the policy of taking assignments of claims for the purpose of bringing action, and that the only interest the assignee has in the subject-matter is a percentage thereof as his compensation for doing those things ordinarily performed by an attorney at law. It is true that he holds the legal title—but it is the bare legal title. *Greig v. Riordan*, 99 Cal. 316, 33 P. 913; *Chase v. Holmes*, 19 Cal. App. 670, 127 P. 652, and *Kelley v. Hampton*, 22 Cal. App. 68, 133 P. 339. In fact, it was determined in *Chase v. Holmes*, *supra*, that the assignment for collection purposes established an agency, revocable by the principal, for the reason that the interest of the assignee to retain a percentage of the moneys collected did not vest him with a power coupled with an interest.

[4] In substance, then, the only interest

the assignee or the plaintiff could have would be the fruit of doing that which he is disbarred from doing, to wit, practicing his profession. Petitioner's reply to the last assertion is that he is in the same position as one who has never been admitted, and, since one who has not been admitted may appear in the justices' court as his own counsel upon a claim assigned to him for collection, that appellant has the same right. He argues that section 300 of the Code of Civil Procedure is unjustly discriminatory and therefore violates both the state and federal Constitutions. But the Legislature is vested with a large discretionary power in determining those matters which are for the protection of the public, and, unless the measure is unreasonable or the discretion arbitrarily exercised, the courts will not interfere. In *re Miller*, 162 Cal. 687, 693, 124 P. 427; *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 93 P. 70, 27 L. R. A. (N. S.) 260; 14 Ann. Cas. 1080, and *In re Barmore*, 174 Cal. 236, 163 P. 50, L. R. A. 1917D, 688. It is also a well-recognized principle of constitutional law that there is no unjust discrimination wherever there is a proper classification, and every one who stands in the same relation and under the same circumstances and conditions is treated in the same manner. In *re Finley*, 1 Cal. App. 198, 81 P. 1041. It cannot be doubted that the Legislature would have the right to say that any person convicted of a criminal offense involving moral turpitude should not be permitted to appear in the justices' court as his own counsel upon a claim assigned to him for the purpose of collection. That such would be a proper classification cannot be denied. The causes for the removal or disbarment of an attorney at law are similarly of such a character as outlined in section 287 of the Code of Civil Procedure as to warrant the Legislature in classifying all of those who have been removed for any of the causes therein mentioned into a special class. There is a great distinction between a man who has proven himself unfit to practice law by the commission of any of the acts denounced by that section and a man who has not proven himself fit for admission. In the first case, the Legislature may properly say as it has, that the public, and in particular those who may desire to assign claims for the purposes of collection, are entitled to the protection of not having them in the hands of those who have proven themselves unfit for the trust.

Judgment affirmed.

We concur: CRAIG, Presiding Justice, pro tem.; MURPHEY, Justice, pro tem.

84 Cal. App. 58

PEOPLE v. PIAZZA. (Cr. 966.)★

District Court of Appeal, Third District, California. June 18, 1927.

Hearing Denied by Supreme Court Aug. 15, 1927.

1. Homicide §250—Evidence held to support conviction for manslaughter.

Evidence held sufficient to support conviction for manslaughter, where defendant killed brother during fight following difficulty over ownership of wine tanks and through enmity arising in settlement of father's estate.

2. Homicide §282—Defendant's guilt of murder or included offense is for jury on conflicting evidence.

In prosecution for murder, it is jury's province to resolve all conflicts in evidence, and on entire evidence determine whether defendant was guilty of murder or any other offense embraced within such crime.

3. Witnesses §37(4)—Witness, who has never heard defendant's reputation for peace and quiet in community discussed, may state that such reputation is good.

Where witness in prosecution for murder declares he has never heard discussed, nor himself discussed, general reputation of defendant for peace and quietude in community in which both reside, it is competent for such witness to conclude from such fact and testify that such general reputation is good.

4. Criminal law §170(1)—Refusal to allow witness to state that defendant's general reputation for peace and quiet was good, though error, held harmless, in view of court's remarks.

Refusal to allow witness, who had never heard defendant's reputation for peace and quiet in community discussed, to state that his general reputation for peace and quiet was good, though error, held harmless, in view of court's remarks that such statement afforded inference which jury can draw that defendant bore good reputation.

5. Criminal law §1044—Admission of testimony of defendant's character witness held not error prejudicial to defendant, where such witness had never discussed defendant's general reputation, but state made no motion to strike testimony.

There was no error prejudicial to defendant in admitting testimony of his character witness, where such witness stated on cross-examination that he had never discussed defendant's general reputation, but no motion was made by district attorney to strike out his testimony.

6. Criminal law §834(1)—Modification of instruction held not error, where part omitted was but repetition of preceding language.

In prosecution for homicide, modification of instruction that good character of defendant is fact in case in aid of presumption of innocence, and is not to be laid out of view by jury, held not error, where part omitted was in effect but repetition of preceding language.

7. Criminal law §1137(3)—Defendant's counsel, having requested certain instruction, cannot complain because it is given.

In prosecution for homicide, defendant's counsel having asked court to include certain instruction in charge to jury, cannot complain because it was given, even if erroneous in that it was not proper under evidence.

8. Criminal law §776(3)—Evidence held to justify instruction in prosecution for homicide that good character was fact of case not to be laid out of view by jury.

In prosecution for homicide, instruction that defendant's good character is fact of case aiding presumption of innocence, and is not to be laid out of view by jury, held justified under evidence that defendant's general reputation for peace and quiet was good, and that the witnesses had never heard such reputation discussed.

9. Criminal law §723(5)—District attorney's argument relative to Italian race held not prejudicial, where state's witnesses as well as defendant were Italians.

In prosecution of Italian for murder, in which deceased and state's witnesses were also Italians, district attorney's argument relating to Italian race held not prejudicial to defendant.

10. Criminal law §723(5)—There is no justification for district attorney's assault in argument on any civilized race of people as a class.

There is no justification, in prosecution for murder, for general assault on any civilized race of people as a class, in district attorney's argument.

11. Criminal law §719(1)—District attorney may present any theory of case fairly within evidence, and is allowed considerable latitude in presenting cause to jury.

In prosecution for murder, district attorney is entitled to present any theory of case fairly within or deducible from evidence, and he is accorded considerable latitude in presenting case to jury.

12. Criminal law §726—District attorney's argument, relative to note which caused enmity between defendant and deceased, held not prejudicial to defendant, who had invited such discussion in murder case.

In prosecution for murder, in which enmity between defendant and deceased was partially caused by note held by deceased, argument of district attorney relative to such note held not prejudicial to defendant, in view of fact that defendant himself had invited full discussion of merits of controversy concerning note.

13. Homicide §166(3)—In murder case, district attorney was properly permitted to prove that beginning of hostile feeling between defendant and deceased was controversy over note.

In prosecution for murder, district attorney was properly permitted to prove that beginning of hostile feeling between defendant and deceased was controversy over certain note, and that defendant had threatened personal vio-

lence to deceased unless deceased delivered note to their mother.

14. Criminal law §1186(4)—District attorney's argument as to absence of testimony corroborating one of defendant's witnesses, though constituting gross misconduct, held harmless, in view of conclusive evidence of guilt (Const. art. 6, § 4½).

In prosecution for murder, district attorney's argument as to absence of testimony corroborating one of defendant's witnesses, though constituting gross misconduct, held not prejudicial, in view of Const. art. 6, § 4½, and conclusive evidence of guilt.

15. Criminal law §1186(4)—Error in criminal case is not reversible, unless it in fact worked injury (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, where error is shown in criminal case, it is duty of reviewing court to examine evidence and ascertain whether error did, in fact, work injury, and mere fact of error does not make out prima facie case for reversal.

16. Criminal law §304(2)—As matter of common notoriety, it is known that juries are alert to catch intimation from judge of his opinion of merits.

As matter of common notoriety and common sense, it is known that juries are ever alert to catch from judge some intimation that will give them cue as to what judge thinks of merits of case, and will readily accept court's suggestion or ruling affirming materiality and relevancy of evidence offered.

17. Criminal law §855(7)—It is improper for jury foreman, after retiring, to talk to sheriff about penalty for different offenses within crime of murder charged.

In prosecution for murder, it is improper for foreman of jury, after retiring, to talk to sheriff about penalty for different offenses within crime charged, since he should send word to court for such information.

18. Homicide §282½—In murder case, jury is not concerned with penalties except for first degree murder.

In prosecution for murder, jury have no concern as to matter of penalties, except that, in case of murder in first degree, matter of punishment, whether death or life imprisonment, rests in their discretion.

19. Criminal law §1174(5)—Action of jury foreman in talking to sheriff about penalty for different offenses within crime of murder charged, though improper, held harmless, where defendant was found guilty of lowest offense.

Action of jury foreman in prosecution for murder, in talking to sheriff about penalty for different offenses, though improper, held harmless, where defendant was found guilty of manslaughter, which is lowest, so far as punishment is concerned, of three offenses embraced within crime charged.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Pete Piazza was convicted of manslaughter, and he appeals. Affirmed.

R. M. Rankin, of Willows, and Ezra Cox, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by indictment found and returned by the grand jury of Glenn county with the crime of murder and upon a trial before a petit jury in the superior court of said county was found guilty of the crime of manslaughter. He appeals from the judgment of conviction and the order denying his motion for a new trial, and in support thereof urges the validity of the following assignments: (1) That the verdict is not supported by the evidence; (2) that the court erred in certain of its rulings relative to the evidence; (3) that a certain instruction, proposed by the defendant, as given, was so modified as to render it an incomplete statement of the rule sought to be declared therein; (4) that the district attorney, in his argument to the jury, was guilty of misconduct, the necessary effect of which was to prejudice seriously the accused in the minds of the jury; (5) that the foreman of the jury that tried the defendant was guilty of prejudicial misconduct.

Preliminarily, and as conducive to an orderly presentation and understanding of the immediate circumstances attending the act of killing, it is proper to explain certain transactions of a business nature affecting the deceased, and the defendant, and particularly their father and mother, the facts in relation to which were developed and shown at the trial. Ignazio Piazza, the deceased, the defendant, and one Tony Piazza, a witness in the case, were brothers. The deceased, by the parents of the brothers and also acquaintances, was known and commonly addressed and referred to as "Charley"; the defendant was likewise known as "Pete." By these names they will at times be referred to herein. The brothers were farmers and grapegrowers on small farms situated in near proximity to the town of Orland, Glenn county, and had been for some six or seven years up to the time that the homicide occurred. Charley lived on his own farm with his family, and Pete and Tony and their respective families lived together and in the same house on a farm not far distant from that of the deceased. Whether the farm was owned severally by defendant or jointly by him and Tony the record does not disclose. It was, however, owned by one or the other or both. About six years prior to the date of the homicide, Pete (so he claimed) caused to be shipped from the city of San Francisco three wine or grape juice tanks (as

they are referred to by the witnesses) to the premises of the deceased. These tanks were placed in the deceased's barn and remained there until the date of the killing. The three brothers owned jointly a grape crusher; the brothers rotating in the use thereof in such a way as to cause no inconvenience to any of the three. The father of the three brothers, Guiseppe Piazza, and their mother, Mrs. Marian Piazza, resided in the city of San Francisco. It appears that in the month of April, 1926, the deceased was in San Francisco visiting with his parents, and that at that time a cousin of his, also named Tony Piazza, applied to the father for a loan of \$1,000, saying that he needed the money in order to carry on his "grape business." Deceased entered into conversation with his father about his affairs, and in the course thereof the old gentleman stated that he proposed to give his house and lot in San Francisco to his sons Pete and Tony. Charley then asked him how he was going to provide for him. The father stated that he would let the cousin, Tony Piazza, have the \$1,000, and that he could make out the note in the name of deceased. This was agreed to, and all three went to the bank, and the old gentleman drew \$1,000 therefrom and delivered it to said Tony. The latter signed a note for the amount; it having been prepared by one of the officers of the bank by direction of the father, and the deceased was made the payee thereof. Deceased got possession of the note and gave it to his wife to preserve, and she held it until the time of the homicide.

1. The homicide occurred on the 2d day of October, 1926, between 2 and 3 o'clock p. m., in the barn of the deceased. Other than the defendant, S. D. Koons was the only witness to the homicide. Koons was a farmer living near Orland and not far distant from the ranch of the deceased. He testified that on the day of the homicide he went to the premises of the deceased for the purpose of having some grapes crushed. The crusher, it seems, had two or three days previously been taken away from the premises of the deceased to the farm of the defendant. The deceased, however, having use for a crusher on the day named, leased one from a neighbor, and this was used for the crushing of the grapes of Koons. While the deceased and Koons were engaged in doing the crushing, the defendant made his appearance in the barn, having gone to the deceased's farm in a Ford auto truck. On entering the barn, he stepped up to his brother and a brief conversation was held between them. The deceased asked the defendant why he did not return the crusher, and the latter replied that he had been pitching hay in the daytime and irrigating at night, that he was tired and his brother (Tony) was sick and he could not help load it, and defendant further said:

"I expected you to come and help me load it." The defendant then went to the crusher and engaged in conversation with Koons about the crushing of the grapes. He took hold of the handle of the machine and proceeded to operate it and thus continued to crush the grapes for a few minutes. He thereupon left the barn, but within a short space of time returned and walked over to the pile of staves which he claimed to have left there six years prior thereto and picked up one. The deceased, observing this act of the defendant, addressed the latter, saying, "You must not take those staves." And the defendant thereupon threw with much force the stave at the deceased, who dodged it, and escaped being struck. The deceased then was standing near a table between eight and ten feet from where the pile of staves lay and the defendant stood and hurled the stave at deceased. The deceased started in the direction of where the defendant was, and they immediately engaged in a personal encounter. Koons watched them for some time while they were fighting and until they fell to the ground. He testified that they fought and rolled one another over for some time, and then he turned and started toward the crusher with his back to them. Almost instantly, upon this movement by Koons, a pistol shot rang out, and he hurriedly went to where the brothers were fighting. The defendant was on top of the deceased, holding a smoking revolver in his hand, and pointing it toward the body of the deceased. Koons grabbed him by the wrist and said, "Give me that gun;" and he refused, saying, "No; I won't give you my gun." Koons said, "Well, put it in your pocket;" and thereupon he put it in his pocket. Koons then ordered him to get off of the deceased, and he did so, but stood and held his left foot over deceased. Koons, noticing blood flowing from the face of the deceased, lifted his head and asked him if he had been shot in the head. The deceased replied, placing his hand on his left breast: "No, no; he shot me here; he shot me here." Within a brief period the wife of the deceased, Josephine Piazza, having heard the noise of the shot from her house, which was situated near the barn, rushed to the barn, and, seeing her husband lying upon the ground and bleeding, addressed the defendant, saying, "You shot my husband, your brother." The defendant answered, "Yes; I will shoot you, too;" and he thereupon drew his pistol from his pocket, and she turned and ran around a milkhouse and back of and into the chicken house. He then left the barn with the pistol still in his hand and went to where his automobile was parked. Koons followed him and "told him to get into the machine and get away; there had been trouble enough. He put the gun in his pocket," continued Koons, "and climbed into the machine, and

then, after he got in his machine, he took it (the pistol) out of his pocket and stuck it down behind the cushion." Koons further testified that the defendant, after passing through the gate leading into the premises of the deceased, he (defendant) turned his machine so that it faced the gate, and there parked it.

Josephine Piazza, wife of the deceased, testified: That she saw from her house the defendant enter the gate surrounding the premises and go into the barn. That a short time thereafter she heard a pistol shot, the noise of which seemed to come from the direction of the barn. That she asked her mother, who was living with her, if she had heard the shot, to which the mother replied, "Yes; it sounded in the barn." She then asked her daughter Marian if she heard the shot, and she replied in the negative. She testified: That Marian, her daughter, immediately ran toward the barn, and she, (the witness) followed her, and when they got to a gate near the big barn door facing their house, and, as the witness was in the act of going into the barn, she saw the defendant, and said to him, "Did you shoot Charley?" He said, "Yes; you son of a b——, I will shoot you, too." That she thereupon ran back of her house and then toward the chicken house. That after she got into the chicken house she looked through a "little window" and saw the defendant running toward the residence. She further testified that, after the shot was fired and as she was approaching the barn, she heard her husband moaning and exclaiming, "Josie, help," evidently referring to the witness; the deceased being in the habit of addressing her as Josie. She said that, as she saw the defendant leaving the premises in his machine, she went into the barn and found her husband on his hands and knees with his head hanging downward, and that she went on her knees and put his head on one of them. She stated that her husband had a black and blue mark on his forehead, a bite on his left cheek, a bite on the right breast and a "big hole shot in his left breast and bleeding." She testified that three or four days before the day of the killing the defendant and his brother Tony visited the premises of the deceased and stopped at the barn, where they entered into a conversation with the deceased; that she was then in the house, but that she heard loud talking between the men and also noises which sounded like they might be fighting; that she took her baby in her arms and went out into the yard as far as the truck owned by defendant; that she heard the defendant say to the deceased that if he did not take that note to his mother he (deceased) was going to pay for it, and then they drove away. Parenthetically, it may at this juncture be explained that the note referred to was the

one given by their cousin Tony Piazza to the deceased in San Francisco in April, 1926, for \$1,000, which was delivered to said Tony by the father of the three brothers.

Marian Piazza, the daughter of the deceased and Josephine Piazza, testified: That she saw the defendant when he reached the farm of her father and saw him enter the barn. That she herself later entered the barn for the purpose of hunting for eggs; that while she was in there engaged in that employment she heard the defendant and her father and Mr. Koons talking with each other. That she left the barn and went to the house and into the kitchen, and shortly thereafter, having heard her mother ask her grandmother a question relative to what was going on in the barn, she immediately started toward the barn and entered it. Before getting inside, she heard her father moaning and "calling 'Josie, help.'" When she entered the barn, she found her father on his knees, with one hand on his head, which was hanging down, and "I found Uncle Pete still with the gun pointing at him like that" (indicating); that is, he was standing over the deceased and pointing the revolver downward toward the body of the latter. That she thereupon started toward the gate to go into the road and give the alarm to their neighbors. That about the time the defendant started to leave the premises, but before doing so she heard him say to some one, she did not know who, "You son of a b——, I will shoot you, too." That she thereafter got out into the road, ran a considerable distance toward the houses of several different neighbors, and shouted with such vigor as to attract the attention of some of them and they left their homes and immediately went over to the barn, having been told by the witness that her father had been shot. She testified, as did her mother and the witness Koons, that the weapon that she saw in the hands of the defendant at the time was a nickel-plated revolver. She also testified: That three or four days before the time at which the homicide occurred, she saw the defendant and his brother Tony at the barn on their farm. That they came in an auto truck on which they loaded the grape crusher which, as before stated, was jointly owned by the three brothers. That she heard from the porch of the house a conversation carried on between the three, and that the manner in which they were talking seemed to indicate that they were going to fight. That they were "talking about that note." That she heard the conversation between Tony and her father as follows:

"Defendant: You take that note to your mother.

"Father: Come into the house and you can read it.

"Defendant: No; you take it to your mother."

And just before Tony and Pete left, and as they were getting into the car, defendant said, addressing the deceased, "Don't forget, you take that note to your mother or you will pay for it."

R. J. Yates, a farmer living about 200 yards from the home of the deceased, his farm bordering on a road running east and west, testified: That he left his house about 2:35 p. m. to go to his letter box. That when he reached the northeast corner of his house he heard a "muffled shot," the sound coming from the direction of the barn of the deceased. That he thereupon cut across the corner of his place, thus saving 50 feet distance between his farm and the barn of the deceased, and ran to said barn. "I heard quite a lot of hollering," he said, and, as he reached the barn, he saw a number of other neighbors going toward the barn. He said that he saw Marian, the daughter of the deceased, going through the gate into her father's premises after the defendant had left. On going into the barn he saw Mr. Koons and also the deceased on his knees and holding his hand over his side. That "there was blood all over his face and running down his head on the side of his face."

Dr. J. D. Edmundson, a physician and surgeon, practicing his profession at Orland, was immediately summoned after the shooting, and in response immediately went to the home of the deceased. When he arrived there, he found that the deceased had passed away. He at that time made a cursory examination of the body of deceased and found a gunshot wound which apparently had entered between the third and fourth ribs a little above the heart. He also noticed bruises on the face, and observed that the "left part of his nose was near cut off and split on one side." Later Dr. Edmundson assisted Dr. F. M. Lawson of Willows, county physician of Glenn county, in conducting the autoptical examination of the body of the deceased. The results of this examination were substantially in accord with those of the superficial examination previously made by Dr. Edmundson. The physicians, however, probed the gunshot wound and found it to have entered the body two inches above the left nipple and passed entirely through the body, coming out just to the left of the spinal column and about five inches higher up than at the point of entrance. The other wounds—those in the face and breast—were described by Dr. Lawson, who stated that they appeared to have been caused by biting.

Deputy Sheriff Carl Heard of Glenn county, immediately upon learning of the shooting, hastened to the scene of the homicide and proceeded to make a search for the de-

fendant. The defendant, however, had left the deceased's premises and the deputy sheriff then went to the residence of the former and there searched for him. The officer testified that he kept up his search throughout the entire night, having during the night gone to the home of the defendant several times and renewed his searches there without avail.

Sheriff Roy Heard testified that he also immediately repaired to the premises of the deceased upon learning of the homicide; that he arrived there some time after 4 o'clock, found the deceased wounded as already described, and that he was the party who sent for Dr. Edmundson. He said that he made a search of the premises of the deceased for the purpose of apprehending the defendant if he were there, but that he was unsuccessful, the defendant having left before he arrived at said premises. He also testified that the first time he saw the defendant after the homicide was committed was at the county jail about 5 o'clock the day succeeding that of the shooting; the accused having been brought to the jail by a traffic officer at Corning, Tehama county, by the name of Hobson.

The story of the defendant relative to the homicide and the circumstances leading thereto was briefly as follows: That he went to the home of the deceased on the day of the homicide in his Ford truck, his purpose being to take to his home the wine tanks or the staves of which they are made; that he spoke to Mr. Koons and discussed with him the matter of crushing grapes, and himself took hold of the handle of the crusher and crushed a few; that thereafter he stepped over to the pile of staves and picked up one; that his brother thereupon said to him that he could not take those staves, as they belonged to him (deceased); that at about the same time the deceased rushed toward him and got him by the body and feet and tripped him, and they fell to the floor, where they rolled over, and then the deceased began biting him; that he in turn inserted his teeth in the flesh of the deceased in several different places and finally, while he was on top of the deceased, observed that the latter had a pistol in his left hand; that he immediately grabbed the pistol and each attempted to use it on the other, or that he attempted to prevent the deceased from shooting him; that within a few seconds the pistol was discharged, with the result as above stated. He denied having thrown a stave at his brother, denied that he threatened his sister-in-law, the wife of the deceased, and denied that he flourished a pistol and threatened to shoot her. He said that he did not take a pistol with him to the premises of the deceased, and that the pistol with which the shooting was done was owned by the last named. After the trouble had ended, he said, he got in his truck, and, with-

out stopping at his home, proceeded in the direction of Hamilton City, which is situated about eight miles east of the town of Orland. He testified that he was anxious to get to the Sacramento river, which was a few miles beyond Hamilton City, as he was very thirsty and also desired to bathe his face. He finally reached the river, drank some water, and bathed his wounds and then got into his car and started in the direction of the town of Corning, Tehama county; that he had gone but a short distance when he became drowsy and everything appeared to him to be dark, and he then concluded to stop the car and take a sleep. This he did, and remained in the car until late in the night, when he awoke and then started on his journey, going to a farm situated near Corning, where at one time he was employed. When morning came, he proceeded, he went to the home of a cousin of his not far from the town of Corning. He told his cousin about the difficulty between him and his brother and the shooting, and requested his cousin to get an officer so he could surrender himself. The cousin went out and found the traffic officer above named and the defendant was taken by him to the county jail of Glenn county, arriving there about the hour of 5 o'clock on Sunday, the 3d day of October. The defendant admitted that he had on several occasions discussed the matter of the note above spoken of with the deceased. He said that he had been appointed, by request of his mother, administrator of the estate of his deceased father and that (as is clearly to be implied from his testimony) he considered it his duty to look after and secure the possession of all the assets of the estate, of which he regarded said note as a part. He stated, however, that his discussions with the deceased regarding this note were inspired by his mother who needed the money (the estate being of little value), and that he did not carry any personal feeling or resentment in the discussions.

The wife of the defendant testified that he owned a pistol, but that he left it at their home when he went to the deceased's home on the day of the shooting; that her husband carried no weapon with him that day. She exhibited the pistol at the house to the officers and other persons, and it, according to said officers, corresponded with the description of the weapon with which the shooting was done as it was described by Koons, the widow of the deceased, and their daughter. Other members of the defendant's family gave substantially the same testimony as given by the wife of the defendant.

One Sam Passafiume testified that some two or three days before the killing he was with defendant and deceased in a cornfield about three-fourths of a mile from the deceased's place (whether the defendant's cornfield or not the record does not show), and that deceased seemed to be acting in a sullen manner; that defendant, addressing the de-

ceased, asked him what was the cause of his queer actions; that the latter replied in effect that defendant had caused a notice of some character in connection with their father's estate to be mailed to him (probably a notice of the date fixed for the hearing of the defendant's application to be appointed administrator), and that he did so to annoy him (deceased). The witness further testified that, on the same day, and within a few minutes only after that conversation between the two brothers, he and deceased, out of the hearing of the defendant, held a conversation, in the course of which, and referring to the notice mentioned, the deceased, speaking of the defendant said: "My brother give me trouble. He got the square head. It is better to kill him." On cross-examination, the witness said that he did not at any time communicate that conversation either to defendant or his brother Tony. It was also thus brought out that Passafiume, at the first trial of the case, it having been once before tried, the jury disagreeing, did not give that particular testimony.

There was considerable testimony received regarding the merits or demerits of the claim of the deceased that he was the owner of the note to which reference has been made above. This testimony, except in so far as the fact of its existence was concerned and that there was a controversy between the defendant and the deceased concerning the ownership thereof, threw no light on the issue before the jury, and indeed was not relevant to the issues.

The above brief statement of the facts as they were related by the witnesses for the people and by the defendant and his wife embraces a synoptical recital of all the important testimony directly involving a disclosure of the circumstances leading to and attending the commission of the homicide.

[1, 2] From the testimony, as thus it has been presented herein, and the conclusion arrived at by the jury, as evidenced by their verdict, it may properly be assumed that the following facts were found, and on this appeal must be taken as the established facts in the case, viz.: First, that a bitter feeling had been conceived and was nourished by the defendant against the deceased because of the latter's claim that he was the real owner of the note for \$1,000 or the money represented by said note, which their father had loaned to their cousin; the deceased claiming, as has been shown, that his father, in his lifetime, had given him the money, and, to the end that he might receive the same, directed that the note be made, and accordingly it was made payable to the deceased. Second, that there existed a difference between the two brothers relative to the ownership of the wine or grape juice tanks or staves mentioned and the defendant's feeling of bitterness against the deceased was thereby intensified. Third, that defendant, arming himself with a pistol, went to the farm of the deceased on Satur-

day, October 2, 1926, for the purpose of carrying away the staves or tanks. Fourth, that when he went to the pile of staves and picked up one, and the deceased protested against the taking of the staff by him, the defendant threw the same at the deceased with great force, and that the latter escaped being struck by the staff only by dodging it. Fifth, that the two brothers then engaged in a personal combat, fell to the ground, and in the scuffle rolled one another over, one being on top and then the other, alternately and viciously biting each other; that at last, while the defendant was on top of the deceased, he drew his revolver and fired a shot into the body of his brother, inflicting a mortal wound; that he remained over his body with the weapon still pointed toward the body of the deceased until S. D. Koons, the witness above referred to, made him arise; that he then held his foot over the deceased until said Koons induced him to put his pistol in his pocket. Sixth, that the widow of the deceased, having heard the shot from the pistol, rushed toward the barn and was there met by the defendant, who, after acknowledging in response to her inquiry as to whether he had shot her husband, drew his pistol from his pocket and, calling her an opprobrious name, said that he would kill her, too. The jury could further have concluded, from all the circumstances in the case, that the defendant, after leaving the premises of the deceased, went to his own home, left his revolver there, and thereupon departed from his house with the intention of fleeing and thus escaping apprehension by the officers. It cannot for a moment be doubted that the foregoing facts were sufficient to establish a case of murder against the defendant. It is true that the testimony is in conflict upon some of the vital questions of fact in the case, but, as is well understood, it was for the jury to resolve all conflicts and upon the entire evidence determine whether the defendant was or was not guilty of murder or any other offense embraced within that crime. In this connection, it may be suggested that it is a significant fact that if, as the defendant testified, the shooting was done with the weapon of the deceased under the circumstances described by Koons, he would have taken with him to his home said weapon. It will be noted from the testimony above given by all the witnesses, other than the defendant and his witnesses, that no weapon was found near the deceased immediately after the shooting or on his premises at any time subsequent thereto, a search having been made by the officers for a weapon within a few hours after the homicide was committed. But, be this as it may, it is perfectly clear that, as stated above, a very strong case of murder was made against the defendant, and that he received at the hands of the jury a most considerate degree of mercy when they returned a verdict of guilty against him of the lowest offense comprehended within the crime charged in the indictment.

[3] 2. The rulings relative to the evidence to which the defendant objects involve the action of the trial court in striking out the testimony of certain character witnesses introduced by him. The witness F. M. Myers, a resident of Orland, was asked whether, prior to the date of the homicide, he knew the general reputation of the defendant "for peace and quiet" in the community in which he resided; to which question he made an affirmative answer, and then stated, in reply to a question as to what that reputation was, that it was good. On cross-examination, the district attorney, seeking to learn the basis of his testimony that the general reputation of the defendant for the traits named in said community was good, asked Myers if he had ever heard such general reputation discussed in Orland or immediately thereabouts. The witness stated that he had not. Thereupon the district attorney moved to strike out his testimony. The motion was granted as to the answer of the witness that such reputation "was good"; the court saying, however, that the statement of the witness that he had never heard the defendant's general reputation discussed constituted proper testimony, for the reason, as the court further explained, that "if he (the witness) has not discussed it, it is in there, and from that the jury can infer that he (the party whose general reputation is under inquiry) has a good reputation." The theory of the court seems to have been that the true rule as to this character of testimony is that, while it is proper to permit a character witness to testify that he never heard the general reputation of a party in the community in which he resides for certain traits of character discussed, it is wholly with the jury to infer and find, and not for the witness himself to state, as a conclusion from such testimony, that such reputation "is good." The theory of the judge that the jury, from testimony of the fact that a party's general reputation in the community in which he resides for certain traits of character has never been discussed by the witness or heard discussed by him, thus become as well prepared to form the conclusion that such reputation of such party is good as is or would be the witness, is logically sound. The only question involved in the inquiry which could become serious or important would be whether the witness had told the truth when declaring that he never discussed or heard discussed the general reputation of the party whose character was under investigation. But, according to the established technical procedure or rule with respect to the admissibility of such proof, the order striking out the answer of the witness Myers that the general reputation, etc., of defendant was good, was erroneous. The true rule as to that sort of testimony is that, if the witness declares that he has never heard discussed nor himself discussed the general reputation of a party for certain traits of personal character in the community in which both reside and have

for some period of time resided, it is competent for such witness to conclude from that fact and testify that such general reputation is good. The rule is well stated by Mr. Justice Henshaw in *People v. Adams*, 137 Cal. 580, 582, 70 P. 662, 663, as follows:

"It is a matter of common sense, common observation, and common knowledge that a man's reputation for peace and quiet is seldom a matter of discussion until some alleged breach of the law calls up its consideration. Thus in *Regina v. Cory*, 10 Cox C. C. 23, Chief Justice Cockburn remarks: 'I am ready to admit that negative evidence to which I have referred, of a man's saying "I never heard anything against the character of the person of whose character I came to speak on," should not be excluded. I think the fact that it is given in the negative form is the most cogent evidence of a man's good character and reputation, because a man's character does not get talked about until there is some fault to be found with him. It is the best evidence of his character that he is not talked about at all. I think the evidence is admissible in that sense.' And so, without multiplying quotations upon the question, may be cited *Ward v. State*, 28 Ala. 53; *State v. Nelson*, 58 Iowa, 208 [12 N. W. 253]; *State v. Lee*, 22 Minn. 207 [407, 21 Am. Rep. 769]; *Davis v. Foster*, 68 Ind. 238; *Craig v. Craig*, 5 Rawle [Pa.] 91; *Johnson v. Brown*, 51 Tex. 65; *Davis v. Franke*, 33 Grat. [Va.] 413; *Rice's Criminal Evidence*, § 380; *Taylor's Criminal Evidence*, § 350."

See *People v. Stennett*, 51 Cal. App. 370, 197 P. 372; 8 Cal. Jur. p. 57.

[4] But with the rule before us, as it is so expressed, it cannot be said with justness in this case, in view of the remarks of the court in making the order striking out upon the theory as conceived by the judge and explained by him, as indicated above, the answer of the witness that the defendant's general reputation for peace and quiet was good, that the accused could have suffered even the slightest prejudice from said order. The court, in making that ruling, while not directly addressing the jury, nevertheless, in effect, thus told them that such statement by the witness afforded the inference, which the jury *can* draw, that he (defendant) bore such good reputation in such community. True, the district attorney objected to said remarks, but they were not withdrawn by the court and remained in the record to all intents and purposes as an instruction to the jury that they were at liberty—indeed, that it was their duty—to infer from the testimony of the witness Myers, that he had never heard the defendant's general reputation for peace and quiet in the community in which he and the witness resided discussed, that his (the defendant's) general reputation for the traits named was good. Of course, if it were as a legal proposition, correct to say that, from the testimony of the witness that he had never heard the general reputation of the defendant for peace and quiet discussed, it was for the jury to determine and not the witness

to state that such reputation was good, it would not be true that it would be the *duty* of the jury to infer from such testimony that such reputation was good, since, as before suggested, there would still be the question for the jury's solution whether the witness had or had not heard such discussion. But it stands true that the tendency of the remarks of the court in ruling upon the question of the legal propriety of said testimony was to benefit rather than damage the defendant. It is hardly necessary to suggest that, if the same ruling and in connection therewith the same remarks had been made by the court as to the testimony of a witness testifying for the people—that is, for instance, as to that of a witness testifying in behalf of the prosecution that the general reputation of the defendant for peace and quiet was bad—the defendant would have just cause for complaint, although, even in such case, it might transpire that the record was such that the error involved in the ruling and the remarks would avail him nothing in the disposition of the case on appeal.

[5] The next assignment under the present head—why made, though, we are unable to perceive—relates to the testimony of the defense witness Cooper, who was asked the usual preliminary questions as to the general reputation of the defendant and then whether such general reputation was good or bad, to which he replied that it was "good." On cross-examination, the prosecuting attorney asked the witness whether he had discussed such general reputation with citizens or residents of Orland and vicinity, and he replied in the negative. No motion was made by the district attorney to strike out Cooper's testimony, and it therefore remained in the record to be considered by the jury. There was nothing said by the court, in ruling on objections to Cooper's testimony, or that was said by the district attorney in arguing the objections, that tended in any measure to prejudice the rights of the accused.

A like assignment is urged against the action of the court with respect to the character testimony of the defense witness George Wright. That witness testified that the general reputation of the defendant in the Orland community for peace and quiet was good. In his cross-examination by the district attorney he stated that he had never heard defendant's reputation for those traits of character discussed, and had himself never discussed it. On a motion by the district attorney to strike out the testimony, the following took place between court and counsel:

"The Court: I think it must go out. Of course the testimony that he never heard it discussed will remain.

"Mr. Rankin, Defense Counsel: As I understand it, to be clear, his answer that he knows the reputation and that it is good is stricken out.

"The Court: No; that will stand; that it has never been discussed, never heard it discussed

before, and that he discussed it after the offense of course is not proper.

"Mr. Rankin: That is the portion that goes out.

"The Court: Yes."

Frankly speaking, it is difficult definitely to determine from the foregoing colloquy between the court and counsel what part or parts of the answer were stricken out. Assuming, though, that the court purposed to strike out that part of the witness' testimony that the reputation of the defendant was good and to permit to stand in the record the part to the effect that the witness had never heard defendant's reputation discussed, then what is said above relative to the ruling on the testimony of the witness Myers is equally pertinent to the action of the court respecting its rulings as to the testimony presently being considered.

[6-8] 3. The instruction, the modification of which by the court is complained of by the defendant, as originally framed and proposed by the accused, reads as follows:

"Proof of good character, when shown by the evidence, comes in aid of the general presumption of innocence, and is no more to be laid out of view by the jury in their deliberations than is the original presumption itself. The good character of the prisoner, when proven, is itself a fact in the case. It is a circumstance tending in a greater or less degree to establish his innocence, and cannot be put aside by the jury in order to ascertain if the other facts and circumstances, considered by themselves, do not establish guilt beyond a reasonable doubt."

The court modified the instruction by eliminating therefrom the following language, and, as so modified, gave it to the jury:

"And cannot be put aside by the jury in order to ascertain if the other facts and circumstances considered by themselves do not establish guilt beyond a reasonable doubt."

Only a casual reading of the instruction as modified, in comparison with the instruction in the form in which it was proposed, is necessary to show that as modified and given it clearly and with sufficient fullness declares the rule respecting the subject to which it relates. The part omitted from the instruction is, in effect, but a repetition of the preceding language thereof. It will be noted that, as given, the instruction states, and properly so, that evidence of good character, when received, supports the general presumption of innocence, "and is no more to be laid out of view by the jury in their deliberations than is the original presumption itself." The part eliminated states substantially the same proposition, although in a different form of language. But the objection particularly emphasized by counsel against the action of the court in modifying the instruction is (so the contention goes) that it was not only inapplicable, since the court "ruled out the

evidence of general reputation," but that the jury "would naturally understand (from the instruction, as given, we may assume is meant) the defendant's proof of good reputation failed, and therefore was not to be considered in the case." To that proposition and the reasoning advanced in its support and the conclusion which is to be deduced therefrom, there are several satisfactory answers, which thus may be summarized: First, that (obviously) the effect of the instruction in the form in which it was submitted to the court for approval would be the same as is claimed for it in the form in which it was modified and given, and that counsel, presumably well knowing the condition of the record as to character testimony, themselves asked the court to include the instruction in its charge to the jury, and therefore are in no position to complain because it was given, even if it was erroneous to give it in any form; second, that the instruction was applicable upon the theory, as explained before the jury by the court, upon which the court excluded the answers to the character testimony for defendant, that his general reputation for peace and quiet was good; third, that the testimony of at least two, and we think three, of the character witnesses for the accused, in which their answers that defendant's general reputation for the traits stated was "good," was not disturbed, but allowed to remain in the record as it was given. The foregoing involves a sufficient consideration of the present assignment.

[9] 4. The district attorney, in the course of his address to the jury, made statements which counsel claim involved gross disparagement of the Italian race, as a class (the defendant being a native of Italy) and for this, it is charged, that official was guilty of misconduct which wrongfully and indeed so seriously affected the rights of the defendant as to have prevented him from securing a fair and impartial trial. The language of the district attorney first adverted to by counsel for the defense, and upon which the charge of misconduct is in part predicated, is as follows:

"He (referring to Tony, brother of defendant) is the bird that goes in and gets these letters of administration. He is the gentleman who shows up here to-day with a deed in his pocket. He is the fine Italian hand in this situation throughout, and he has a particular prominent hand throughout. * * *

"Sam Passafume (witness for defendant, whose testimony is above considered), I think you could infer from his testimony, is no—he is a pretty smart Italian. He seeks the usual 'out' that all of those people seek in this way. If you want to try to get a nickel from him, they can understand perfectly, but if you go to ask them something that they don't want to understand, no sabe, right away, no sabe right away, immediately no sabe. Now Sam is no ordinary hombre, and he knows just exactly

what he is doing in connection with those things, and what does Sam do. He is also in this league. He is in this league of people from the same part of Italy, from the same neighborhood—Sicilian. They want to help out their fellow townsman. * * *

"The sole question is, Are you going to make these people abide by our laws? Are you going to make them do business in the American way, or are you going to let them shoot you, or me, or any one else, in that method, their method of settling quarrels, and make a Chicago out of Glenn county, a Sicily out of Glenn county, and let these men shoot you if they have a difficulty with you, and settle their troubles in that method, or shall we do it according to the law of this land, and the customs of America? That is what we are here for to-day, and I think you, gentlemen, will take that most important viewpoint."

The specific objection against the foregoing remarks is that the district attorney thus attempted to prejudice the jury against the accused because of the race to which he belongs—that is, because he is an Italian—and at least by innuendo charged that Italians, as a race, in their native country were propensed to the taking of the law into their own hands rather than to submit to constituted authority in the settlement of differences among themselves, or, if brought into a court of justice, will not scruple to fabricate and give false testimony, if the ends they seek to attain require it; that, on coming to our country and locating here, they bring with them the same notions and practice the same methods. The recent case of *People v. Simon* (Cal. App.) 252 P. 758, decided by this court, Judge H. L. Preston of the superior court of Mendocino county, sitting pro tem. on this bench, writing the opinion, is cited by counsel as supporting their position that the district attorney's remarks were so prejudicial as to imperatively demand a reversal. In that case, it appears, the defendant was a Hebrew charged with the crime of burning insured property, with the intent to defraud the insurers, and the district attorney, in his argument to the jury, said, among other like and equally reprehensible criticisms of the accused:

"There has, of course, grown up a suspicion in this country with reference to fires whenever a Jew has anything to do with it. * * * And that is the reason they were asking you that question [presumably a voir dire question relative to the nativity or religion of the defendant], was because of the fact that there has been so many fires where the Jew lived in the house, in order to obtain the [insurance] money."

[10, 11] The foregoing language constituted misconduct on the part of the district attorney of the most flagrant character, and was itself sufficient to compel a reversal. There is absolutely no justification for such a general assault upon the race of people referred

to by the district attorney in the *Simon Case*; nor is there justification for any such an attack upon any civilized race of people as a class. There are the good and the bad in all classes or all races, but the latter represent the exception in all. There is, however, a distinction in the particular situation in the *Simon Case* and that in the case at bar. The obvious purpose of the district attorney, in referring derisively to the defendant and the defense witness Passafiume as Italians and insinuating that the framing up of court cases, to which they are parties, or in which they are solicitously interested, was a common practice with and among the Italians as a race, was to degrade or depreciate the evidentiary value of their testimony. Therefore, since the deceased also was an Italian, and his widow, daughter, and his cousin, Tony Piazza, were of the same race, the three last-named testifying for the people to important and singularly significant facts, it is but reasonable to assume that the effect of the remarks of the prosecutor, if indeed they had any effect at all upon the minds of the jury, was to cause no less damage to the case of the people than that of the defendant. In the *Simon Case*, there was no witness of the Hebrew race that testified for the people. The defendant himself was the only Hebrew concerned in that case; hence the conduct of the district attorney therein in appealing to race prejudice to obtain a conviction was far more vulnerable, so far as the effect it is to be presumed to have had upon the minds of the jury in their consideration and discussion of the case is concerned, than that of the district attorney in the instant case in uttering the remarks to the jury hereinabove reproduced. From this consideration, however, it must not be assumed that we intend to hold, as a matter of law, that the remarks complained of here were not calculated to injure the defendant, merely because they probably more or less had the same effect upon the people's case. There might be in such a situation other considerations entering into the deliberations of the jury which might lead them to throw entirely against the accused the weight of any prejudice with which their minds might have been poisoned by the remarks of the district attorney in disparagement of the honesty and integrity of the Italian people as a race. But the point we make is this: That in the *Simon Case*, because of its peculiar circumstances, the mollifying lubricant confined within and at proper times percolating through and out of section 4½ of article 6 of the Constitution could not penetrate the huge wall of prejudice so firmly erected by the district attorney and so smooth down or eliminate the damaging friction between the invaded rights of the accused and his constitutional guaranty of a fair and impartial

trial; whereas, in the present instance, the misconduct, while justly subject to severe censure, was not so serious as to compel the conclusion that a miscarriage of justice followed therefrom, when it is considered and viewed in the light of the conclusive character of the evidence presented by the people as in proof of the guilt of the defendant and the fact that such misconduct had application alike to the people's and the defendant's important witnesses. It should be added, however, that there are parts of the remarks of the district attorney included within the above excerpts from his address to the jury that constituted legitimate subjects of discussion. He was entitled to present any theory of the case fairly and reasonably within or deducible from the evidence. In this regard, considerable latitude is to be accorded to the prosecutor in presenting his case to the jury. As to this, it is sufficient to refer to *People v. Glaze*, 139 Cal. 154, 72 P. 965, and cases therein cited; *People v. Swigart* (Cal. App.) 251 P. 343.

[12, 13] Referring to the note executed by the cousin, Tony Piazza, and of which frequent mention has been made above, and to the claim by the defense that the father of deceased and defendant never intended that the money loaned to the cousin was to go to the deceased in exclusion of other members of the family, and that deceased, fraudulently or by undue influence, procured the instrument to be made in his name as the payee thereof, the district attorney in the course of his argument said, in effect, that, if such claim of the defense was well founded, defendant should have subpoenaed and so have produced as a witness the officer of the bank at which the note transaction was had and who prepared the note at the request of the father and in his presence, and thus have shown, if he could, that said transaction as it was carried out was superinduced by the fraud or undue influence of the deceased, or, in other words, thus show that the transaction did not, in material respects, occur or was carried out as described in the testimony of Tony Piazza, the cousin; he having testified that the father gave the money to the deceased and directed the note to be made out in the latter's favor. The district attorney was properly permitted to prove that the genesis of the hostile feeling between the defendant and the deceased was the controversy over the note in question and that the defendant had angrily made a statement to the deceased, which might reasonably be interpreted as a threat to commit personal violence on the latter if the condition involved in the statement were not complied with, and conceivably, as a motive for the act of killing, that, unless he (deceased) delivered the note to their mother, the deceased "would pay for it." This was as far

as the inquiry, so far as the note was concerned, should have been permitted to be extended. In other words, proof of the fact that the note was made to evidence a loan of money owned by the father of the brothers, of the fact that the deceased was named in the note as the payee thereof, and of the fact that the defendant claimed that the father did not intend to make a gift of the note or the money payable thereunder to deceased, and that the controversy between the brothers thereupon arising became very bitter, was all that it was proper or necessary to be made relative to that transaction. But counsel for the defendant, with vigorous persistency, pressed upon the court the proposition that they had the legal right to go fully into the merits of the controversy, and, although frequently asseverating that an investigation of the merits in this case could result only in introducing issues, collateral and entirely foreign to any question which could legitimately be tried under the indictment, or to any evidence relating to the charge, and which might be presented and properly received, the court nevertheless permitted, over objection by the district attorney, counsel for the accused to open up and press to the limit and inquire as to whether the note really was owned by the deceased or by the estate of the deceased father of the two brothers. That counsel, having taken the initiative in bringing the merits of the controversy into the case, discussed the merits thereof in their arguments to the jury is a clearly warranted conclusion. In fact, the parts of the argument of the district attorney complained of here plainly imply that counsel for the defense, in their discussion of the case to the jury, went into the merits of the controversy quite fully. Thus the defendant himself, through his counsel, directly invited full discussion of the merits of the controversy by the district attorney, and, while that officer's declaration or insinuation in his address to the jury that the bank officer who prepared the note according to the directions of the father of the brothers was not subpoenaed and produced as a witness by the defendant, was because said officer would not have supported defendant's claim that the transaction was fraudulent or brought about through improper influence brought to bear upon the father of the two brothers by the deceased, was improper, still it is hardly reasonable to conceive, in view of the repeated declarations of the court that the merits of the controversy were wholly foreign to the issues of the case, how it could have exerted any influence upon the minds of the jury against the accused or his constitutional right to a fair trial upon the question whether the slaying of the deceased by the defendant was or was not justifiable or excusable un-

der the law. This consideration, together with the fact that, as before stated, an examination of the evidence discloses a strong case of guilt—indeed, a case in which it clearly appears that a verdict of manslaughter possesses the quality of mercy in a very great degree—irresistibly conduces to the conclusion that the misconduct under review has not resulted in a miscarriage of justice.

[14, 15] Again, proceeding under the present head of assignments, the district attorney referred to the fact that, although the young son of the witness Passafiume, so the latter stated, was present in the cornfield in which the witness and the deceased held a conversation, in the course of which the latter, after some angry words with defendant about the note, remarked, in the presence of the son, that it would be better to kill "that square-head," referring to the defendant, or words to that effect, the defense failed to call the lad as a witness to corroborate that testimony of his father, and intimated that such failure was due to the fact that counsel for the accused were fearful lest, on cross-examination, the boy would not corroborate his father's testimony in that particular. "What do they (counsel for the defense) know," exclaimed the prosecutor in this connection, "but what that boy has told things to other people here and there and everywhere about his father's testimony, and they knew I could ask what was said, if he did not say it, and he would have to tell the truth, but, if he did not tell the truth, I could put these people on the witness stand to show that that was all a lie. But, if they do not produce him, I cannot show it. Aren't you, gentlemen of the jury, and this court, entitled to that bit of evidence from this defense? * * *

And why, oh why, is not that boy of Sam Passafiume's here to tell you about that occasion in the cornfield, and that conversation in the cornfield, where Sam tells this dastardly fabrication about that threat?" The foregoing remarks constituted gross misconduct on the part of the prosecutor. But, under the rule promulgated by the Constitution in section 4½ of article 6 thereof, as the scope of that section has been construed and applied by the higher courts of the state, the case should not be reversed therefor, since, as repeatedly declared herein, the defendant's guilt, as the record evidence as it must be viewed and considered by a court of appeal shows, is positively established. The case of *People v. Smith*, 121 Cal. 355, 360, 361, 53 P. 802, and the recent case of *People v. Harris*, (Cal. App.) 251 P. 823, are cited by the defendant as authorities in which, so counsel declare, the misconduct of the district attorney, for which those cases were reversed, is no more glaring than the misconduct complained of here. The *Smith Case* was decided July 1, 1898, long before section 4½ was adopted in to article 6 of the Constitution. Down to the

date of the adoption of the section of the Constitution just named, the higher courts, as they were then required to do and properly so, did not sanction approval of a judgment of conviction in a criminal case in which gross errors, directly affecting the substantial rights of the accused, were committed. This course was founded upon the proposition that any material departure from the established procedure and practice in the prosecution of criminal cases would tend to, if not actually, cause a denial of the right of persons charged with and tried for public offenses of the fair and impartial trial guaranteed by the Constitution and the laws of the state in such cases. It will not be denied that, in many instances, a miscarriage of justice as against society followed from that course (then necessary to be observed or followed) in the treatment of criminal cases by the higher courts. It was for that reason that the people amended the Constitution so that, where an examination of the evidence and the entire record would plainly show that no miscarriage of justice would result or has resulted from any error occurring in the admission of evidence, in the giving of instructions or any misconduct of the prosecuting officer in his presentation of the case to the jury, the cause should not be reversed. The effect of the adoption of section 4½ of article 6 was to abrogate the old rule that prejudice is to be presumed from any error of law, so that now, where—

"error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal which must be overcome by a clear showing that no injury could have resulted." *People v. O'Bryan*, 165 Cal. 55, 56, 130 P. 1042, 1046.

The opinion in the case of *People v. Harris* was handed down and filed December 16, 1926. In that case, the defendant was accused of selling intoxicating liquors contrary to the mandates of the Wright Act. St. 1921. p. 79. The defendant "was a deputy sheriff running a lunchroom in Topango Canyon, in the county of Los Angeles." The district attorney, in his argument to the jury, commented upon the fact that the defendant did not call as witnesses the sheriff and certain deputies to testify to his good character. "Exception was taken to the argument, but the court stated it to be within the bounds of argument, and did not advise the jury." The trial court later instructed the jury that, if they believed "from the evidence beyond a reasonable doubt that the defendant is guilty, then you should so find, notwithstanding proof of his good general reputation as a peaceable and law-abiding citizen." The appellate court held that that instruction involved error, citing *People v. Ashe*, 44 Cal.

288, quoting from *State v. Henry*, 50 N. C. 66. The appellate court, referring to those assignments, said:

"We have carefully examined the transcript of the testimony, and while from that reading, unaided by the opportunity to judge of the credibility of the witnesses, by seeing and hearing them, we are inclined to the belief that the defendant may have sold the liquor, we cannot say that there is no reasonable doubt upon the subject."

[16] It is to be noted that a distinction exists between the *Harris Case* and this, in that in the first named the trial court declared to the jury that the comments of the district attorney on the failure of the defendant to call the officers named to testify to his good character constituted a proper subject of argument by the district attorney, while the trial court in this case made no remarks concerning the district attorney's criticism of the defense in not calling Passafiume's son to the stand as a witness to corroborate his father's testimony of the conversation referred to. The court's statement in its instruction in the *Harris Case* that the district attorney's argument in the respect mentioned was legally proper may well be assumed to have exerted no little influence upon the minds of the jury in the connection with which the statement was made. In this case, no objection or exception to the district attorney's remarks having been made by counsel for the defense, the court expressed no opinion as to the propriety or impropriety thereof. As a matter of common notoriety and common sense, it is known that juries, always composed of laymen unfamiliar with the technical rules designed to guide the trial of a case, until, in proper instances, such rules are explained to them by the court, are ever alert to catch from the judge, learned in the law and who sits as the nonpartisan director of the trial, some intimation that will give them a cue as to what he (the judge) thinks of the merits of the case, and will readily accept, as they must, for the particular case, the court's suggestion or ruling affirming the materiality and relevancy of the evidence offered. Hence, in the *Harris Case*, the weight of the judge's opinion as to the right of the district attorney to make a point of the fact that the defendant, by failing to call the officers named to support his case by testifying that he was a man of good general reputation as a law-abiding citizen, must have exercised a potent influence on the jury against the accused or his defense. In connection with the consideration of the instant assignment, we may, even at the expense, more or less, of repetition, pertinently emphasize the fact that the main witness for the people in this case (Mr. Koons)—in fact the only direct witness to the tragedy other than the accused himself—was wholly a disinterested party in the case, so far as he was individually concerned. There was no motive

or partisanship in him for or against either the state or the defendant. He had known the deceased for about three weeks only, during which period he had met him but three or four times; one of those occasions being the day of the tragedy, and had never seen nor met the defendant until the day and at the time of the slaying of the deceased. It may from these facts be confidently assumed that Mr. Koons absolutely had or entertained no degree of friendship for the deceased or any feeling of animosity or hostility towards the accused or any attitude of mind with reference to the case that would induce him to tell anything but a straight story of the circumstances leading to and immediately attending and following the fatal combat as he saw it. And he was positive as to all the facts to which he testified. His testimony was not impeached, nor was there any serious effort to impeach it. His testimony alone, the jury believing it, was sufficient to justify a verdict of conviction. That the defendant held in his breast a feeling of malice not only against the deceased, but also against the latter's wife, was shown by his (Koons') testimony and that of the deceased's daughter and widow, to the effect that, after slaying his brother, the defendant, on seeing the widow of the deceased, drew his pistol from his pocket, in which he had deposited it immediately after the shooting, but only on the urgent opportunity of Koons, and threatened to kill the widow of deceased, even cursing her and following her, as she, in a state of fear, fled hastily and in quest of a place of safety. Again, the defendant's testimony that, while he and the deceased were on the ground, clutching and fighting and viciously biting each other, first one on top and then the other, he saw in and took from the left hand of the deceased the pistol he (the defendant) used in taking his brother's life, might well have been regarded by the jury, as presumptively they did so regard it, as a pure fabrication. The deceased was "right-handed," according to the testimony of his widow, and it is more than probable that if, at the time they were fighting, he had had on his person a pistol, the weapon would have been carried on his right side, where he the more conveniently could have taken it from his pocket, particularly under the conditions in which the fight was being waged. Koons said that he saw no weapon on the person of the deceased while he (Koons) and deceased were together engaged for several hours in the barn in crushing grapes; that he saw no weapon of any kind until he saw the pistol in defendant's hand instantly after the shooting. The deputy coroner, living at Orland, a short distance from the scene of the tragedy, who was there within a brief time after the tragedy was enacted, testified that he found no pistol or other weapon upon the person of the deceased or in the barn. The sheriff and a

deputy, who were at the scene of the homicide a few hours after it occurred, especially searched for a weapon and found none at the premises of the deceased. The widow testified that her husband never owned a pistol. The pistol found at defendant's home corresponded in description with that with which the shooting was done. From these and other circumstances, it was a reasonable theory which the district attorney presented in his argument that defendant, before leaving for the river, after the shooting, stopped at his home and left his pistol with his family. The jury could have reasonably adopted, and no doubt did adopt that theory of the defendant's disposal of the weapon. This recapitulation and analysis of some of the evidence as presented by the people is to show that, as to the facts, there is no analogy between this and the case of the People v. Harris, supra. Again, it is to be noted that, unlike the action of the court in that respect in the Harris Case, the court in this case gave to the jury a clearly expressed and a correct instruction on the character testimony and the part such testimony, when relevant, is designed and entitled legally to play in the jury's deliberations in a criminal case.

Finally, in the present connection, it may be suggested that, while the conclusion that the judgment and the order should be permitted to stand is based, so far as the misconduct of the district attorney above reviewed is concerned, upon the conviction following from an examination of the entire evidence in the case that a miscarriage of justice has not resulted from such misconduct, yet the fact may nevertheless be noted that the attorneys for the defendant at no time interposed an exception to the objectionable remarks of the district attorney or assigned the same as misconduct, so that the court would have been afforded an opportunity to admonish that officer to refrain from employing such an argument and to instruct the jury to pay no heed to the remarks. Some of the remarks above quoted herein would not be reviewable unless such an exception had been taken thereto, while some of them, particularly the last considered, might be held to be intrinsically so objectionable as to require no specific objection thereto to justify a reversal of the case. People v. Derwae, 155 Cal. 592, 102 P. 266; People v. McDonald, 167 Cal. 545, 551, 140 P. 256.

5. The last assignment to be considered is the alleged misconduct of the foreman of the trial jury after the case had finally been submitted to that body for deliberation. This point was urged on the one hand and resisted on the other upon affidavits. R. M. Rankin, attorney for the defendant, deposed that the room in the courthouse of the county of Glenn, to which the jury retired to consider the case after it was submitted to them adjourns the courtroom in said courthouse; that

the jury retired for deliberation upon the case at about 6:30 p. m. on December 20, 1926, and that affiant, while said jury were engaged in such deliberation, was in the courtroom from 9:50 p. m. of said day, and continuously remained there until the jury returned their verdict to the court; that, at about four minutes to 10 o'clock p. m. of said day, Chester Robinson, foreman of said jury, knocked upon and opened the door of the jury room, "and upon the appearance at said door of Roy Heard, sheriff of Glenn county, the said Chester Robinson said to said sheriff, in substance, as follows: 'How can we get information as to the penalties?' and said Roy Heard * * * answered, in substance, as follows: 'You fellows have no jurisdiction except as to murder in the first degree, as stated in the instructions and verdict you have' (meaning the form of verdict submitted by the court to the jury), and further stated, 'You will have to call the court.' The said sheriff then called the court and the officers thereof, and within a few minutes thereafter the said jury announced that they had a verdict and returned the same herein."

Robinson, in his affidavit, admitted that he knocked at the door of the jury room, that said sheriff went to the door, and thereupon said Robinson, addressing the sheriff, said, "We would like to get some information about penalties," to which the sheriff replied, "You have the instructions of the court and the verdict in there which state that you have nothing to do with the penalties, except as to first degree murder, but you will have to call the court to get any information, and I will call the court." The foreman further deposed that, prior to the said episode, the jury had already voted on the question of the guilt of the defendant and had unanimously found him guilty, but, so the affidavit implies, had not determined the particular offense embraced within that charge of which he was guilty.

[17-19] The foreman should not have talked to the sheriff about the penalty for the different offenses within the crime charged, but should have sent word to the court for that information, although, as to the matter of penalties, a jury have no concern, except, as the court instructed them, that in a case of murder of the first degree the matter of punishment, whether death or life imprisonment, rests in their discretion, nor should the sheriff have attempted to vouchsafe an answer to the foreman's question. But we cannot perceive wherein the defendant was in the remotest degree prejudiced by the incident. The sheriff accurately repeated, in substance, what the court had said to the jury in its instructions regarding their verdict. Besides, the court, upon a consideration of the affidavits, was at liberty to find, as the affidavit of Robinson alleged, that the jury had, before the foreman had talked to the sheriff, unani-

mously agreed upon the proposition that the defendant was guilty of one of the three several offenses comprehended within the crime charged but not of a particular one of said offenses, and the implication from the order denying the motion for a new trial is that the court so found. In that situation, if the jury obtained the information they were seeking through their foreman under the circumstances as explained, it would seem, since the crime of which the defendant was found guilty was the lowest, so far as punishment is concerned, of the three embraced within the crime charged, he certainly suffered no prejudice—indeed, he was favored and materially benefited.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

84 Cal. App. 142

KNAUGH v. BAENDER et al. (Civ. 5453.)★

District Court of Appeal, First District, Division 1, California. June 24, 1927.

1. Mortgages ⚡38(1)—Finding that deed absolute on face was mortgage held sustained by evidence.

Evidence held sufficient to sustain trial court's finding that a deed absolute on its face, which was given by owners of land to purchaser thereof on execution sale, was in fact only a mortgage.

2. Appeal and error ⚡1010(1)—Trial court's finding that deed absolute on face was mortgage will not be disturbed if evidence of party so claiming when taken by itself satisfied trial court.

If the evidence offered by a party claiming that a deed absolute on its face is in fact a mortgage is sufficient to satisfy the trial court thereof when taken by itself, the trial court's finding to such effect will not be disturbed on appeal.

3. Deeds ⚡206—Finding that one certain person gave deed to another certain person, designated in deed by assumed name, held sustained by evidence.

Evidence held sufficient to sustain the trial court's finding that one certain person gave a deed to another certain person, who was designated as grantee by an assumed name.

4. Deeds ⚡31—One may receive title under assumed name and thereafter may convey good title under such assumed name.

A person may assume any name in which to receive the title to property, and, if he does so, he can convey good title under such assumed name.

5. Deeds ⚡45—Deed signed in grantor's presence at his request and with his authorization was sufficiently signed (Civ. Code, § 1091).

Where a deed was signed by a person in the grantor's presence, at his request, and with

his authorization, it was sufficiently signed although not signed by the grantor himself, under Civ. Code, § 1091, providing that real property may be transferred by a writing subscribed by the party disposing of the real property.

6. Mortgages ⚡304—Where deed from first party to second party was actually mortgage, subsequent deed from second party to first party releases mortgage.

Where a deed absolute on its face given by first party to the second party was in fact only a mortgage, a subsequent deed given by the second party to the first party operated as a release of the mortgage.

7. Acknowledgment ⚡6(2)—Defective acknowledgment of deed does not affect transfer of title.

That a deed is defectively acknowledged in no way affects the transfer of title.

8. Quieting title ⚡43—Under complaint to quiet title, admitting deed held not error, where evidence thereafter showed that one under whom title was claimed had assumed name by which grantee was designated and was true grantee.

In an action to quiet title, where the complaint was in the usual form, the court did not err in admitting a deed where the evidence subsequently showed that the one under whom the title was claimed had assumed the name by which the grantee was designated, had received the deed, and was the true grantee.

9. Evidence ⚡370(4)—Deed proper in form was admissible without preliminary proof (Code Civ. Proc. § 1951).

Under the express terms of Code Civ. Proc. § 1951, a deed was admissible without preliminary proof where it was proper in form.

10. Evidence ⚡373(1)—Under complaint to quiet title, admitting deed held not error, where evidence showed that one under whom title was claimed had assumed name by which grantor was designated and was true grantor.

In an action to quiet title, where the complaint was in the usual form, the court did not err in admitting a deed, where the evidence showed that one under whom title to the disputed land was claimed had assumed the name by which the grantor was designated and was in fact the true grantor.

11. Husband and wife ⚡267(1)—Husband's sole deed conveying for valuable consideration community property acquired prior to 1917 is sufficient.

Where community property was acquired prior to 1917, husband's deed conveying it for a valuable consideration passes complete title without the wife joining in the deed.

12. Estoppel ⚡72—Wife joining in conveyance held estopped to assert title as against subsequent innocent purchaser for value (Civ. Code, § 3543).

Where a wife joined in a conveyance she was estopped to assert title as against an innocent purchaser for value without notice of the true character of the conveyance, he being protected by statute and the real owner of

⚡For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Petition for hearing in Supreme Court, after judgment in District Court of Appeal, denied Aug. 22, 1927.

property since, under Civ. Code, § 3543, if one of two innocent persons must suffer loss, the one whose act causes the loss must bear it.

13. Husband and wife ⇨267(1)—Wife selling on execution for alimony property received by husband in exchange for community property ratified exchange.

Where husband transferred community property in exchange for other property, and thereafter wife caused execution to issue for alimony in divorce action and sold the property received in exchange for community property, she ratified the exchange.

14. Husband and wife ⇨267(1)—Wife by own act may ratify husband's acts.

The law permits a wife by her own act to ratify and affirm her husband's acts.

15. Deeds ⇨31—Man receiving title under assumed name could not assume additional name of Ada M. G. in conveying title.

A man assuming the name of G. F. G. in which to receive title could not assume names of G. F. G. and Ada M. G. in which to convey title.

16. Appeal and error ⇨837(2)—Prosecution held no basis for inferences in action to quiet title, evidence not being same.

Criminal prosecution for offering for filing for record a false and forged deed held no basis for drawing inferences on appeal in a subsequent action to quiet title, in which it was claimed that the defendant in the criminal case had a fraudulent intent; the two cases not being based on the same evidence.

17. Appeal and error ⇨837(2)—Prosecution where evidence conflicted, jury found fraudulent intent, and appellate court affirmed conviction held no basis for inferences in action to quiet title where evidence conflicted and court found against fraudulent intent; presumption favoring judgment in each case.

Criminal prosecution for offering for filing for record a false and forged deed, in which the evidence was conflicting and in which the jury found that defendant had a fraudulent intent, and in which conviction was affirmed by the appellate court, held no basis for drawing inferences, on appeal in a subsequent action to quiet title in which the evidence was conflicting and in which the trial court found that the defendant in the criminal action had no fraudulent intent, since in each case the presumptions were, on appeal, in favor of the judgment.

18. Appeal and error ⇨1048(1)—Refusing to compel witness to answer questions respecting identity of persons signing assumed names to deed held not prejudicial, where evidence showed identity.

In an action to quiet title, it was not prejudicial error to refuse to compel a witness, claiming that answers would incriminate him, to answer questions seeking to elicit the identity of the persons signing assumed names to a deed, where the evidence showed that the witness had signed the assumed names.

19. Appeal and error ⇨1056(1)—In action to quiet title, excluding testimony respecting conversation with former owner with reference to quitclaim deed to defendant held not prejudicial to defendant, where conversation occurred subsequent to former owner's conveyance to plaintiff's remote grantor.

In an action to quiet title, sustaining an objection to a question as to whether witness had a conversation with a former owner of the land in dispute with reference to making quitclaim deed to defendant held not prejudicial error as to defendant, where the conversation, if it occurred, was subsequent to the former owner's conveyance of the property to plaintiff's remote grantor.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action to quiet title brought by Laura M. Knaugh against Lillie Baender, who brought a cross-action against plaintiff and others. From an adverse decree, Lillie Baender appeals. Affirmed.

L. Gonsalves and A. T. MacDonald, both of Oakland, for appellant.

Nusbaumer & Bingaman, and Ralph W. Arnot, all of Oakland, for respondents.

CAMPBELL, Justice pro tem. This is an appeal from a decree quieting title to certain real property in an action brought by respondent against appellant and others. Appellant in her answer denies the title of respondent and by way of cross-complaint alleges title in herself and has brought in under an order of court the parties herein designated as cross-defendants.

The property involved was originally the community property of one Charles L. Baender and defendant and cross-complainant Lillie Baender, and the same was acquired previous to the year 1917. On August 24, 1919, a writ of execution was issued out of the superior court of Alameda county in the case of Arthur T. Johns v. Charles L. Baender and Lillie M. Baender et al., and at such execution sale on November 18, 1919, one F. B. Schuyler purchased the property. On November 10, 1919, Charles L. Baender and Lillie M. Baender and others conveyed the property to F. B. Schuyler. On November 20, 1919, Schuyler conveyed the property to G. F. Gillellen; November 22, 1921, G. F. Gillellen and Ada M. Gillellen conveyed the property to Charles Baumann; December 12, 1921, Charles Baumann and Elsie Baumann, his wife, conveyed the property to Laura M. Knaugh; and on February 17, 1922, Laura M. Knaugh conveyed the property to Cora B. Dermott. Such is the chain of title as shown by the records. On August 17, 1921, a decree was entered granting Lillie Baender an interlocutory decree of divorce from Charles L. Baender, and by such decree the court set aside the property in controversy to Lillie Baender for life.

An appeal was taken from the interlocutory decree of divorce; the appeal was subsequently dismissed and the remittitur was sent down to the trial court on July 7, 1922.

[1] On the date of the execution sale by the sheriff in August, 1919, and just previous to the bid of Schuyler for the property, one Niels Gostave, who at the time had the record title to the property, but which was owned by Charles L. Baender and Lillie M. Baender as community property, together with Charles L. Baender and Lillie M. Baender and other persons, by grant, bargain and sale deed, conveyed said property to F. B. Schuyler. The facts and circumstances surrounding the execution of this deed and the bid of Schuyler at the execution sale as appears from the evidence were as follows: Charles L. Baender and F. B. Schuyler were dealing together concerning the purchase by Schuyler of an invention made by Baender. During such negotiations the execution sale referred to was advertised, and Baender requested Schuyler to come to his rescue. Baender raised \$275, which was all the money he could raise to purchase the property at the execution sale, and Schuyler advanced the remaining \$500 necessary to bid the amount of the judgment and costs, and the property was purchased in the name of Schuyler. Previous to the execution sale Charles L. Baender and appellant Lillie Baender for reasons of their own carried the record title to the property in the name of one Niels Gostave, but, this fact having been discovered by plaintiff in the action of *Johns v. Baender et al.*, the execution sale was proceeded with regardless of the record title in Niels Gostave, and under the judgment in that case holding the conveyance to Niels Gostave void. Schuyler was brought into the transaction, and instead of making a loan to Baender on a mortgage took a deed absolute on its face, which the court in its findings found to be a mortgage. Against this finding of the court the appellant urges the objection that it is not supported by the evidence. We are of the opinion that the evidence supports the finding of the trial court in this respect. The record discloses that Baender and Schuyler at the time of the transaction, in order to make it appear that Schuyler was an actual purchaser, arranged the transaction as follows: An additional sum of \$2,000 was apparently paid over by Schuyler to Baender at the office of the Alameda County Title Insurance Company, but which sum was immediately and as soon as Baender and Schuyler went outside the Title Company's office paid back to Schuyler by Baender by agreement previously arranged between them. So far as the transaction appeared on its face, Schuyler was the purchaser at the execution sale for the sum of \$775 and a purchaser of the equity under a deed from Niels Gostave, Charles L. Baender, appellant Lillie Baender, and others for the sum

of \$2,000. Such, however, was not the fact. Baender himself paid \$275 of the \$775 bid at the sale, and Schuyler advanced the difference. On November 18, 1921, over two years later, Schuyler received a sheriff's deed to the property. Baender and Schuyler both testified that the \$500, being the money Schuyler actually advanced, was a loan, and the deed was taken as security.

The following, quoting from the testimony of Schuyler and Baender, is sufficient to support the finding of the trial court that the deed was intended as a mortgage. Schuyler testified:

"Q. Didn't you tell me last night that the deed was merely taken as a bond, that if the patent was not issued, that you would be safe in your money? A. That is what I told you now; if the patent issued I would have the property with the money that I put up. But if the patent—that is, if the patent did not issue. But if the patent did issue, I was to buy it back with the property.

"Q. You were to reconvey the property if the patent issued? A. Yes, sir.

"Q. And the property itself was merely taken as security that the patent would issue? A. No; taken as security for the money that I advanced.

"Q. It was taken as security for your money? A. Sure. When you put up any money you get property as security, don't you?"

Baender testified:

"Q. Now, you say this \$2,000 and the Twentieth street property were turned over to you by Mr. Schuyler in payment for one-half interest in this invention; is that true? A. In order to make clear, I think I can explain a little more fully. Mr. Schuyler advanced on the invention \$500, which he paid to the sheriff for this property, and he took that property as security for the \$500 that he advanced as part payment. * * *

"Q. Was there any understanding or agreement between you and Mr. Schuyler to the effect if letters patent did not issue you were to give him back the money or property? A. No, sir; there was not anything in writing to that effect. There was a verbal agreement if the patent did not issue I would give him back the \$2,000.

"Q. Or the property; is that it? A. Either one."

[2] The testimony, together with the inferences logically to be drawn from the circumstances surrounding the transaction considered most favorable from appellant's viewpoint, creates merely a conflict in the evidence. If the evidence offered by respondent taken by itself was sufficiently clear, satisfactory, and convincing to satisfy the trial court that the deed was in fact a mortgage, such finding will not be disturbed on appeal. *Couts v. Winston*, 153 Cal. 686, 96 P. 357; *Hillwig v. Boyer* (Cal. App.) 254 P. 662.

[3] Baender and Schuyler continued to deal with each other concerning Baender's invention and the sale thereof to Schuyler. During

the negotiations Baender got into trouble, and Schuyler advanced the sum of \$2,000 for bail for Baender, this money being the \$2,000 referred to in the testimony of Baender quoted above. The money was paid on an assignment of a one-half interest in the invention and had nothing to do with the original transaction concerning the property. The testimony shows that it was agreed between Baender and Schuyler that, if the patent for the invention was issued, the patent was to be sold to Schuyler and he was to be paid the money he advanced at the execution sale. As a result Schuyler considered the obligation eliminated and was prepared to reconvey the property to Baender or to whomever he desired it conveyed. Baender, not desiring to take the title in his own name, had Schuyler make the deed to G. F. Gillellen, which the court found in its findings to be an assumed name. This name was very similar to the name of Baender's brother-in-law, with the exception that the brother-in-law's name was spelled with three "l's" instead of four, and the deed was delivered by Schuyler to Baender, Schuyler's testimony being that he was delivering the title to Baender as Baender should request, as he had no further interest in the matter. Baender testified that he used a name very closely resembling the name of his brother-in-law in order that in case of death his brother-in-law might be able to convey the property without the necessity of probate under certain instructions that he thereafter wrote upon a typewriter and pinned to the deed.

Baender testified that it is not true that at the time of making the Schuyler deed he had in mind his brother-in-law, G. F. Gillellen; it was C. L. Baender himself that he had in mind; that he never told anybody that the grantee in the deed from Schuyler to Gillellen was his brother-in-law; that he never assumed the name of his brother-in-law and sister and never signed the name G. F. Gillellen of Los Angeles; as a matter of fact, when he signed the name G. F. Gillellen he signed it as his own; that there is no such thing as exclusive ownership of a name; that he assumed the name for convenience; and that he authorized and directed the execution of the deed under the name Gillellen to Baumann.

The evidence is sufficient to support the finding that F. B. Schuyler gave to C. L. Baender, under the name of G. F. Gillellen, a deed to the property in question.

[4, 5] It is the settled law of this state that a person may assume any name in which to receive title to property, and that if he assumes such a name a conveyance by him under such assumed name passes a good title (*Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347; *Emery v. Kipp*, 154 Cal. 83, 97 P. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792), and in *Wilson v. White*, 84 Cal.

239, at page 242, 24 P. 114, 115, the court uses this language:

"It is involved in the very conception of a deed that there must be a grantee, to whom delivery is made, and in whom the title can vest. If there be no grantee, and the deed is to a mere fictitious name, it is obvious that it is a nullity. But if there be a person in existence, and identified, and delivery is made to him, it makes no difference by what name he is called. He may assume a name for the occasion; and a conveyance to and by him under such name will pass title."

It is urged that the deed is ineffective since it was not signed by Baender himself. The testimony, however, shows that it was signed by a person in Baender's presence, at his request, and with his authorization. This is a sufficient execution of the deed. In *Blaisdell v. Leach*, 101 Cal. 408, 35 P. 1020, 40 Am. St. Rep. 65, the court says:

"The Civil Code, § 1091, requires that a grant of real property shall be subscribed by the grantor in order that the title may be transferred thereby, but it is not necessary that the signature of the grantor be affixed by himself. It may be so affixed by another, if done in his presence, and by his own direction (*Gardner v. Gardner*, 5 [Mass.] Cush. 483 [52 Am. Dec. 740], and he may also adopt and ratify a signature made by another without any previous authority (*Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92 [1 Am. Rep. 101]); and the adoption of a forgery has been held to be binding upon the maker of a promissory note (*Forsyth v. Day*, 46 Me. 176; *Greenfield Bank v. Crafts*, 4 [Mass.] Allen, 447). The owner of property cannot be divested thereof by a forged instrument, but his conduct in reference to the instrument may estop him from denying its validity. As between himself and the person who committed the forgery such estoppel may not arise, but if, with knowledge of the forgery, he should declare to an innocent person that the signature was his own, and that he had executed the instrument, and thereby induced him to purchase the property, he could not afterwards claim the property upon the ground that the instrument was a forgery."

[6, 7] If the deed held by Schuyler was merely a mortgage—and it was so found to be by the trial court—the deed from Schuyler to Baender under the name Gillellen, as grantee, would operate as a release of such mortgage, as was likewise found by the court. Appellant contends that the Gillellen deed was not acknowledged as required by law. The fact of a defective acknowledgment in no way affects the transfer of title. *Gordon v. City of San Diego*, 108 Cal. 264, 41 P. 301.

[8-10] Appellant claims that it was error to admit the Schuyler to Gillellen deed in evidence because of no pleading. The pleading was in the usual form of an action to quiet title, which has been held sufficient. *Rough v. Simmons*, 65 Cal. 227, 3 P. 804; *Castro v. Barry*, 79 Cal. 443, 21 P. 946. The admission of the deed was simply a matter of evidence under the pleading. The deed, being proper

in form, was admissible without any preliminary proof. Sec. 1951, Code Civ. Proc. After its introduction evidence was offered and the court found that Baender had assumed the name Gillellen and that he had received the deed. This was sufficient to fix the identity in Baender. Appellant also claims error in admitting the deed from Baender under the name Gillellen as grantor to Baumann. There is likewise no merit in this claim of error.

[11] The property in controversy was acquired by the Baenders prior to 1917, and it was stipulated at the trial that up to the date of the Baumann deed, which was November 22, 1921, the property was the community property of Charles L. Baender and Lillie M. Baender. On that date Charles L. Baender, under the assumed name of G. F. Gillellen, deeded to Charles Baumann—his wife, Lillie M. Baender, not joining in the deed. Unless it be on account of the interlocutory decree of divorce entered on August 17, 1921, setting aside the property to Lillie M. Baender for life, this deed passed a complete title, as the husband's deed alone conveying community property for a valuable consideration, as in this case, acquired prior to 1917, passes a complete title without the necessity of the wife joining in the deed. *Roberts v. Wehmeyer*, 191 Cal. 601, 218 P. 22.

[12] Appellant urges that the interlocutory decree of divorce vested a life estate in the property in Lillie M. Baender and that therefore a deed to the property without her joining as a grantor did not pass complete title, and cites us to *Abbott v. Superior Court*, 69 Cal. App. 660, 232 P. 154, in which the court uses this language:

"But when each and every period has expired within which an attack could have been made by motion or by appeal, then and in that event the so-called interlocutory decree, in so far as it adjudges the property rights of the parties, becomes a conclusive decree."

In the instant case an appeal was taken from the interlocutory decree, and such appeal was pending on November 22, 1921, when Charles L. Baender, under the assumed name of Gillellen, deeded to Charles Baumann. It is not material, however, when or if at all the interlocutory decree vested title in Lillie M. Baender, for by her deed to Schuyler she is estopped from asserting title as against a subsequent innocent purchaser for value.

[13, 14] The title of an innocent purchaser for value as here and without notice of the true character of the conveyance cannot be disturbed; he is protected by the provisions of the statute and by his purchase becomes the real owner of the property. *Todd v. Todd*, 164 Cal. 259, 128 P. 413; *Carpenter v. Lewis*, 119 Cal. 18, 50 P. 925; *Bell v. Pleasant*, 145 Cal. 410, 78 P. 957, 104 Am. St. Rep. 61. The parties who executed and placed upon the record such deed are estopped as to a

subsequent innocent purchaser for value from averring that the instrument is not such as it appears to be. 17 Cal. Jur. 802, and cases cited. Appellant joined in the conveyance to Schuyler, which led subsequent purchasers for value to ignore the divorce decree. It is well established that if one of two innocent persons must suffer loss, the one whose act is responsible for the loss must be the sufferer. Civ. Code, § 3543. Further than this, the evidence shows that Lillie M. Baender caused execution to issue for back alimony due in the divorce action, and under the execution sold the property which Baender received in exchange for the property sold to respondent's predecessor in interest, thereby affirming the transfer of Charles L. Baender and ratifying his act. A wife by her own act may ratify her husband's acts and affirm them. *Spreckels v. Spreckels*, 172 Cal. 775, 158 P. 537.

[15] Appellant is correct in the contention that, even though Baender could assume the name of Gillellen, he could not also assume the name of Ada M. Gillellen. Assuming the name Ada M. Gillellen is the basis for holding Baender criminally liable; but this name was not necessary to pass title. When Baender signed the assumed name G. F. Gillellen, that of itself was sufficient to pass a good title without the name Ada M. Gillellen subscribed to the deed under the authority of *Roberts v. Wehmeyer*, supra.

[16, 17] Appellant has called our attention to the case of *People v. Baender*, 68 Cal. App. 49, 228 P. 536, which was an appeal by Charles L. Baender from a judgment of conviction of having offered for filing in the office of the county recorder of Alameda county a false and forged deed, the Charles L. Baender convicted being the same Charles L. Baender referred to here and the transaction being the offering for record for filing the deed from G. F. Gillellen and Ada M. Gillellen to Charles Baumann. Appellant here seeks to have us sustain appellant's contention by passing on conflicting evidence in the instant case and by drawing inferences from the case of *People v. Baender*. On established principles of law this cannot be done, as the evidence in the cases is not the same. In *People v. Baender* the letter upon which the court lays stress was introduced, but it is not in evidence in this action, and there are other differences as to the evidence and facts surrounding the trial. In *People v. Baender* a man was being tried by a jury, which found him guilty, but on evidence somewhat different than that in the instant case. The jury having found against Baender and that his intent was fraudulent, all intentions were in favor of that finding and judgment, and the appellate court could hold only that all of Baender's defenses were untrue. The court did not usurp the province of the trial court and pass upon conflicting evidence. Here the court having found that Baender's

statement and act were clear of such fraudulent intent, all intendments and presumptions are in favor of the finding and judgment. In both cases there was a conflict in the evidence.

[18, 19] Appellant objects to the court's rulings allowing Charles L. Baender, when testifying as a witness, to refuse to answer certain questions on the ground that his answers would incriminate him and in sustaining an objection to a question propounded to the witness Schuyler as to whether he had any conversation with Baender in reference to making the quitclaim deed to Lillie Baender, this quitclaim deed being executed on December 9, 1921. Had the court's rulings been otherwise on these objections, it would have made no difference, as the question asked of Baender was to elicit the identity of the persons signing the assumed names, and the question asked of Schuyler was directed to a conversation which, if it occurred at all, was subsequent to the conveyance of the property to Baumann.

This disposes of the errors assigned by appellant. From what has been said it follows that we find no error in the record. Furthermore, the equities of the case are all with the respondents.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 114

CROCKER v. CROCKER et al. (Civ. 3162.)

District Court of Appeal, Third District, California. June 22, 1927.

1. Executors and administrators ⇨455—Attempted appeal by plaintiff executrix from order denying new trial did not present for review issues solely between plaintiff in individual capacity and defendant (Code Civ. Proc. § 963).

Attempted appeal by plaintiff as executrix from an order denying a motion for new trial held not to present for review, under Code Civ. Proc. § 963, providing when appeal may be taken, an issue which was under the pleadings and evidence solely between the plaintiff in her individual capacity and defendant.

2. Corporations ⇨139—Evidence held to sustain finding that corporation's stock was transferred to partner on partnership's dissolution.

Evidence held to sustain trial court's finding that corporation's stock, owned by a copartnership, was on dissolution transferred to member who assumed debts, though the transfer was not entered on the corporation's books.

3. Corporations ⇨129—Transfer of corporate stock, not entered on corporation's books, was valid between parties (Civ. Code, §§ 324, 1044).

Transfer of corporate stock by a copartnership to member who assumed debts on dis-

solution of partnership was valid, under Civ. Code, § 1044, providing that any property except as provided by statute may be transferred, though not entered on the books of the corporation in conformity with section 324, which especially excepts from its operation transfers as between parties.

4. Executors and administrators ⇨421—Executrix's suit to recover corporation's stock theretofore transferred by partnership of which deceased was member was legally between transferor and transferee.

Action by executrix to recover stock which stood on corporation's books in name of dissolved partnership of which deceased had been member, and which had been transferred, was in legal contemplation between the transferor and the transferee, since executrix, for the purpose of administration, stands in the shoes of deceased.

5. Partnership ⇨77—Copartner held possession of shares of stock registered in partnership name, since partner's interest extends to every portion of partnership property (Civ. Code, § 2402).

Copartner at all times had possession in legal contemplation of shares of stock registered in partnership name, since under Civ. Code, § 2402, the interest of each member of a partnership extends to every portion of its property.

6. Corporations ⇨94—"Certificates of stock" in corporation are paper representation of incorporeal right.

"Certificates of stock" in a corporation are the paper representation of the incorporeal property right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Certificate of Stock.]

7. Partnership ⇨282—Property in shares of stock passed from copartnership to member on dissolution when partners agreed on present transfer (Civ. Code, § 1140).

Claimant became the owner of shares of stock owned by the copartnership when on dissolution an agreement was reached by him and his sole partner for a present transfer of the other's interest to him, under Civ. Code, § 1140, providing that the title to personal property passes to buyer when the parties agree on a present transfer of a thing identified.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action upon a policy of life insurance and to quiet title to personal property by Mary Estell Crocker, executrix of the estate of William Franklin Crocker, deceased, against Mary Estell Crocker and Warren Crocker, substituted as defendants instead of the Western States Life Insurance Company. Judgment for the second named defendant, and the plaintiff appeals from an order denying a motion for a new trial and from the judgment. Appeal from the order denying a new trial dismissed, and judgment affirmed.

James F. Gaffney, of Sacramento, for appellant.

C. E. McLaughlin, of Sacramento, and Henry S. Lyon and J. D. Elliott, both of Placerville, for respondents.

HART, J. The complaint originally filed herein was by the plaintiff above named and against the Western States Life Insurance Company and one Warren Crocker to recover on a life policy of insurance on the life of the plaintiff's testate in the sum of \$1,867.16, and, as a second cause of action, to have adjudged that 110 shares of the stock of defendant insurance company are the property of and rightfully belong to the estate of the deceased.

The beneficiary named in the insurance policy upon which recovery is sought by the plaintiff, as executrix, etc., is Warren Crocker, the brother of the deceased. The shares of stock referred to are in the name of "Crocker Bros.," the firm name or designation by and under which the deceased and said Warren Crocker, during a long period of time prior to the death of the former, conducted general merchandising stores in the county of El Dorado. The plaintiff is the widow of the deceased, William Franklin Crocker.

On December 27, 1924, all the parties entered into and filed a written stipulation, in which it was stated: That the Western States Life Insurance Company "admits its liability in the sum of \$1,867.16 under the policy mentioned in plaintiff's complaint"; that "in said policy, and upon the records of said defendant, said Warren Crocker appeared as the beneficiary under said policy," and that the said Warren Crocker, as such named beneficiary, and the plaintiff, Mary Estell Crocker, individually, and as the widow of the deceased, have each made a claim to the money payable on said policy; that each has made a demand on the defendant insurance company for the payment thereof, and that the claims so made are conflicting. It is further stated in the stipulation that defendant insurance company "is unable to determine the merits of the said conflicting claims of the said parties to the proceeds of said policy and cannot safely pay the same to any of said claimants without an adjudication of the rights of said claimants; that said defendant (insurance company) is anxious and willing to pay to the party or parties entitled thereto the said sum due under said policy, and is willing to deposit said sum in this court to await the determination of said court as to the party or parties entitled thereto." It was further stipulated that the defendant insurance company, the defendant Warren Crocker, and the plaintiff Mary Estell Crocker are willing that the sum of money due and payable on said policy may be deposited with the court, and that

the said Mary Estell Crocker and the said Warren Crocker may be substituted as defendants in this action in the place and stead of defendant insurance company, and that the last named may "be dismissed from this action and discharged from further liability with reference to said policy upon the deposit of said sum with the clerk of this court." As to the controversy between Mary Estell Crocker and Warren Crocker over the shares of stock mentioned in the complaint, it was agreed and stipulated by the parties that no stock stands upon the books of said insurance company in the name of William Franklin Crocker, and that, so far as known to said defendant insurance company, said William Franklin Crocker, at the time of his death, owned no stock of said defendant; that the stock here in dispute "consists of 110 shares of the capital stock of said defendant, standing upon the books of defendant in the name of 'Crocker Bros.'; * * * that said Warren Crocker has possession of said certificates of stock and claims to be the owner of said stock; * * * that defendant (insurance company) makes no claim to said stock adversely to plaintiff, or either to said Mary Estell Crocker or Warren Crocker, and is willing to abide by the determination of this court as to the ownership thereof and of the dividends heretofore declared and unpaid and hereafter to be declared upon said stock." The stipulation proceeds, as in the case of the conflicting claims of the Crockers to the insurance money, that defendant insurance company is willing to deposit in court the money due as dividends on said stock, and that the right thereto, as between Warren Crocker and Mary Estell Crocker, as executrix, etc., be litigated in and determined by the court, said insurance company expressly disclaiming any interest in or right to said stock; that, as to said second cause of action, said Warren Crocker and said Mary Estell Crocker be substituted as defendants in the place of defendant insurance company, and that the latter be dismissed from said action as a party defendant thereto and discharged from all liability with relation to said stock; that said Mary Estell Crocker and said Warren Crocker are willing that said dividends be deposited with the court, that they be substituted as defendants as to said second cause of action in place of defendant insurance company, and that the latter be dismissed from said action and discharged "from all further liability with reference to said stock or said dividends upon the deposit of said dividends with the clerk of this court." It was stipulated by the parties that the court be authorized to make and enter an order in pursuance of the provisions of said stipulation. Upon a filing of said stipulation and the depositing by defendant insurance company of the money referred to with the clerk of the court, an or-

der was duly made and entered eliminating the defendant insurance company from the action as a party thereto and substituting as defendants, in place of the insurance company, Mary Estell Crocker and Warren Crocker.

On January 23, 1925, an amended complaint was filed by Mary Estell Crocker, as executrix of the estate of her deceased husband, in which she and Warren Crocker were alone named as defendants. The allegations of the amended complaint are substantially the same as those of the complaint as originally framed and filed. It is alleged in said complaint, as the first cause of action therein set up, that the Western States Life Insurance Company, on the 21st day of December, 1910, made and executed its policy of insurance upon the life of said William Franklin Crocker, payable to Warren Crocker; that William Franklin Crocker died testate, at the town of Camino, in the county of El Dorado, on the 25th day of June, 1923; that plaintiff is the widow of said deceased, and by due proceedings held in the superior court of the county of El Dorado she was appointed executrix of the last will and testament of deceased; that in the month of February, 1923, "and thereafter, and up to the time of his death, the deceased, William Franklin Crocker, requested said insurance company to change the beneficiary in said insurance policy to his wife, Mary Estell Crocker, this plaintiff, and during said time applied to the said insurance company to have the said beneficiary changed from his brother Warren Crocker to his said wife, Mary Estell Crocker, plaintiff herein." It is further alleged that by the terms of said policy the right to remake and change the beneficiary under said policy was reserved to the insured; that deceased "did everything in his power to have said change in said beneficiary (from Warren Crocker to plaintiff) made before his death," but that said Warren Crocker, at all times having possession of said policy, refused to surrender the same, and represented and claimed that said policy had been lost; that for years before the death of William Franklin Crocker "his said brother Warren Crocker took and had possession of said policy of insurance," and, by representing to the deceased that the same was lost and his refusal to surrender the same, "prevented the change of beneficiary from himself to this plaintiff against the will of deceased." There are certain formal allegations which need not be recited herein.

The basis of the second cause of action involves, as above explained, the controversy between the plaintiff, as executrix, etc., and Warren Crocker, over the ownership of the 110 shares of stock, as set forth in the stipulation of the parties that the insurance company interplead and be dismissed as a defendant in the action and Warren Crocker and plaintiff be substituted as defendants.

Mary Estell Crocker, in her individual capacity, filed an answer to the amended complaint, and, in like capacity, filed a cross-complaint. In her answer, after formal denials of certain allegations of the said complaint, she admits the issuance of the policy on the life of her deceased husband by the said insurance company, as set forth in the amended complaint, but denies that said "policy of insurance is any part of said estate," and alleges that "said policy of insurance and all proceeds therefrom belong to Mary Estell Crocker, individually." The cross-complaint, with the exception of certain additional amendments, is, in all essential particulars, the same as those of the amended complaint. The additional amendments referred to are:

"That said William Franklin Crocker complied with all the requirements of the rules and by-laws of said Western States Life Insurance Company for the purpose of changing the beneficiary and substituting Mary Estell Crocker, his wife, for Warren Crocker, his brother; * * * that the Western States Life Insurance Company has not paid said policy of insurance," but has deposited the sum of \$1,867.16 with the clerk of this court, etc.; "that said Mary Estell Crocker, this defendant, individually, claims to be the equitable beneficiary under said policy, and is the equitable beneficiary, and is entitled to payment of the said sum of \$1,867.16; that the claim to payment of said sum of \$1,867.16 to Mary Estell Crocker is made in good faith."

The defendant Warren Crocker, answering the amended complaint, admitted: (1) The corporate character of said insurance company; (2) the issuance on the 21st day of December, 1910, of the policy of insurance on the life of the deceased, as alleged in the amended complaint; (3) the death of William Franklin Crocker, at Camino, El Dorado county, on the 25th day of June, 1923; (4) the due appointment of Mary Estell Crocker, as executrix of her deceased husband's last will and testament; (5) that Mary Estell Crocker was the widow of the deceased; (6) that during his lifetime deceased made all required payments on said policy to said insurance company, and complied with and performed all the terms and conditions of said contract of insurance, as alleged in the amended complaint; (7) that said insurance company, shortly after the death of William Franklin Crocker, was furnished with proof of the death of said Crocker, "and also," quoting from the amended complaint, "with a certified copy of the will of the deceased and of plaintiff's letters testamentary, and the plaintiff has otherwise performed all conditions of the said insurance contract on her part."

As to paragraph sixth of the amended complaint (first count) the answer of defendant Warren Crocker denies that deceased intended or tried to, or before his death did

everything in his power to, have the beneficiary in the insurance policy mentioned in said paragraph changed from Warren Crocker to Mary Estell Crocker. Defendant denies that William Franklin Crocker "at any time requested the defendant to surrender said insurance policy, either for the purpose of having the beneficiary therein changed from Warren Crocker to Mary Estell Crocker or at all, and denies that he at any time refused to surrender said policy to said William Franklin Crocker. Defendant denies that he at any time stated or represented to William Franklin Crocker that said insurance policy had been lost or misplaced, or by any act or in any way prevented a change of the beneficiary named therein by refusing to surrender the said policy, or otherwise, or at all."

Interposing a special defense, the said Warren Crocker alleges:

That "for more than two years prior to his death, the deceased was suffering from a painful and fatal disease, which finally caused his death, and that, as a result of said disease, he steadily became feeble and infirm in body and mind, until during the months of April, May, and June, 1923, he was so weak and suffering so much that he was easily influenced and controlled by, and yielded to the importunities of, his wife, the plaintiff herein, without exercising any independent volition or control of his acts. That for more than two years prior to the death of her said husband, Mary Estell Crocker, plaintiff herein, continuously and persistently endeavored to prejudice him against his brother Warren Crocker, defendant herein, and to persuade him to transfer all his property, including said insurance policy, to her."

Then follow averments particularizing the acts and conduct of Mary Estell Crocker tending to unduly influence deceased against his brother and to cause her to be substituted for his brother as beneficiary in said policy of insurance; that finally, and for several months immediately preceding the death of her husband, the latter became feeble in mind and infirm of body to an extent that enabled the plaintiff to acquire an overpowering control and directing influence over the mind and will of the deceased to such a degree that, "if he (the said William Franklin Crocker), during the months of April, May, and June, 1923 (as alleged in the amended complaint), filed or made any application or request to the Western States Life Insurance Company of San Francisco to change the beneficiary in said policy No. 531, set forth in the complaint herein, from Warren Crocker to Mary Estell Crocker, the said William Franklin Crocker did so solely and only as a result of" such dominating control "and undue influence" so practiced and exercised upon deceased by the plaintiff; that but for such undue influence, so exercised under the circumstances indicated, the deceased would never at any time have made or filed any applica-

tion or request for such or any change of beneficiary in said life insurance policy.

Answering the averments of the second count in the amended complaint, defendant Warren Crocker denies that the deceased was, at the time of his death, "the owner of all or any of the shares of the capital stock or dividends accruing thereon, referred to in said second count or cause of action, or had any claim to or interest in any of the certificates or dividends as set forth in said second count of the amended complaint."

The defendant Warren Crocker filed an answer to the plaintiff's cross-complaint, filed in her individual capacity, in which, as shown, she sets up an alleged right in her to the money due under the said policy of life insurance. This answer, as to the denials and allegations thereof, is, in all substantial respects, the same as the answer interposed by said Warren Crocker to plaintiff's amended complaint.

The cause was tried by the court, sitting without a jury. Findings were favorable to defendant Warren Crocker, and judgment was accordingly rendered and entered, adjudging defendant Warren Crocker to be the owner of and entitled to the possession of the money due under the said insurance policy and the shares of stock described in the amended complaint. Mary Estell Crocker, as a "substituted defendant," moved for a new trial, and the motion was denied. She, as executrix of the estate, etc., appeals from the judgment and also from the order denying her motion for a new trial.

[1] The principal point made by the appellant is that the evidence does not support the findings. The respondent, however, on the threshold of his argument, urges the point that, so far as is concerned the first cause of action set up in the amended complaint, the basis of which, as shown, is the claim by appellant of ownership of the money due under the life insurance policy in controversy, the appeals here present no question or point which can competently be reviewed. The notice of appeal from the judgment is, in form, as follows:

"In the Superior Court of the State of California, in and for the County of El Dorado.

"Mary Estell Crocker, as Executrix of the Estate of William Franklin Crocker, Deceased, Plaintiff, v. Mary Estell Crocker and Warren Crocker, Substituted as Defendants instead of Western States Life Insurance Company, Defendants. No. 2974.

"Notice of Appeal from Judgment and Order Denying Motion for New Trial.

"To Mary Estell Crocker and Warren Crocker, substituted defendants above named, and to C. E. McLaughlin and Henry S. Lyons, Attorneys for defendant, Warren Crocker, and to the Clerk of said Court:

"Please take notice that the plaintiff in the above-entitled action hereby appeals to the District Court of Appeal of the Third Appellate

District of the state of California, from the judgment entered on the 17th day of July, 1925, and from the whole of said judgment, and also from the order subsequently made and entered by said superior court, denying the motion of plaintiff, Mary Estell Crocker, for a new trial. * * *

The attempt by plaintiff to appeal from the order denying her motion for a new trial is futile, and the appeal or attempted appeal from said order must be dismissed. Code Civ. Proc. § 963; *Hester v. McMullan*, 29 Cal. App. 664, 157 P. 521.

It is plainly manifest from the phraseology of the notice of appeal from the judgment that there is afforded no escape from the conclusion that, with respect to the issue involved in the first cause of action set up in the complaint, the plaintiff has not presented here a reviewable record. While it is not expressly stated in the body of the notice of appeal in what capacity she appeals from the judgment—whether as executrix of the estate of her deceased husband or in her individual right upon the issue made by her cross-complaint and the answer thereto by defendant Warren Crocker—it is nevertheless to be noted that the language of the notice necessarily makes its caption embracing or stating the title of the action a part thereof. In other words, the language of the notice, "the plaintiff in the above-entitled action hereby appeals," etc., refers to the action, the entitlement of which is, as above shown, "Mary Estell Crocker, as Executrix of the Estate, etc., plaintiff, v. Mary Estell Crocker and Warren Crocker, Substituted as Defendants instead of Western States Life Insurance Company." By such reference, the title of the action is necessarily imported into and made an essential part of the notice itself, and in effect, makes the notice read as follows:

"Mary Estell Crocker, as executrix of the estate of William Franklin Crocker, deceased, hereby appeals * * * from the judgment entered on the 17th day of July, 1925, in favor of the defendant Warren Crocker and against said Mary Estell Crocker, as said executrix," etc.

And it is only a reasonable interpretation of the appeal taken by plaintiff, viewed by the light of the character of the several pleadings filed by her herein, that will lead to the conclusion that she intended to appeal from the judgment in her representative capacity, and thus, on behalf of the estate, try out or have reviewed the points affecting the issue as to the ownership of the shares of stock described in the amended complaint. This conclusion is supported, not only by the language of the notice itself, but also by the consideration that the notice of appeal was addressed to herself and Warren Crocker, "as substituted defendants above named" and to said Crocker's attorney, conceiving, as

we may assume, that her rights on appeal upon the question whether she or Warren Crocker was the rightful owner of the money due under the insurance policy could and would be preserved and reviewed on her appeal from the order denying her motion for a new trial. But, whether intentionally or unintentionally, plaintiff omitted to take an appeal from the judgment in her individual capacity, the fact remains that in the latter role she took no such appeal, with the inevitable result that the question whether the findings of the trial court that defendant Warren Crocker was the beneficiary of the deceased in the insurance policy mentioned, and entitled to the money due under and by virtue of the terms of said policy, cannot be reviewed upon this record, since it cannot be, nor is it claimed, that the estate of William Franklin Crocker has any interest in said policy or the money payable thereon. Indeed, as has been made to appear herein, the plaintiff subscribed to the stipulation whereby the insurance company, expressly declaring that it was indebted under the policy in the sum due thereon either to plaintiff individually, or Warren Crocker, agreed to and did deposit the money due under said policy with the clerk of the court, to be disposed of in accord with any judgment, which as between her personally and Warren Crocker, the court might render and cause to be entered in this action with respect thereto. Furthermore, in her answer, as a substituted defendant to the amended complaint, she specifically denied that the estate, or the executrix thereof as such, had any interest in or right to said money. In her cross-complaint, as seen, she set up a claim to said money in her personal or individual right and an issue thereon was tendered by Warren Crocker's answer to said cross-complaint. Upon those pleadings, that issue was litigated and decided. It may be added that neither she in her individual capacity, nor Warren Crocker, as substituted defendants in the action brought by her as executrix, appealed from the judgment, nor did she, as cross-complainant, take such appeal. From the foregoing considerations, it necessarily follows that the only issue that is open to review by this court on the appeal by plaintiff from the judgment involves the question whether there is or is not sufficient support in the evidence to uphold the finding that the shares of stock in the Western States Life Insurance Company are the property of the defendant. A brief reference herein to the evidence will readily disclose that the finding is sufficiently supported. There is no impropriety, though, in stating that, notwithstanding that we are not required—in fact, as pointed out above, not legally authorized—to review the testimony addressed to the question of the ownership of the insurance money, we have nevertheless read

the testimony bearing upon that question (and necessarily have we done so, because of the fact that the testimony upon both issues is more or less intermingled), and thus it is comforting for us to learn that, while the merits of the appeal, in so far as is concerned the issue as to the insurance money, cannot be reviewed or considered because of the omission by plaintiff to observe and follow a rule in procedural law, the record contains sufficient evidence of facts and circumstances to sustain the finding responding to that issue.

[2] As to whether the finding that the ownership of the stock in the insurance company rests in Warren Crocker, the evidence may thus be summarized: In the year 1896, the deceased and defendant, brothers, as has been shown, formed a copartnership under the firm name of Crocker Bros., for the purpose of engaging in the general merchandising business in Placerville, El Dorado county, and in that year did start such business in said town. At some time subsequent to the establishment of the Placerville store—the exact time, so far as we have been able to ascertain from the record, is not disclosed therein—a branch general merchandising store was opened by the firm in the town of Camino, in said county. The two stores were thereafter conducted by the Crocker Bros. simultaneously until the month of November, 1918, at which time a dissolution of the partnership between the brothers by mutual consent was effected. The corporate stock in question was, as seen, in the Western States Life Insurance Company, and consisted of 110 shares, evidenced by three certificates issued and entered upon the stock book of said company in the name of Crocker Bros., and were numbered and dated as follows: Certificate No. 3058, for 80 shares, dated August 27, 1910; certificate No. 3819, for 20 shares, dated August 31, 1910; certificate No. 5204, for 10 shares, dated August 17, 1914. Some time prior to the year 1916 (the exact time not revealed by the record) these shares of stock, then and at the time of the dissolution of the value of \$800, were indorsed in blank and as so indorsed delivered to the El Dorado County Bank, at Placerville, by the Crocker Bros., as a pledge to secure the payment of a promissory note evidencing a loan from said bank to Crocker Bros., in the sum of \$700. This loan was carried by the bank by annual renewals thereof until after the dissolution of the firm of Crocker Bros., and the stock during all that time remained in the possession of the bank as security for the note. Down to the time of the dissolution, the note was signed by William Franklin Crocker and Warren Crocker. The agreement of dissolution was not in writing. Warren Crocker, testifying in his own behalf, explained that the terms of the agreement to dissolve were (briefly given) that the de-

ceased was to take and did take for his share of the partnership assets the Camino store and business, including the real property used in connection therewith, and that Warren Crocker was to and did receive as his share of the partnership assets the Placerville store and the real property connected therewith; that Warren Crocker was to and did assume the payment of the entire indebtedness due from the firm to certain creditors thereof; that Warren Crocker was to receive and William Franklin Crocker turned over to him as his (Warren's) separate property the stock of the insurance company purchased by and issued to Crocker Bros. Warren Crocker testified that, at some time after the dissolution, the note, to secure the payment of which the stock was pledged, matured or fell due and became payable, that he alone renewed and signed said note, and that henceforward continued so to do upon each annual renewal thereof, and that he paid the interest thereon.

In the course of time subsequent to the dissolution, Warren Crocker disposed of the Placerville store and located at Fallon, in the state of Nevada. It appears that the insurance company had not been notified of the transfer of the stock by Crocker Bros. to Warren Crocker. The result was, of course, that such transfer was not entered in the stock book of the corporation. Warren Crocker failed to notify the insurance company of the transfer of his place of residence from Placerville to Fallon. The insurance company therefore continued to remit to and in the name of Crocker Bros., at Placerville, the dividends earned by and payable on the stock from time to time. Those dividends were received by the deceased, still residing at Camino, and by him appropriated to his own use. Having learned of this, Warren Crocker at Fallon addressed to his brother at Camino a letter in which he (Warren) stated, among other things:

"When you was here (deceased had a short time before visited Warren at Fallon), I meant to speak to you about the Western States Life Insurance Company dividends that you have been collecting. It appears that the letters have been going to Placerville in the name of Crocker Bros., and you have been taking them out and getting the checks. You have had the following checks." (Here specifying four different checks from the corporation and the amount of each; the sum total of the four checks being \$140.25.)

The letter continued:

"Now, I want you to send the balance by return mail, as this belongs to me, and I need the money very bad."

The deceased replied to said letter, in effect admitting that the claim of Warren Crocker made in his letter in relation to the ownership of the stock was well founded. In the reply letter of deceased, he stated,

among other things, that the assets of the firm at the time of the dissolution amounted in value to the sum of \$8,000, "so," continued the letter, "I took the Camino store as my share and let you have the balance as your share." That Warren Crocker told the truth when he testified that, as a part of the consideration of the agreement of dissolution he was to assume the payment of the existing indebtedness of the firm, is borne out, if not conclusively established, by the fact that deceased, after the dissolution, replying by letter to a letter addressed to him by a creditor of the partnership, demanding settlement of a claim held against Crocker Bros., by said creditor, declared that Warren Crocker had, upon the dissolution, assumed the payment of all the debts of Crocker Bros., and that to him alone the creditors of the firm must look for satisfaction of their claims against the partnership. And this further tends to confirm or support the testimony of Warren Crocker as to the terms of the agreement culminating in the dissolution of the partnership.

There is other testimony in the record which is more or less corroborative of the testimony of Warren Crocker relative to the terms of the agreement of dissolution, but enough of the evidence on the question of the ownership of the shares of stock has now been considered herein to show that the finding of the court upon that issue is abundantly supported by the evidence.

[3] The point is made by the plaintiff that the purported transfer of the stock by Crocker Bros. to Warren Crocker was invalid because the stock was not formally assigned to the latter. The point is not maintainable. As between the parties themselves—that is, as between the transferor and transferee—a transfer of shares of stock of a corporation may be effected by any of the several modes whereby personal property of a different species may be transferred. Civ. Code, §§ 324 and 1044; *Young v. New Pedrara Onyx Co.*, 48 Cal. App. 1, 14, 15, 192 P. 55. Section 324 reads in part:

"Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock, except as hereinafter provided, are personal property, and may be transferred by indorsement by signature of the proprietor, * * * and the delivery of the certificates; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer."

In *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 327, 163 P. 54, 59, speaking of that part of section 324 of the Civil Code hereinabove quoted, the court, speaking through Mr. Justice Shaw (later Chief Justice), said:

"It [referring to the provision of section 324 relating to corporations organized for the purpose of selling and distributing water for irrigation or domestic uses] does not violate the provision of section 324 that shares of stock 'may be transferred by indorsement' and 'delivery of the certificate.' This language does not forbid the making of agreements to transfer, nor the making of contracts, good between the parties, that a certificate shall pass with the transfer of certain other property. Corporate stock would be transferable without such provision. Civ. Code, § 1044. The provision merely prescribes a mode by which the transfer may be made. It does not prohibit a transfer by other methods, nor declare that when made in another manner a transfer may not be enforced by the party entitled to the shares."

In *Young v. New Pedrara Onyx Co.*, supra, referring to the provision quoted above from section 324, the court, through Presiding Justice Finlayson, said:

"This section of the Code is intended for the protection of the corporation and those who claim under the persons to whom the certificates were originally issued. The section clearly does not cover the whole subject of transfer. Corporate stock would be transferable without such provision as that contained in this particular Code section. Civ. Code, § 1044."

[4-7] Here, as we have seen, the action to recover the stock is by the executrix of the estate of the deceased. The executrix stands, for the purpose of the administration of the affairs of the estate, in the shoes of the deceased, and therefore the action to recover the stock is, in legal contemplation, between the transferor and the transferee thereof. As "the interest of each member of a partnership extends to every portion of its property" (Civ. Code, § 2402) Warren Crocker at all times, in contemplation of law, not only held possession of the shares of stock, although such stock is a species of incorporeal property (*Young v. New Pedrara Onyx Co.*, supra) and not capable of manual possession, but also had possession of the certificates which are, as stated in the case just named, "the paper representative of the incorporeal right." The uncontradicted testimony of Warren Crocker is that, in the negotiations looking to the dissolution, an agreement was reached for the "present transfer" of the stock to Warren Crocker, or so much thereof as the deceased, as a member of the partnership, was owner of, and hence the title to the whole of the shares of stock thereupon passed to Warren Crocker. Civ. Code, § 1140. The stock being for the purpose explained in the possession of the bank in so far as such possession could be effected by the fact of the actual possession of the written evidence thereof in the form of certificates, indorsed in blank, what more could be done than was done effectually to accomplish a transfer of the stock to Warren Crocker and vest in him title thereto, except by the mode prescribed by section 324

of the Civil Code, a resort to which mode of transfer, as seen, is not, as between the parties themselves, indispensable to the validity of a transfer of corporate stock, cannot be conceived.

Our conclusion, as the above discussion indicates, is that the findings stand immune from just attack, and that they, in turn, support the conclusions of law.

The attempted appeal from the order denying plaintiff's motion for a new trial is dismissed, and the judgment appealed from is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

201 Cal. 397

**TOWN OF MARTINEZ v. JOHNSON, Town
Clerk. (S. F. 12452.)**

Supreme Court of California. June 17, 1927.

1. Municipal corporations ⚡926—Town board might issue bonds bearing lesser rate of interest than rate specified in ordinance calling election to vote on issuance (Municipal Bond Act, as amended [Deering's Gen. Laws 1923, p. 1964], particularly sections 2 and 5).

Town board of trustees *held* to have power to direct by resolution the issuance of municipal improvement bonds bearing 5 per cent. interest per annum, payable semiannually, though the ordinance of the board calling the election to vote on the issuance of the bonds provided that the rate of interest to be paid should be 6 per cent. per annum, payable semiannually, under Municipal Bond Act (St. 1901, p. 27), as amended (Deering's Gen. Laws 1923, p. 1964) particularly sections 2 and 5.

2. Municipal corporations ⚡907—Legislative intent in enacting statute dealing with interest on municipal bonds must be gathered from statute as originally enacted.

The intent of the Legislature in the enactment of Municipal Bond Act (St. 1901, p. 27), as amended (Deering's Gen. Laws 1923, p. 1964), particularly sections 2 and 5, as to whether a town board of trustees might issue bonds bearing 5 per cent. interest when the ordinance calling the election to vote on the issuance of the bonds specified 6 per cent. interest, must be determined from the statute as originally enacted and not by any subsequent amendment.

In Bank.

In the matter of the controversy between the Town of Martinez and Raymond B. Johnson, as Clerk of the Town of Martinez submitted on an agreed statement of facts under Code Civ. Proc. §§ 1138-1140. Application by the Town of Martinez for a writ of mandate to compel Raymond B. Johnson, as Town Clerk of the Town of Martinez, to sign municipal improvement bonds. Peremptory writ of mandate granted.

A. F. Bray, Town Atty., of Martinez, for petitioner.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

CURTIS, J. [1] This application for a writ of mandate was presented to this court upon an agreed statement of facts. The petitioner makes the application under the provisions of sections 1138 to 1140, inclusive, of the Code of Civil Procedure, which relate to

the submission of controversies which might be the subject of a civil action to courts which would have jurisdiction of such action upon an agreed statement of facts. The petitioner herein, the town of Martinez, a municipal corporation, seeks to compel the respondent, as town clerk of said town of Martinez, to countersign certain municipal bonds which had been directed to be issued by resolution of the board of trustees of said town of date February 23, 1927. Previous to the passage of said last-named resolution, and on the 7th day of September, 1926, said board of trustees had, by ordinance duly enacted, called a special election to be held in said town for the purpose of submitting to the qualified electors thereof the proposition of incurring a bonded indebtedness of \$75,000 for the purpose of acquiring, constructing, and completing certain municipal improvements described in the ordinance calling said election. Thereafter said election was held in all respects as required by law, with the result that more than two-thirds of the qualified electors of said town voting at said election voted in favor of the proposition to incur said bonded indebtedness and to issue said bonds in the sum of \$75,000. In the ordinance calling said election, it was provided "that the rate of interest to be paid on said indebtedness is 6 per cent. per annum, payable semiannually." In the resolution of February 23, 1927, directing the issuance of said bonds it is provided that—

"All of said bonds shall bear interest from their date until paid at the rate of 5 per cent. per annum, payable semiannually."

It will thus be seen that, while the ordinance calling said election provided for a 6 per cent. bond, the resolution directing the issuance of the bonds called for a 5 per cent. bond. On account of this variance between the ordinance and the resolution as to the rate of interest the bonds should bear, the town clerk has refused to countersign the bonds prepared in pursuance of and in conformity with the resolution. The sole question involved in this controversy is the power of the board of trustees to direct by resolution the issuance of bonds bearing 5 per cent. interest, when the ordinance calling the election to vote upon their issuance provided that they should bear interest at 6 per cent.

The proceedings to incur said bonded indebtedness were held under the provisions of the Municipal Bond Act (Stats. 1901, p. 27) and amendments thereto (Deering's Gen. Laws of Cal. 1923, p. 1964). In section 2 of said act it is provided:

"* * * The ordinance calling such election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvements, the amount of the principal of the indebtedness to be incurred therefor, and the rate of interest to be paid on said indebtedness, and

shall fix the date on which such election will be held, the manner of holding such election and the voting for or against incurring such indebtedness, and in all particulars not recited in such ordinance, such election shall be held as provided by law for holding municipal elections in such municipality; provided, however, that if the rate of interest to be paid on such indebtedness shall not exceed four and one-half per centum per annum payable semiannually, the rate of interest need not be recited in such ordinance, but in its discretion the said legislative branch may recite in such ordinance a maximum rate of interest to be paid on such indebtedness, not exceeding six per centum per annum payable semiannually, which rate when so recited, shall not be exceeded in the issuance of bonds for such indebtedness."

All that part of said section after the words "provided, however," was incorporated in the statute by an amendment thereto adopted in 1917 (St. 1917, p. 79). As originally enacted, that portion of said section read as follows:

"* * * The ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvements, the amount of the principal of the indebtedness to be incurred therefor, and the rate of interest to be paid on said indebtedness, and shall fix the date on which such special election will be held, the manner of holding such election and the voting for or against incurring such indebtedness, and in all particulars not recited in said ordinance, such election shall be held as provided by law for holding municipal elections in such municipality."

Section 5 of said statute, as originally enacted, and which has never been amended, provides for the form of the bonds and their manner of issuance and directs that—

"The bonds shall be issued in such denominations as the legislative branch of the municipality may determine, except that no bonds shall be of a less denomination than one hundred dollars, nor of a greater denomination than one thousand dollars, and shall be payable on the day and at the place [or places] fixed in such bonds, and with interest at the rate specified in the bond, which rate shall not be in excess of six per cent. per annum and shall be payable semiannually."

It will be observed that there is nothing to be found in this section of the act, and this is the only section in the act dealing with this subject, directing that the bond shall bear the rate of interest specified in the ordinance; the only direction being that the rate of interest shall be "the rate specified in the bonds, which rate shall not be in excess of six per cent. per annum, and shall be payable semiannually." In construing these provisions of the act, this court has held that the rate of interest provided in the bond cannot exceed that recited in the ordinance calling the election. *Peery v. City of Los Angeles*, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044. A similar ruling was made by this court in

construing a like act of the Legislature, passed in 1889, authorizing the incurring of bonded indebtedness for the construction of municipal improvements. Stats. 1889, p. 399, as amended (Stats. 1891, p. 94; *Skinner v. Santa Rosa*, 107 Cal. 464, 40 P. 742, 29 L. R. A. 512). In *O'Farrell v. County of Sonoma*, 189 Cal. 343, 208 P. 117, it was held that the board of supervisors of a county could not use revenue derived from the sale of bonds for highway purposes except in constructing the highways described in the ordinance calling the bond election. The reasons advanced by this court in *Peery v. City of Los Angeles*, supra, for holding that the rate of interest provided in the bonds could not exceed that recited in the ordinance, were that, after securing the assent of the electors of the municipality to the issuance of bonds at a definite rate of interest, it would be a fraud upon said electors for the board thereafter to issue a bond bearing a greater rate of interest and thereby increase the burden of taxation beyond that to which the electors had given their assent. This argument, however, cannot be made against the issuance of bonds which bear a less rate of interest than that recited in the ordinance, as by the issuance of such bonds the burden upon the taxpayer would be lightened rather than increased.

It would have been a simple matter, had the Legislature desired to limit the power of the governing body of the municipality in this respect, to have inserted such a provision in the statute. It did provide for certain limitations as to the rate of interest the bonds should bear—that is, not exceeding 6 per cent. per annum, payable semiannually. It can well be claimed that this studied effort on the part of the Legislature to avoid providing that the bonds should bear the same rate of interest as recited in the ordinance and in expressly specifying the maximum rate of interest the bonds might bear, evinces an intention to confer upon the legislative body a discretion in fixing the rate of interest within the limitations provided. This discretion cannot be exercised so as to cast upon the taxpayers of the municipality a burden greater than that provided for in the ordinance calling the election, but we can see no good reason why it could not be resorted to in an attempt to lessen such burden. The only possible argument that has been presented against such a construction is that the board of trustees or other governing body of the municipality, after reciting in the ordinance a definite rate of interest and after the electors of such municipality had voted in favor of the bond issue upon the assumption that the bonds when issued would bear said rate, may thereafter fix a less rate of interest and one so low that would render the bonds unsaleable, and thereby defeat the whole scheme of public improvements which

had been approved by the electors of the municipality. In answering this argument, we would repeat that the Legislature could have provided against such an exigency by a simple statement in the statute to that effect, and the fact that it did not include any such provision in the statute may well be taken as indicative of the belief on the part of the Legislature that such a contingency would seldom if ever arise. There are advantages in favor of giving such discretion to municipal authorities. A very substantial one is shown by the facts in the present proceeding, that of obtaining the funds for municipal improvements at 5 per cent. instead of 6 per cent. The Legislature may well have considered that the advantages to be gained in investing the municipal authorities with this discretion greatly outweighed any possible disadvantages which might arise in withholding said authority.

The only case directly in point to which our attention has been called is the case of *Omaha National Bank v. City of Omaha*, 15 Neb. 333, 18 N. W. 63. This statute under which said bonds were issued appears to be in many of its essential features similar to the Municipal Bond Act of this state (Compiled Statutes of Nebraska 1881, p. 694). It provides that the proposition to be voted upon by the electors of said city shall state the rate of interest the bonds shall draw, and that, if two-thirds of the votes cast at said election be in favor of the proposition submitted the city council shall thereupon issue said bonds. Under this statute the city council of Omaha submitted to the voters of said city a proposition for the issuance of bonds to draw interest at 6 per cent. The proposition was adopted, "and the mayor and council, having ascertained that bonds at a less rate of interest than 6 per cent. could be sold at their face value, issued said bonds with interest at 5 per cent., but conforming in all other respects to the proposition as adopted by the electors." In a proceeding to declare these bonds illegal and void, the Supreme Court of Nebraska held:

"No question is raised as to the authority conferred upon the mayor and council, when properly authorized by the electors of the city, to issue bonds for the purpose indicated, and the only question for determination is, did the insertion of a less rate of interest in the bonds than was provided in the proposition, affect their validity, the bonds at the reduced rate bringing more than their face value? The attorneys in the case have been unable to find any case bearing directly upon the question, and in our researches we have found none. The general rule is that all contracts made by municipal officers in excess of their powers are void; and the rule applies to municipal bonds. In the case under consideration, however, the power to issue bonds of the kind actually issued and sold was expressly conferred, except as to interest. Under that power bonds for a greater rate of interest than 6 per cent. could not legally be issued, because the greater rate of interest would be in excess

of the authority conferred. The officers issuing the bonds are public agents of the city, and must act within the scope of their authority. This authority is in the nature of a power of attorney to issue bonds of a certain description in the name of the municipality to raise a definite sum for the use of the city for a specified purpose. The object was to raise \$100,000. If this can be done for a less interest than the agents were authorized to pay, the city is benefited to that extent, and the contract is not ultra vires. It is a fundamental principle of the law of agency that it is the duty of the agent to protect and advance the interests of his principal. That the proper authorities of the city of Omaha have done in this case, and their acts in issuing the bonds in question being within the scope of their authority, the bonds are valid."

A similar ruling is found in the case of *Cleveland v. City Council of Spartanburg*, 54 S. C. 83, 31 S. E. 871. But the statute under which the bonds were issued expressly gave the city authorities discretion in fixing the rate of interest to be paid on the bonds. We have found no authority contrary to the case of *Omaha National Bank v. City of Omaha*, supra, and none has been called to our attention. Our statute is somewhat more elastic than the Nebraska statute considered in the Omaha Case. We think there is substantial ground for holding that under the Municipal Bond Act of 1901 the board of trustees are invested, at least impliedly, with some discretion in fixing the rate of interest in the bonds. It is doubtful whether the same can be claimed for the Nebraska statute, and the court there based its decision upon the broad ground that the city council, as agents of the city, were in duty bound to protect and advance the interest of the city, and that they had done so by issuing the bonds at the lower rate of interest. It is not necessary for us to go to this extent in upholding the validity of the bonds here in controversy, for the reason that in our opinion the statute clothes the board of trustees with a certain discretion in fixing the interest the bonds shall bear, provided the interest is not more than 6 per cent. per annum, payable semiannually, and does not exceed that recited in the ordinance calling the election.

[2] Respondent further contends that the Municipal Bond Act, as amended in 1915 (St. 1915, p. 1453), and as it stood when the proceedings to issue said bonds were taken, provided for the issuance of bonds under two different methods; one method providing that the rate of interest shall be recited in the ordinance, in which case the bonds must bear the same interest as that recited in the ordinance, and the other method providing that the maximum rate of interest shall be recited in the ordinance, in which case the board of trustees might issue bonds bearing any rate of interest less than the maximum rate recited in the ordinance. These two

methods, respondent contends, being contained in the same statute, it must be assumed that the Legislature intended that the result of proceeding under one of such methods would be different from that of proceeding under the other, and that, if under the second method the board has power to fix a rate less than the maximum rate recited in the ordinance, as it unquestionably has, then under the first method provided for in the statute it has no such power. This argument would be more persuasive if the statute in its original form had embraced these two methods, but, as we have already seen, the second method was provided for in the amendment of 1915. As originally enacted, the statute provided for the first method only. The intent of the Legislature in the enactment of this statute must be determined from the terms of this statute at the time of its enactment and not by any amendment subsequently adopted. We think we have shown that the Legislature by the statute as originally enacted did not intend that the rate of interest fixed in the bonds should necessarily be the same as that recited in the ordinance. The Legislature of 1915 may have placed a different construction upon this statute or it may have considered that its meaning in respect to the power of the board of trustees to fix a less rate of interest than that recited in the ordinance was uncertain, and, in order that there might be no question as to such power, it amended the statute by adding the proviso which made certain that which might otherwise be considered uncertain. But whatever may have been the reason that prompted the Legislature to enact the amendment of 1915, nothing that it did then and no intent that it or any of its members then had could affect the intent of the previously Legislature which adopted the statute in its original form. Therefore the presence of these two methods in the statute as now in force does not necessarily indicate that there is any material difference in their application or in the results to be obtained by proceedings under one than those which might be reached if the other of such provisions were followed. We are accordingly not able to agree with this last contention made by respondent.

For the reasons hereinbefore stated, we are of the opinion that the bonds issued in pursuance of the resolution of the board of trustees of the said Town of Martinez, of date February 23, 1927, are valid and that it is the duty of the respondent as town clerk of said town to countersign the same as provided by the Municipal Bond Act. Let a peremptory writ of mandate issue out of this court directed to the said respondent, Raymond B. Johnson, as town clerk of the town of Martinez directing him as such town clerk to countersign the bonds issued in pursuance of the resolution of the board of trustees

of such town of Martinez on the 23d day of February, 1927.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

PEOPLE v. FERLIN. (Cr. 2977.)★

Supreme Court of California. June 25, 1927.

Rehearing Granted July 25, 1927.

1. Arson $\S$ 37(1)—Evidence held to support conviction for arson (Pen. Code, $\S$ 447, 452).

Evidence held sufficient to support conviction for arson, in violation of Pen. Code, $\S$ 447, 452, where there was testimony showing that defendant, either individually or with assistance of another, willfully ignited store building with intent to destroy it.

2. Arson $\S$ 15—Whether fire resulted from direct efforts of defendant or those of another acting for him held immaterial, since defendant was guilty of arson as principal in either case.

Whether conflagration resulted from direct efforts of defendant or from conduct of another acting for him held fact question in prosecution for arson, determination of which was immaterial, since in either event defendant was guilty as principal of crime charged.

3. Arson $\S$ 37(1)—Evidence held to support conviction for burning insured property (Pen. Code, $\S$ 548).

Evidence held sufficient to support conviction for burning insured property, in violation of Pen. Code, $\S$ 548, where testimony tended to show that defendant, either individually or with assistance of another, ignited insured property with intent to destroy it.

4. Criminal law $\S$ 1156(1)—Appellate court will not disturb order granting new trial, unless record discloses manifest abuse of discretion.

Appellate court will not disturb order granting new trial in criminal case, unless record discloses manifest abuse of legal discretion which trial court is required to exercise in disposition of such motion.

5. Homicide $\S$ 253(6)—Evidence held to support conviction for murder committed in perpetration of arson (Pen. Code, $\S$ 189).

Evidence held sufficient to support conviction for murder committed in perpetration or attempt to perpetrate arson, in violation of Pen. Code, $\S$ 189, where death of deceased resulted from burns received in building which defendant had caused to be burned.

6. Homicide $\S$ 101—Death resulting from arson is neither justifiable nor "excusable homicide"; "justifiable homicide" (Pen. Code, $\S$ 195-197).

Death of deceased resulting from arson committed by defendant with or without assistance of another is neither justifiable nor ex-

cusable homicide, within meaning of Pen. Code, $\S$ 195-197.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Excusable Homicide; Justifiable Homicide.]

7. Homicide $\S$ 18(1)—One committing arson held liable for death of partner in crime resulting from such arson (Pen. Code, $\S$ 189).

Where death of deceased resulted from arson committed by defendant, fact that deceased was particeps criminis will not relieve defendant of responsibility for death, under Pen. Code, $\S$ 189.

8. Criminal law $\S$ 934—Granting new trial for murder in perpetration of arson held abuse of discretion, though deceased was partner in crime and instruction advised acquittal (Pen. Code, $\S$ 189, 1118, 1181, subd. 6).

Granting of new trial, under Pen. Code, $\S$ 1181, subd. 6, after conviction for murder committed in perpetration of arson, under section 189, held abuse of discretion, where defendant's partner in crime died from burns resulting from arson committed by defendant, notwithstanding that jury's verdict of guilty was brought in after instruction, under section 1118, advising acquittal on such charge.

9. Criminal law $\S$ 887—Instruction advising acquittal is not binding on jury (Pen. Code, $\S$ 1118).

Jury is not bound by instruction advising them to acquit on charge of murder, authorized by Pen. Code, $\S$ 1118, since such provision does not authorize court to determine, as matter of law, that evidence is insufficient.

10. Criminal law $\S$ 810—Court properly instructed jury on charge of murder after advising acquittal (Pen. Code, $\S$ 1118).

Court properly instructed jury on charge of murder after having given instruction advising acquittal, under Pen. Code, $\S$ 1118, since such advisory instruction is not binding on jury.

11. Jury $\S$ 131(3)—Juror cannot be examined on voir dire solely to lay foundation for peremptory challenge.

Juror may not be examined on voir dire as to membership in named secret organization solely for purpose of laying foundation for exercise of peremptory challenge.

12. Criminal law $\S$ 438—In prosecution for murder committed in perpetration of arson, admission of deceased's photograph taken after death held admissible to show extent, degree, and character of burns.

In prosecution for murder committed in perpetration of arson, admission of photograph of deceased taken after death held not error, where it was identified by deceased's father and two doctors, who testified that it correctly showed extent, degree, and character of burns which caused death.

13. Arson $\S$ 31—In prosecution for arson, testimony that lessee rebuilt after fire held inadmissible, notwithstanding contention that premises were destroyed to secure lessee's removal.

In prosecution for arson in which it was claimed that premises were destroyed to secure

removal of lessee, testimony that lessee had rebuilt on property subsequent to fire *held* inadmissible.

14. Criminal law $\S$ 427(3)—Admission of evidence of conversations with defendant's partner in crime in defendant's absence relative to negotiations to burn property *held* proper in advance of other proof of conspiracy.

In prosecution for arson and burning insured property, admission of evidence of conversations with defendant's partner in crime in defendant's absence, showing negotiations for burning of property, *held* not error, even in advance of proof by independent evidence of conspiracy between them.

15. Criminal law $\S$ 680(1)—Order of admission of evidence is within trial court's discretion.

Order in which evidence in cause may be admitted is matter within sound discretion of trial court.

16. Criminal law $\S$ 423(2)—In prosecution for arson, conversations in defendant's absence with his partner in crime *held* not inadmissible as hearsay.

In prosecution for arson, conversations with defendant's partner in crime in defendant's absence *held* not inadmissible as hearsay, since declarations of conspirator in furtherance of common design are binding upon and admissible against coconspirator.

17. Criminal law $\S$ 1169(5)—Admission of conversations in defendant's absence with partner in crime, if error, *held* harmless, in view of instruction to disregard such evidence.

In prosecution for arson, admission of conversations, in defendant's absence, with his partner in crime, if error, *held* not prejudicial where court instructed jury to disregard evidence of such conversations; it being presumed that jury heeded court's instructions.

18. Criminal law $\S$ 1036(1)—Error in admission of testimony will not be reviewed in absence of seasonable objection in court below.

Defendant in criminal case will not be permitted to assign as error admission of testimony, where he did not make seasonable objection in court below.

19. Criminal law $\S$ 1044—Motion to strike all of witness' testimony is not sufficient objection to preserve question of admissibility of particular statement for review.

Motion, on cross-examination of witness, to strike from record all of witness' testimony given on direct examination is not sufficient objection to particular statement in direct examination to preserve question of its admissibility for review.

20. Criminal law $\S$ 742(2)—In prosecution for arson and burning insured property, refusal to instruct that certain person was accomplice *held* error in view of evidence.

In prosecution for arson and burning insured property, refusal of instruction, that another person who died from burns received in fire was accomplice, *held* error in view of evidence.

21. Criminal law $\S$ 829(10)—Error in refusing to instruct that witness was accomplice *held* not prejudicial, in view of instructions defining accomplice and requiring corroboration.

In prosecution for arson and burning insured property, error in refusing to instruct that certain person was accomplice *held* not prejudicial, in view of instructions correctly stating definition of accomplice and requiring accomplice's testimony to be corroborated.

22. Criminal law $\S$ 775(2)—Alibi instruction authorizing acquittal if defendant, who had accomplice, was not present at scene of crime of arson and burning insured property *held* properly refused.

In prosecution for arson and burning insured property, alibi instruction intimating that absence from scene of crime would justify acquittal *held* properly refused, in view of evidence that defendant had accomplice.

23. Criminal law $\S$ 814(1)—In arson case, refusal to instruct that imprisonment in state prison suspends right to defend civil actions for damages *held* proper, notwithstanding pending action against defendant.

In prosecution for arson and burning insured property, refusal to instruct that imprisonment in state prison suspends all civil rights, including right to prosecute and defend all civil actions for damages, *held* proper, notwithstanding that suit for damages had theretofore been instituted by defendant's lessee.

24. Criminal law $\S$ 1216(2)—Sentences for arson and burning insured property must run consecutively and not concurrently (Pen. Code, $\S$ 669).

Where defendant was convicted of arson and of burning insured property, before sentence was pronounced on him for either, sentences must operate consecutively and not concurrently, in view of Pen. Code, $\S$ 669.

25. Criminal law $\S$ 991(1)—Error in sentence for burning insured property in allowing it to run concurrently with sentence for arson will not alter effect of judgment (Pen. Code, $\S$ 669).

Where defendant was convicted of arson and of burning insured property, error in sentence for latter in allowing it to run concurrently with former *held* not to vitiate or alter its effect, in view of Pen. Code, $\S$ 669.

26. Criminal law $\S$ 1216(2)—Sentences for arson and for burning insured property must operate consecutively, even in absence of direction to that effect (Pen. Code, $\S$ 669).

Sentences for arson and for burning insured property will and must operate consecutively, even in absence of direction to that effect, in view of Pen. Code, $\S$ 669.

27. Criminal law $\S$ 991(3)—Sentences fixing exact term of imprisonment for second degree arson and burning insured property *held* improper (Pen. Code, $\S$ 1168).

Sentences of 25 years for arson in second degree and 10 years for burning insured property *held* improper in view of indeterminate sentence law, Pen. Code, $\S$ 1168, investing trial court of any discretion in fixing exact term.

28. Criminal law $\Rightarrow$ 991(3), 1184—Error in fixing definite terms of imprisonment for arson does not nullify judgments, but they will be modified.

Error in sentences for second degree arson and burning insured property, in that exact terms of imprisonment were fixed, held not to nullify judgments, but they will be modified by Supreme Court by striking objectionable parts.

In Bank.

Appeals from Superior Court, Los Angeles County; Lacy D. Jennings, Judge.

George Ferlin was convicted of arson, of destruction of insured property, and of murder, and he appeals from the conviction of arson and of destruction of insured property, while the People appeal from orders granting a new trial on the charge of murder and directing that terms of imprisonment be concurrent. Affirmed on defendant's appeal, and reversed, with directions, on the appeal of the People, and judgment modified.

H. C. Mills, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

PER CURIAM. The defendant, George Ferlin, was charged in an information filed in the county of Los Angeles with the crime of arson, murder, and the destruction of insured property. After trial, the jury returned verdicts finding him guilty as charged in each of the three counts of the information. The verdict finding the defendant guilty of murder carried with it a recommendation that he be imprisoned in the state prison for life. This latter verdict was returned notwithstanding the fact that the trial court had theretofore advised the jury, as provided in section 1118 of the Penal Code, to acquit the defendant on the charge of murder. A motion for new trial was thereafter addressed by the defendant to each count of the information. The motion was denied as to counts 1 and 3 and granted as to count 2, the latter count charging the defendant with murder. Judgments were accordingly entered by the trial court directing that the defendant be incarcerated in the state prison for a period of 25 years for arson and 10 years for burning insured property. In the latter judgment it was indicated that the two sentences were to run concurrently.

The defendant has appealed from each of said judgments and from the order denying his motion for a new trial on each of the charges contained in counts 1 and 3 of the information. There is also presented herein an appeal on behalf of the people from the order of the lower court granting the defendant's motion for a new trial on the murder charge and from that part of the judgment

entered upon the verdict finding the defendant guilty of burning insured property which directs that the sentence thereunder run concurrently with the sentence entered upon the verdict finding the defendant guilty of arson. A synoptical statement of some of the evidence adduced upon the trial will materially assist in a proper understanding of the innumerable assignments of error upon which the respective appeals are founded.

Drs. F. R. Webb and D. E. Stewart testified substantially that they had examined the deceased, Walter Skala, a boy about 21 years of age, and found that his death had resulted from burns of the third degree which were described as burns actually destroying the tissue on the surface of the body.

Carl W. Pirl testified that during the month of August, 1925, he had operated a gasoline service station in the county of Los Angeles; that on August 3, 1925, the defendant purchased of him 26 gallons of low grade gasoline; that 6 gallons of said quantity were placed in the gasoline tank attached to the defendant's automobile, and that the remaining 20 gallons were transported by the defendant in 4 five-gallon cans; that prior to the date of said purchase the defendant had never taken gasoline away in five-gallon containers; that on the day preceding the purchase of this gasoline the defendant had indicated to him that he would require a large quantity of gasoline with which to wash some old motors and suggested to the witness that "if anybody should ask me how much gasoline he bought I wasn't to tell them anything"; that this admonition was apparently prompted by the fact that defendant said that other vendors of gasoline wanted his business; that he recognized a can shown him, by the faucet or spigot at the bottom, as one of the cans employed by the defendant to carry away a portion of the 20 gallons of gasoline purchased.

Fred W. Brown testified that he had a 5-year lease from the defendant on a grocery store and butcher shop located at 1681 East Manchester street, in the town of Graham, Los Angeles county; that his lease would not expire for approximately 2½ years; that on the day preceding the fire, which occurred about 3 or 4 o'clock on the morning of August 4, 1925, he had placed on a shelf in his storeroom certain aprons and rags recently returned from the laundry; that after the fire he found these materials on the floor saturated with either gasoline or oil; that he also found 4 five-gallon cans in his storeroom subsequent to the fire and that 2 of said cans contained some gasoline; that he recognized a can shown him with a faucet or spigot at the bottom thereof as one of the cans he had found in his storeroom; that the east wall of the building had been blown out and up against the railway posts; that on two sep-

arate occasions within four months preceding the fire the defendant had conversed with him concerning the witness' lease; that upon the first of these occasions the defendant said he thought he had a buyer for the premises, whereupon he offered the witness \$2,300 for his lease; that the defendant upon the latter occasion offered him \$1,000 for the lease; that on the day preceding the fire he noticed the defendant had removed certain electrical fixtures from his store, which adjoined the witness' store to the lot or yard at the rear of the premises; that he had not seen the defendant cleaning any motors. On cross-examination, the witness admitted he had stated to the defendant's wife subsequent to the fire that he would do whatever possible "to give the defendant 40 years."

Chester Hill testified that he was 20 years of age; that he knew the defendant and the deceased; that on or about July 28, 1925, the defendant said to him that "he wished the building was burned down in front"; that the witness "in a joking way" stated that he would burn it down for \$300, to which the defendant replied, "Well, we will fix it up;" that he had a conversation with the defendant during the afternoon preceding the fire at which time the defendant stated "he had the gasoline and that evening would be all right;" that the witness thereupon agreed to burn the building that evening; that he then went to see the deceased, whom he had previously informed of the conversations with the defendant, and the deceased said, "I will be down this evening;" that he, the witness, had on other occasions told the deceased he did not intend to fire the building and that he was "through with it," whereupon the deceased said, "Let me have the job and I will do it;" that the deceased on several occasions had inquired as to the defendant's readiness; that on the evening of the fire the defendant told the witness the gasoline "was up in the front of the building"—that part of the building under lease to the witness Brown—and suggested that the storeroom to the rear of the butcher shop be fired; that the defendant stated he wanted the property destroyed because "he had a chance to sell his property, but Mr. Brown kept holding out for too much money for the lease;" that the defendant had also referred to the insurance on the premises. On cross-examination, the witness stated that he never intended burning the property or having anything to do therewith; that the defendant had previously said, "I will get the gasoline, and you throw it around and then light the match;" that he told deceased to make arrangements with the defendant; that during the progress of the fire he and another boy went to the defendant's residence and awakened him; that they then drove in the defendant's car to the scene of the conflagration; that as far as he knew

the defendant was unaware of any of the conversations had with the deceased; and that the defendant had not authorized him to talk with or to employ the deceased for any purpose.

Floyd G. Austin testified that he drove the witness Hill to the deceased's place of employment on the day preceding the fire, and that said Hill went in to see the deceased.

Ralph Barnes testified that he was employed by the defendant as a plumber's helper; that he slept in the rear of the burned premises and was awakened by the explosion and some one knocking on his door; that he accompanied the witness Hill to the defendant's home to inform the defendant of the fire; and that, with defendant and his wife, they returned to the scene of said fire.

Bronson Skala testified that he was a brother of the deceased; that the deceased awakened him about 3 o'clock on the morning of August 4, 1925, by his "hollering"; that he opened the door of his home and saw the deceased horribly burned; that "his hair was standing straight up and his shirt and his underwear was burned off to his waist, and his skin was laying over, it was burned;" that he secured a doctor and had the deceased removed to the White Memorial Hospital where he died about half past 2 o'clock in the afternoon; that a key shown to him was found in a pocket of the deceased's trousers. On cross-examination, he stated that the deceased said, "He got burned in the fire, and he saw two men run out of the place. He ran in * * * was an explosion. He got blew out into the street."

James R. Garrett testified that he operated a restaurant two doors from the witness Brown's store; that he heard an explosion and a scream; that he saw the defendant on the afternoon preceding the fire carrying what appeared to be electrical fixtures from his store to a shed on the rear of the premises.

Ira L. Curtis and William H. Bond, conductor and motorman, respectively, testified substantially that their street car passed the defendant's premises about 3 o'clock on the morning of August 4, 1925; that they saw a bareheaded man about 6 feet in height standing there, and that his hair was combed pompadour style and was streaked with gray; that the defendant's hair was more combed back and more gray when they saw him in the sheriff's office prior to the trial than it was at the time of the trial.

William Heldoorn testified that he was a captain in the fire department and that he attended the fire at the defendant's premises and noticed the odor of gasoline; that he saw some "big five-gallon cans" in the storeroom back of the butcher shop.

P. C. Miller testified that he was district county fire warden; that he investigated the

storeroom to the rear of the butcher shop as soon as the fire had been sufficiently wet down to permit of entry and found 5 five-gallon cans therein, 2 of which contained some gasoline; that he also found gasoline soaked rags and papers near the door leading from the storeroom to the butcher shop; that he recognized a can shown him with a faucet or spigot on it as one of the cans he had seen in the storeroom.

G. L. Walker, county chemist, testified that he had examined the contents of a can shown him and found that it contained a low grade of gasoline.

R. E. Rankin, deputy sheriff, testified that a key shown to him had been given to him by the deceased's brother subsequent to the time of the fire, and that it opened a lock taken from the door leading to the defendant's electrical shop; that on the evening of August 4, 1925, in the sheriff's office, the defendant freely and voluntarily stated, in response to interrogatories, that he had purchased gasoline the preceding day and had carried it away in cans; that he had used it for cleaning old motors and in his business; that he knew the deceased and that the latter had worked for him at one time; that he had an opportunity to sell the destroyed premises for \$20,000 but had unsuccessfully attempted to purchase the witness Brown's lease.

Two policies of insurance covering the destroyed premises and aggregating \$4,300 were introduced in evidence by the people.

The defense produced several witnesses who testified that the witness Hill's general reputation for truth, honesty, and integrity was bad. These witnesses also testified that they had seen the defendant use gasoline in his business for cleaning plumbing and electrical fixtures.

R. E. Williams testified that the defendant had authorized him in March, 1925, to sell the property for \$15,000; that the defendant, at the time, said he could buy the witness Brown's lease in the event a sale was arranged; that he was unable to sell the property; that he thought it to be worth about \$8,000.

Mrs. Deamie Ferlin, wife of the defendant, testified that he was 44 years of age and 6 feet 4 inches in height; that on the evening of August 3, 1925, the defendant took his family for an automobile ride from which they returned home about 10:30; that the defendant slept in the dining room that night with one of their sons; that she awakened the defendant between 3 and 3:30 o'clock in the morning when the witnesses Hill and Barnes came to their home, and that the four of them drove to the scene of the fire; that the witness Brown told her not to testify in the defendant's favor, and that he had some one who would testify to having seen the defendant at or near the property on the morn-

ing of the fire; that the defendant had never combed his hair pompadour, and that it was the same color as at the time of the fire.

By stipulation of counsel the testimony of Dr. Stewart given at the preliminary examination was admitted on behalf of the defendant in lieu of recalling the witness. This testimony was to the effect that the deceased had stated to the witness that he was driving past the witness Brown's store when he saw the fire and two men running therefrom, whereupon he ran into the store and an explosion occurred which blew him into the street. Further outline of the evidence is unnecessary for our consideration of the appeals herein.

Arson is defined as "the willful and malicious burning of a building, with intent to destroy it." Section 447, Pen. Code. To justify a conviction on a charge of arson, it is not necessary that a person other than the accused should have had ownership in the building fired; it is sufficient that at the time of the burning another person was rightfully in possession of or was actually occupying such building or any part thereof. Section 452, Pen. Code. The crime of burning insured property is defined and denounced in section 548 of the Penal Code, which declares in part:

"Every person who wilfully burns * * * any property which at the time is insured against loss or damage by fire, * * * with intent to defraud or prejudice the insurer, whether the same be the property or in the possession of such person or any other person, is punishable by imprisonment in the state prison for not less than one year and not more than ten years."

[1, 2] We find no merit in the defendant's contention that the evidence adduced upon the trial is insufficient to warrant his conviction upon counts 1 and 3 of the information. There was, in our opinion, ample testimony from which the jury might properly conclude that the defendant had, either individually or with the assistance of another, willfully and maliciously ignited the property described in the information with the intent to destroy the same. Whether the conflagration resulted from the direct efforts of the defendant or was the outgrowth of the conduct of another acting for and on behalf of the defendant was a question of fact to be determined by the jury. On this appeal, however, the conclusion of the jury on that point is of little moment, for in either event the defendant is unquestionably guilty, as a principal, of the crime of arson. *People v. Creeks*, 170 Cal. 368, 149 P. 821; *People v. Raber*, 168 Cal. 316, 143 P. 317.

[3] Nor do we think the verdict finding the defendant guilty of burning insured property in violation of section 548 of the Penal Code is vulnerable to an objection going to the sufficiency of the evidence to sustain the

same. When the evidence addressed to the arson count is considered with that showing the destroyed premises to have been heavily insured at the time of the fire, there can be little question as to the propriety of the verdict finding the defendant guilty as charged in the third count of the information.

[4, 5] In advance of considering the numerous particular assignments of error urged by the defendant we will turn our attention to the appeal of the people from the order granting to the defendant, upon motion therefor a new trial on the charge of murder contained in the second count of the information. It is definitely settled that an appellate court will not disturb an order granting a new trial unless the record discloses a manifest abuse of the legal discretion which the trial court is required to exercise in the disposition of such a motion. *People v. Canfield*, 173 Cal. 309, 312, 159 P. 1046; *People v. Knutte*, 111 Cal. 453, 455, 44 P. 166; *People v. Flood*, 102 Cal. 330, 332, 36 P. 663. In the instant case the motion for new trial was based, in part, upon subdivision 6 of section 1181 of the Penal Code, which authorizes the court to grant a new trial when the verdict is contrary to law or evidence. It appears from the record herein that the court below granted the defendant's motion upon the ground that under no theory of the evidence had the crime of murder been shown or established as against the defendant. Section 189 of the Penal Code provides in part that:

"All murder which is * * * committed in the perpetration or attempt to perpetrate arson, * * * is murder of the first degree. * * *

This section of the Code received consideration in the case of *People v. Milton*, 145 Cal. 169, 78 P. 549, wherein it was declared, in effect, that the killing may be willful, deliberate, and premeditated, or it may be absolutely accidental—in either case the offender is equally guilty. Upon the trial of the cause both sides introduced evidence herein tending to establish that the deceased came to his death as a result of having been burned in the fire which consumed the defendant's premises. We have already referred to the sufficiency of the evidence to support the verdict finding the defendant guilty as a principal in the destruction of said premises. The conclusion is inevitable, therefore, that the death of the deceased resulted from arson committed by the defendant, either individually or in concert with another. In this state of the record the jury very properly returned a verdict finding the defendant guilty of the crime of murder, as denounced in section 189 of the Penal Code.

[6, 7] The death of the deceased resulting, as it did, from arson committed by the defendant, with or without assistance of another, is neither justifiable nor excusable homi-

cide, within the meaning of sections 195, 196, and 197 of the Penal Code. Nor do we think the fact, if it be a fact, that the deceased was particeps criminis will relieve the defendant of responsibility for the death occurring in the perpetration of the arson conceived and procured by the defendant. For we are of the opinion that our penal statutes are sufficiently broad and definite to charge a defendant with legal responsibility for the death of his partner in crime when, as here, such death results from and is directly attributable to the carrying out of an unlawful and felonious enterprise which had its inception in the mind of the defendant. As we have already indicated, section 189 of the Penal Code provides that *all* murder committed in the perpetration or attempt to perpetrate arson is murder of the first degree. We experience no hesitancy, therefore, in characterizing the death of the deceased as a felonious homicide. It is our opinion that the evidence, regarded in the light of any conceivable theory, is ample to support the verdict returned on the count charging the defendant with murder.

[8] The trial court, in granting the defendant's motion for new trial upon the ground that under no theory of the evidence was the crime of murder shown as against the defendant, did not purport to pass upon the weight of the evidence but held that such evidence, as a matter of law, failed to show the defendant to be guilty as charged. This conclusion was apparently prompted by the lower court's determination that the defendant was not liable or legally responsible for the death of his partner in crime under circumstances such as have been herein narrated. In arriving at this conclusion the lower court was in error upon a question of law. We therefore conclude that said court manifestly abused the discretion vested in it, when, on motion for new trial, it held that under no theory of the evidence had the crime of murder been shown or established as against the defendant. This conclusion obviates the necessity of an extended discussion of the various arguments of counsel as to the theory upon which the prosecution presented its case.

[9, 10] The defendant next contends that the jury were bound by the lower court's instruction advising them to render a verdict of acquittal upon the charge of murder. The instruction as a whole was proper, and its giving was authorized by the provisions of section 1118 of the Penal Code. In conformity to the provisions of said section and as a part of the same instruction, the court informed the jury that it was not bound by the advice to acquit. Section 1118 of the Penal Code receives consideration in 8 Cal. Jur. 284, 285, where it is declared:

"The Code provision does not give a trial court the power to determine as a matter of law

that the evidence of the prosecution is insufficient to justify a conviction, and under no circumstances is it authorized to command a jury to return a verdict of acquittal. Any such direction or command is not only erroneous but void. After the submission of the case upon the evidence, however weak, it is still the duty of the jury to pass upon its sufficiency, and find a verdict according to its own best judgment, paying all due respect to the advice of the court as to its insufficiency" (citing numerous authorities).

It is declared in *People v. Stoll*, 143 Cal. 689, 77 P. 818, that:

"Under no circumstances is the court authorized in a criminal case to direct a jury to return any particular verdict. It can simply advise them to do so, an advice which they are not bound to follow."

We are referred by the defendant to many authorities wherein it is indicated that a distinction must be drawn between a case where the trial court is merely of the opinion that the evidence is insufficient to support a conviction and a case where the record is destitute of evidence that would justify a conviction. It is urged that in the latter class of cases, within which class it is said the instant case falls, the instruction of the court is binding upon and may not be disregarded by the jury. What has already been said herein is sufficient refutation of the defendant's argument that there is an entire want of evidence to justify his conviction upon the charge of murder. In passing, it may be said that the trial court, after the giving of the advisory instruction, very properly instructed the jury upon the charge of murder. The defendant's assignment of error in this regard is, therefore, without merit.

[11] We will now direct our attention to the numerous particular assignments of error urged by the defendant in support of a reversal. Upon voir dire examination, the defendant attempted to ascertain of each juror whether he was a member of or affiliated with a named secret organization. Objection was promptly made by the prosecution, which the court sustained. The defendant thereupon explained the purpose of this line of inquiry as being necessary to his intelligent exercise of peremptory challenges. It is now well settled in this state that a juror may not be examined on voir dire solely for the purpose of laying the foundation for the exercise of a peremptory challenge. *People v. Edwards*, 163 Cal. 752, 754, 127 P. 58. We find no error in the lower court's ruling.

The trial court very properly overruled the defendant's objection to the introduction by the prosecution of evidence in support of the charges contained in the three counts of the information. An examination of the information convinces us that each count thereof states sufficient facts to constitute a public offense.

[12] Nor do we think the trial court erred in admitting, over objection by the defendant, a photograph of the deceased taken after his death. The picture was identified by the deceased's father and by two doctors who testified that it correctly showed the extent, degree, and character of the burns which caused the death of the deceased. The case of *People v. Rogers*, 163 Cal. 476, 480, 126 P. 143, disposes of the defendant's contention.

[13] We perceive no error in the court's ruling striking out the answer of the witness Brown to the effect that he had rebuilt on the property subsequent to the fire. It will be recalled that Brown was lessee under the defendant. The stricken testimony was attempted to be elicited, so the defendant asserts, to rebut the prosecution's claim that the premises were destroyed in order to effectively secure the removal of the lessee. We cannot appreciate the relevancy or materiality of this evidence tending to show reconstruction of the premises subsequent to the fire. The assignment is without merit.

[14-16] It is next urged by the defendant that the trial court erred in admitting over his objection certain conversations which the witness Hill claimed to have had with the deceased. These conversations occurred in the absence of the defendant and apparently without his knowledge and concerned purported negotiations with the deceased for his burning of the defendant's premises. The defendant interposed a two-fold objection to the introduction in evidence of these conversations, it being insisted that there had been no antecedent and independent proof tending to establish a conspiracy between the defendant and the witness Hill, and that such evidence was not admissible for the purpose of establishing one. The testimony was also objected to as being hearsay. It is our opinion, as already indicated, that the jury upon an examination of the entire evidence in the case would be warranted in concluding that the plan for the felonious burning of the premises had originated in the mind of the defendant and had been carried out in concert with another. In the case of *People v. Matthew*, 68 Cal. App. 95, 107, 228 P. 417, 421, it is declared:

"It unquestionably is the general rule that proof of the existence of the conspiracy ordinarily should precede proof of the acts or declarations of a coconspirator made pending the conspiracy and in aid and furtherance of the common design. But the rule in this respect is not absolute and unyielding; and sometimes, for the sake of convenience, evidence of the acts and declarations of an alleged conspirator is admitted before sufficient proof of the conspiracy is given. Thus where, as here, the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to sepa

rate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that evidence should first be introduced to establish *prima facie*, in the opinion of the court, the fact of conspiracy. *People v. Fehrenbach*, 102 Cal. 394 (36 P. 678); *People v. Sing*, 42 Cal. App. 397 (183 P. 865) * * *."

It was not error, therefore, to permit the introduction in evidence of the conversations here complained of in advance of proof by independent evidence of the conspiracy between the defendant and Hill. The order in which the evidence in a cause may be admitted is a matter within the sound discretion of the trial court, and we see no abuse of such discretion. *People v. Rodley*, 131 Cal. 240, 253, 63 P. 351; *People v. Fehrenbach*, *supra*. Nor do we find any merit in the defendant's contention that the conversations between Hill and the deceased looking to the destruction of the premises were hearsay and therefore inadmissible. The rule is well established in this state that the acts and declarations of a conspirator, in furtherance of the common design, are binding upon and admissible in evidence against a coconspirator. *People v. Kauffman*, 152 Cal. 331, 334, 92 P. 861; *People v. Lawrence*, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193; *People v. MacPhee*, 26 Cal. App. 218, 146 P. 522. In view of this settled rule it may properly be said that the acts and declarations of the coconspirator Hill, in furtherance of the felonious enterprise, were, in contemplation of law, the acts and declarations of the defendant. *People v. Creeks*, *supra*; *People v. MacPhee*, *supra*.

[17] That these conversations with the deceased were had without the defendant's knowledge does not suggest any variation in the above rule. The apparent purpose of the conversations was the acquisition of an agent through whom the felonious scheme might be consummated. But, aside from what has been said, we do not believe that the defendant was or could have been prejudicially affected by the introduction in evidence of these conversations, even if it be assumed that their admission constituted error upon the part of the trial court. The record discloses that the lower court instructed the jury, at the request of the defendant, to disregard the evidence of any conversations between the witness Hill and the deceased unless said conversations had taken place in the presence of the defendant. It will be presumed that the jury exercised its jurisdiction soundly, and that they heeded the instructions of the court. *People v. Durrant*, 116 Cal. 179, 207, 48 P. 75.

We find no error in the several rulings of the court below sustaining objections to certain questions propounded by the defendant during the cross-examination of the witness Hill. The evidence sought to be elicited by the defendant was either irrelevant or not proper cross-examination.

[18, 19] The witness Evans, called by the prosecution, was permitted to testify, without objection by the defendant, that he had seen the deceased walking with the defendant's minor stepson on the morning preceding the fire. It is now urged that the admission of this evidence constituted error. In the absence of a seasonable objection in the court below, the defendant should not now be permitted to assign as error the admission of this testimony. *Wood v. Moulton*, 146 Cal. 317, 322, 80 P. 92. It is true that the defendant on cross-examination of the witness moved to strike from the record *all* of the witness' testimony given on direct examination. This motion was properly denied and may not now serve to relieve the defendant of his failure to seasonably object to the admission of the evidence complained of under this assignment. It cannot be said that "all" of the witness' testimony on direct examination was incompetent, irrelevant, and immaterial, as urged in said motion.

[20] We have examined in detail some 14 additional assignments of error touching various other rulings of the lower court and have concluded that an extended discussion thereof would unduly prolong this opinion. Our study of these several assignments of error has disclosed nothing approximating prejudicial error.

[21] Complaint is made by the defendant that the lower court erred in refusing to charge the jury, as matter of law, that the witness Hill was an accomplice. It is urged that this question, in view of the evidence in the case, was not a proper one to be submitted to the jury for determination. We are of the opinion that the defendant's contention is meritorious, for the evidence in the case unquestionably points to Hill as an accomplice. Moreover, the conduct of the prosecuting officer throughout the trial strongly indicates that Hill was so regarded. The question as to whether or not the witness Hill was an accomplice, under the evidence, was not seriously disputed upon the trial of the cause. It was the duty of the trial court, therefore, to instruct the jury, as matter of law, that Hill was an accomplice of the defendant. *People v. Coffey*, 161 Cal. 433, 436, 119 P. 901, 39 L. R. A. (N. S.) 704; *People v. Howell*, 69 Cal. App. 239, 242, 230 P. 991. However, this error cannot be said to have prejudicially affected the defendant. In *People v. McDermott* (Cal. App.) 243 P. 485, it is declared that:

"The jury should have been instructed that Sova must be regarded as an accomplice. That question should not have been left to it to determine. However, it must be presumed that the jurors observed and applied the instructions given them. In other instructions the definition of an accomplice was correctly stated, as also was the rule that the defendant may not be convicted on the uncorroborated testimony of an

accomplice, and that the corroborating evidence is not sufficient if it merely shows the commission of the crime and the circumstances thereof; and further, that such corroborating evidence must tend to connect the defendant with the commission of the crime. Hence it is inconceivable that the erroneous instruction given in any way prejudiced any right of the appellant."

Practically an identical situation is presented in the instant case, for the court below in several instructions correctly stated the definition of an accomplice and likewise informed the jury that the testimony of an accomplice must be corroborated and that the corroborating evidence must not only tend to show the commission of the offenses charged in the information, but must also tend to connect the defendant therewith.

[22] The defendant's alibi instruction was properly refused, for it erroneously intimated that, if the evidence addressed to the alibi gave rise to a reasonable doubt as to the defendant's presence at the scene of the crimes when perpetrated, then a reasonable doubt arose as to his guilt and he would be entitled to a verdict of acquittal. In our opinion, absolute proof of the defendant's absence from the scene of the crimes would not, under the circumstances of this case, necessarily preclude his conviction thereof. Citation of authority is unnecessary to support this proposition.

[23] As a final contention the defendant urges that the court erred in refusing to instruct the jury to the effect that imprisonment in a state prison suspends all civil rights, including the right to prosecute and defend all civil actions for damages. The obvious purpose of this instruction was to cause the jury to consider the effect of a conviction upon the defendant's defense of a civil suit for damages theretofore instituted by the lessee Brown. We cannot perceive the pertinency of such civil litigation to the offenses charged in the information. The instruction had no bearing upon the issues raised herein and was therefore properly denied.

[24] At the commencement of this opinion we stated that the trial court in its judgment under count 3, charging the burning of insured property, directed that the sentence thereunder run concurrently with the sentence imposed under count 1, charging arson. This direction is assigned as error by the people, it being their contention that these sentences must run consecutively. Section 669 of the Penal Code provides that:

"When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termina-

tion of the second or other subsequent term of imprisonment, as the case may be."

In the instant case the defendant was convicted of the offenses charged in counts 1 and 3 before sentence was "pronounced upon him for either." It necessarily follows, in view of the mandatory provisions of section 669 of the Penal Code, that the sentences under counts 1 and 3 must operate consecutively.

[25, 26] We have held in *Ex parte Kirby*, 76 Cal. 514, 18 P. 655, that said Code section "is a mandate to the warden who holds the prisoner in custody, and by it he is informed that the imprisonment on the second conviction must commence at the termination of the first term of imprisonment." The error of the court below is not, therefore, such as to vitiate or alter the effect of the judgment under count 3. However, to avoid any uncertainty in this respect, the judgment under count 3 of the information is amended by striking therefrom the sentence reading, "To run concurrently with sentence in Case No. 25876, count 1." The sentences under counts 1 and 3 will and must operate consecutively, even in the absence of a direction therein to that effect. *Ex parte Kirby*, supra.

[27, 28] In conclusion, it may be said that the lower court also erred in sentencing the defendant to the state prison for 25 years for arson in the second degree, and 10 years for the offense of burning insured property. These sentences were improper and without the authority of the trial court to pronounce. The indeterminate sentence law (section 1168, Pen. Code) has divested the trial court of any discretion in fixing the exact term of imprisonment and has vested such discretion in the board of prison directors, within the limits prescribed by the Penal Code (*People v. Gonzales*, 36 Cal. App. 782, 173 P. 407). This error of the lower court does not, however, nullify the judgments entered under counts 1 and 3. *People v. Rossi*, 37 Cal. App. 778, 174 P. 916. The judgments pronounced under said two counts are, and each is, hereby modified by striking therefrom that part thereof in which a definite period of imprisonment is provided. *People v. Rossi*, supra.

The judgments pronounced upon the verdicts finding the defendant guilty of arson in the second degree and of burning insured property are, and each is, hereby affirmed as modified herein. The order denying the defendant's motion for a new trial under counts 1 and 3 of the information is also affirmed. The order granting a new trial upon the charge of murder, contained in count 2 of the information, is reversed with directions to the court below that judgment be entered *nunc pro tunc* in accordance with the verdict of conviction under said count 2.

83 Cal. App. 707

FINNIE et al. v. SMITH et al. (Civ. 3273.)★

District Court of Appeal, Third District, California. June 9, 1927.

Hearing Denied by Supreme Court Aug. 8, 1927.

1. Trusts ⚡203—Irrevocable declaration of express trust in realty for purpose of sale held to convey all legal and equitable interest of trustor, hence judgment creditor of trustor and beneficiary by attachment acquired no lien on land superior to right of prior bona fide purchaser from trustees (Civ. Code, § 863).

Where owner of land conveyed to trustees by means of declaration of express trust for purpose of selling land and distributing proceeds in a specified manner, and where trust instrument contained no reservation of title or right of revocation, *held*, under Civ. Code, § 863, trustor thereby divested herself of all title and interest, legal or equitable, in the land and judgment creditor of trustor and of beneficiary of trust by attachment issued and served on trustees acquired no lien on the property superior to right of prior bona fide purchaser from trustees, notwithstanding trustees' agreement to sell was not recorded until after levy.

2. Attachment ⚡180—Unrecorded deed is ineffective against subsequent levy of attachment.

An unrecorded deed or conveyance is effective as against a subsequent levy of attachment.

3. Trusts ⚡134, 153—Irrevocable declaration of express trust in realty invests trustee with entire title and divests trustor of all estate and interest (Civ. Code, § 863).

An express trust to sell real property and distribute proceeds of sale in a specified manner to designated beneficiaries, which declaration of trust contains no reservation of title and no power of revocation, vests entire title in trustee and absolutely divests trustor of all estate and interest in the property, in view of Civ. Code, § 863.

4. Trusts ⚡151(1)—Where irrevocable trust in realty for purpose of sale is made without fraud, creditor of beneficiary may attach proceeds.

Where irrevocable trust in realty for purpose of sale and distribution of proceeds is made without fraud, attaching creditor of beneficiary acquires no lien on realty, but may attach proceeds of sale.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Robert J. Finnie and another, as executor of the last will and testament of Theodore A. Bell, deceased, against Clarence M. Smith and others. From judgment for plaintiffs, defendant Clinton L. Walker appeals. Affirmed.

Preston & Duncan, of San Francisco, for appellant.

A. E. Cooley, of San Francisco, and Theodore W. Chester, of Sacramento, for respondents.

THOMPSON, Justice pro tem. This is an action to quiet title to 1,032 acres of land situated in Colusa county.

The facts are not disputed. Sarah Doak, a widow, was the owner of an undivided seven-tenths of the land in question. The balance was owned by the estate of Theodore A. Bell, deceased. March 30, 1922, Sarah Doak executed a conveyance in trust of her entire interest in this property to her two sons, Fred M. Doak and Bert G. Doak. This trust conveyance was recorded July 31, 1923, by the express terms of which the trustor, Sarah Doak, conveyed this property to her trustees, "to sell * * * upon the best obtainable terms, but at a price of not less than \$42,500, unless the trustor shall consent to a sale for a lesser amount, and to pay to the following named persons from the proceeds of such sale, the sums set opposite their respective names, to wit: To William C. Doak, \$5,000; to John L. Doak, \$5,000; to Bert G. Doak, \$5,000; to Claude K. Doak, \$5,000; to Charles Doak, \$5,000; and to retain the balance of said proceeds, in trust, for the use and benefit of the trustor. * * *"

May 25, 1923, the trustees executed a written agreement to sell and convey said real property to the plaintiff Robert J. Finnie, in consideration of the sum of \$29,300, payable in installments, three-tenths of which purchase price was to be paid to the estate of Theodore A. Bell, deceased, for its interest in the property. This sale was duly approved by Sarah Doak, the trustor, and the purchaser immediately entered into possession. Pursuant to the terms of this contract of sale, the purchaser agreed to commence the construction of a clubhouse on said premises before September 1, 1923, and to complete and equip the same at an expense of not less than \$8,000. It was further agreed that upon the payment of one-half of the purchase price a deed of conveyance was to be executed to the purchaser, who was to thereupon execute and deliver to the trustees his promissory note for the balance of the purchase price, secured by mortgage on said real property. This agreement was subsequently modified, in accordance with the provisions of which the purchaser, on November 15, 1923, deposited in escrow in the Gridley branch of the Bank of Italy, the sum of \$12,452.50, together with \$311 interest, to be held by said bank pending the trial of a proposed suit to quiet title to said land, after which the sum so deposited was to be distributed in accordance with the written instructions accompanying the same. These instructions, after directing the payment of taxes, among other things, provided for the payment from said deposit, to the proper parties of "such amounts as are held to be liens on said property by final judgment in said action to quiet title." And further provided:

"That in the event of said property, or any part thereof being offered for sale * * * (said trustees were) to satisfy such final judgment against said property."

In that event, said judgment was to be discharged from said lien. And in order to prevent the actual sale of said property, an injunction was to be sued out to restrain the sale, if necessary. The instructions to the bank further provided that:

"Ninety days after the filing of said quiet title action (said bank was) to pay \$1,000 to Bert G. Doak and \$1,000 to John L. Doak, and if judgment in said action has become final in favor of the plaintiff therein against Clinton L. Walker, who will be a defendant therein, to pay each of said parties the additional sum of \$1,000."

Upon making said deposit pursuant to said agreement and escrow instructions, on November 15, 1923, a deed of conveyance was duly executed and delivered to plaintiff, who immediately thereupon executed and delivered to the trustees his promissory note for the balance of the purchase price, secured by mortgage on said real property. Upon proceedings duly had in the matter of the estate of Theodore A. Bell, deceased, the remaining three-twentieths interest in said real property was also conveyed to plaintiff.

Subsequent to the agreement of sale of said real property by the trustees, but prior to the actual execution of the deed of conveyance, the appellant Clinton L. Walker instituted two separate suits in Monterey county, one of which was against Claude K. Doak and Sarah Doak, in which action he finally recovered a judgment by default for the sum of \$6,920. The other action was prosecuted against Claude K. Doak alone, and likewise resulted in a judgment by default for \$2,650. In each of these cases writs of attachment were duly issued and on July 26, 1923, served upon this plaintiff, the trustees, Claude K. and Sarah Doak, and levied against all of their right, title, interest, or estate in or to said real property.

By the terms of the trust instrument heretofore referred to, certain bonds and personal property were also conveyed to the trustees for the purposes therein specified. This personal property, however, is not involved in the title to said real property, and for the purposes of this opinion its transfer is immaterial.

The trial court found that the plaintiff was the sole owner of said real property and entitled to the possession thereof, and that this appellant, nor any of the other defendants, had any right, title, interest, or lien upon said real property by virtue of said attachment or otherwise, and thereupon quieted title in plaintiff. From this judgment the defendant Clinton L. Walker has appealed.

The sole question on appeal is whether said

attachments created a lien upon the title to said real property.

Appellant contends that the beneficiaries under the declaration of trust retained an equitable interest in the land in question, which was subject to attachment by judgment creditors.

[1] The title to the property involved in this action was conveyed to the trustees by means of this declaration of an express trust for the purpose of sale, on March 30, 1922. By this instrument the trustor was divested of title, and the title was thereby absolutely vested in the trustees for the purpose of sale. Section 863 of the Civil Code provides:

"Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

The attachment under which the appellant claims a lien upon this property was not levied until July 26, 1923. In the meantime a valid binding agreement to sell the property was executed and delivered May 25, 1923, pursuant to which the purchaser had actually taken possession of the premises. At the time of the attachment, therefore, no title remained in the trustor, Sarah Doak, subject to such lien, and the interest of the beneficiaries was confined solely to the proceeds of said sale as provided by the terms of the trust instrument, and could in no way affect the title to the real property which had already actually passed. The attachment which was subsequent to the trust conveyance, was, therefore, subject to that transfer of title in spite of the fact that the agreement to sell the property was not recorded until after the levy. In the case of the *National Bank of Pacific v. Western Pacific Railway Co.*, 157 Cal. 573, 108 P. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, it is said:

"A creditor who attaches property for his debt obtains a lien only upon the title or interest which the debtor has in the property at the time of the levy, and that if, at that time, all title and interest therein has passed from the debtor to a third person, the attaching creditor gets nothing by the levy. *Tuohy v. Wingfield*, 52 Cal. 319; *Howell v. Foster*, 65 Cal. 173 [3 P. 647]; *Ward v. Waterman*, 85 Cal. 508 [24 P. 930]."

[2] An unrecorded deed or conveyance is effective as against a subsequent levy of attachment. *Morrow v. Graves*, 77 Cal. 218, 19 P. 489; *Commercial National Bank of Los Angeles v. Roberts*, 49 Cal. App. 764, 194 P. 751.

Moreover, in 5 *Thompson on Real Property*, 337, § 4250, it is said:

"Actual possession of land by one who holds an unrecorded contract of purchase, or a bond for deed, is notice of his rights." 2 *Tiffany on Real Property* (2d Ed.) 2220, § 571; *Grants*

Pass L. & W. Co. v. Brown, 168 Cal. 456, 143 P. 754; Beattie v. Crewdson, 124 Cal. 577, 57 P. 463.

[3, 4] An express trust to sell real property and distribute the proceeds of sale in a specified manner to designated beneficiaries, which declaration of trust contains no reservation of title and no power of revocation, vests the entire title in the trustee and absolutely divests the trustor of all estate and interest in the real property. Civ. Code, § 863; Ward v. Waterman, 85 Cal. 488, 24 P. 930; Craven v. Dominguez Estate Co., 72 Cal. App. 713, 237 P. 821. It naturally follows, that under such circumstances, in the absence of fraud, an attaching creditor of a beneficiary under such a trust sale will acquire no lien upon the real property thus conveyed for the satisfaction of his judgment. A bona fide purchaser of real property thus acquired is entitled to a decree quieting his title against such beneficiaries and their creditors. But in a proper proceeding the beneficiaries may enforce a distribution of the proceeds of sale and specific performance of the provisions of the trust. And likewise, in a proper proceeding, the creditors of the beneficiaries may attach the proceeds of sale for the payment of their debt.

Appellant correctly says that, pursuant to the provisions of section 863 of the Civil Code, the trustees under an express trust take the entire title to the property involved, both legal and equitable, so far as it is necessary to carry out the purposes of the trust. In other words, the quantum of title is measured by the express purposes declared in the trust created. But this does not mean that, because the declaration of trust enjoins upon the trustees the duty of distributing the proceeds of the sale of land, therefore, a judgment creditor of a beneficiary under the trust may have a lien upon the title to the land already conveyed. It is equally true, and appears to be the clear construction of our courts, that where by an express trust one is given the unqualified authority to sell and convey real estate, such trustee is thereby necessarily invested with the entire title so that he can carry out the trust and convey a good and sufficient title.

In the case of Ward v. Waterman, 85 Cal. 488, 24 P. 930, plaintiff commenced an action against defendant on a promissory note for \$21,404, and attached all of defendant's interest in certain Alameda county land. Plaintiff recovered judgment, and an execution which was duly issued therein was returned nulla bona. Subsequently another action, which was in the nature of a creditor's bill, was instituted by plaintiff against the defendant Waterman and one Smith, in which it was alleged that Waterman had conveyed his one-eighth interest in the Alameda county land to Smith to hold in trust in order to defeat and defraud the creditors of

Waterman. The answer alleged that Waterman had been the owner of a contract to purchase said one-eighth interest in said land, which contract he had assigned to one Stanford as security for Stanford's accommodation indorsement on Waterman's \$16,500 note. The statute of limitations ran upon this \$16,500 note, and subsequently Waterman conveyed this one-eighth interest in the Alameda county land to Smith "for the purpose of more conveniently making sales of said property, and in trust to divide the proceeds of such sales, * * * among the parties thereunto beneficially interested, and [in order] that the interest of said Waterman therein [which] is now held in trust by said Smith [may be devoted to] for the purpose of paying the indebtedness of Waterman to Stanford, so far as the same can be applied to such payment." Defendant had judgment in the trial court, and on appeal the Supreme Court said:

"The trust created in Smith is an express trust, under subdivision 1, section 857, of the Civil Code. It vests in Smith the whole title, legal and equitable. Civ. Code, § 863. By the very terms of the trust, whether we read it as originally written or as revised, Waterman had no interest in the property, and could never acquire any interest, unless he purchased it, as any stranger might do.

"The only right that any beneficiary under the trust had or has was to share in the proceeds of the rents and profits when realized, and of the sale of the land when sold, and the only remedy that of proceedings to enforce the execution of the trust. * * * Even if Waterman had an interest in the attached property the lien of the attachment would be subject to all equities. O'Rourke v. O'Connor, 39 Cal. 442; De Celis v. Porter, 59 Cal. 464. Even an unrecorded deed would prevail against the lien of the attachment. Plant v. Smythe, 45 Cal. 161; Le Clert v. Oullahan, 52 Cal. 252; Hoag v. Howard, 55 Cal. 564. * * * Upon the true theory of this case, the plaintiff took nothing, and acquired no right, by the levy of his attachment. * * * As we have already seen, Waterman had no interest in the land, legal, equitable, present, or prospective. 'An attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt.' Howell v. Foster, 65 Cal. 173 (3 P. 647)."

The appellant attempts to distinguish the case of Ward v. Waterman, supra, from the one at bar, on the ground that that case was essentially an action to reform a declaration of trust. The pertinent language above quoted is disposed of by the appellant by the assertion that it is dictum. It is true that, through the medium of a complaint in intervention, the declaration of trust was modified and reformed, but the primary purpose of that action was to force an alleged interest of Waterman in certain real property, to re-

spond to the satisfaction of a judgment, by means of an attachment. The chief issue was whether the attaching creditor could fasten upon Waterman's interest in that real property to satisfy the judgment, after Waterman and the other joint owners had conveyed the land to Smith in trust for the purpose of selling the land and distributing the proceeds pursuant to the directions contained in the declaration of trust. The reforming of the trust in no way altered or affected the application of the principle which was declared by the court, to the effect that, in the absence of fraud, by the conveyance of his title, legal or equitable, Waterman had divested himself of all the right, title, and interest which he had in the property, and there was, therefore no interest of Waterman's for the creditor to attach.

In the case of *Craven v. Dominguez*, supra, which, like the case at bar, was a suit to quiet title, the Dominguez Estate Company conveyed a large tract of land in trust to the Title Insurance Company by deed dated March 21, 1917. On that same day the Title Insurance Company executed a declaration of trust acknowledging the trust nature in which it held this same land for the purposes of subdivision, sale, and distribution of the proceeds thereof to certain beneficiaries named. On March 20, 1920, while the land was still standing in the name of the Title Insurance Company as trustee, the Dominguez Estate Company executed and delivered an oil lease affecting 140 acres of said tract of land. On April 19, 1920, the Title Insurance Company executed and delivered to plaintiff Emma Craven a deed of conveyance to the same 140-acre tract covered by the oil lease. Plaintiff then had notice and knowledge of the previous execution of the oil lease on the part of the Dominguez Estate Company. On August 21, 1921, the Title Insurance Company executed a written declaration attempting to ratify the oil lease which was made by the Dominguez Company prior to the execution of the deed of conveyance to the plaintiff. Upon these facts the trial court quieted title in plaintiff, which judgment was affirmed by the District Court of Appeal, and a hearing was denied by the Supreme Court. It was there contended that the Dominguez Estate Company was the real owner of the property and that the grantee of the 140-acre tract took it with notice and was bound by the former oil lease. The court said:

"The trust thus created was an express trust to sell real property and dispose of the proceeds of such sale. * * * 'Express trusts may be created for any of the following purposes: 1. To sell and convey real property and to hold or reinvest or apply or dispose of the proceeds in accordance with the instrument creating the trust.' Civ. Code, § 857. As a general rule every express trust in real property, valid as such in its creation, vests the whole estate in

the trustee subject only to the execution of the trust. The beneficiary takes no estate or interest in the property, but may enforce the performance of the trust. Civ. Code, § 863.

"* * * In our opinion this trust comes within the general rule expressed in section 863. As we have seen, by the terms of this section, the absolute title to the trust property is vested in the trustee, and the only interest the beneficiary has therein is to enforce the trust. As against the trustee and those lawfully claiming under him, the beneficiary has no interest in the property itself, but only in the proceeds thereof after the property has been sold by the trustee. This was so held by the Supreme Court in construing a trust similar to the one before us. * * * *Ward v. Waterman*, 85 Cal. 488, 506 (24 P. 930, 934). The beneficiary, the Dominguez Estate Company, therefore, having no interest legal or equitable in the trust property, an attempted transfer thereof by it either in the form of a deed or lease, as against the trustee or its grantee, would not convey any interest in the trust property. On the other hand, the trustee, being vested with both the legal and equitable title, not only could convey by deed a good title to the trust property, but it is the only person clothed with such power. * * *

"A trustee has all the authority necessary to carry out the objects and purposes of the trust. This is true even though the instrument creating the trust may not directly confer upon him such power. * * * The quantity of interest which passes to the trustee in case of an express trust is commensurate with the necessities of his office; the trustee shall have an estate in fee, if that is necessary, to enable him to perform the duties imposed upon him; * * * on this principle a devise of lands in trust to sell clothes the trustee with the fee, because necessary to the execution of the trust * * * (citing *Perry on Trusts*, § 320; *Young v. Bradley*, 101 U. S. 787 [25 L. Ed. 1044; see, also, *Rose's U. S. Notes*]).

"The Title Insurance & Trust Company as trustee, therefore, took an estate in the trust property adequate to the execution of the trust, and as the trust was to convey an absolute title to the lands and to distribute the proceeds of all sales thereof, it was necessary for it to own and hold the absolute title to the trust property. * * *

"The creator (of a trust) may, by the provisions of the instrument creating the trust, be divested of an estate or interest in the trust property. Thus where a trust deed creates a valid trust and gives a power of sale to the trustee at the request, and for the benefit of, the beneficiary, under the deed, no power of revocation being reserved, no estate in the premises is left in the grantor, which is capable of being transferred.' 39 Cyc. 245. See, also, *Marvin v. Smith*, 46 N. Y. 571; *Kopp v. Gunter* [Gunter] 95 Cal. 63 [30 P. 301]; *Willhoyt* [Willhoit] v. Cunningham, 87 Cal. 454 (25 P. 675).

"It follows, therefore, that the Dominguez Estate Company had no interest in the trust property which it could transfer by deed or otherwise. * * *

The foregoing authorities clearly hold that where a declaration of trust conveys real property to a trustee for the purpose of selling the land and distributing the proceeds of sale in a specified manner, and where the

trust instrument contains no reservations of title or right of revocation, the trustor thereby divests himself of all title to the land. It naturally follows that if the trustor has no interest in the land, legal or equitable, there is no title upon which the judgment creditor of a beneficiary can fasten by means of an attachment. In a careful analysis of the cases cited by appellant there appears to be no case cited which is in real conflict with the principle announced in the foregoing cases.

The appellant contends that just the opposite doctrine has been announced in the case of *Kennedy v. Nunan*, 52 Cal. 326. The entire opinion of the court in that case is as follows:

"It is provided by section 688, Code Civil Procedure, that 'all goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, * * * are liable to execution.' The deed of trust vested or left an interest in the property in question in *Thomas O. Larkin*, and such interest is, under the Code, subject to sale under execution."

In view of the foregoing authorities, if this language in the *Kennedy* Case can be said to conflict with these later decisions, the *Kennedy* Case must be deemed to have been overruled. But since the terms of the trust deed involved in the *Kennedy* Case are not set out in the opinion, and since the court deliberately says "the deed of trust vested or left an interest in the property in question in *Thomas O. Larkin*," we must assume that, unlike the declaration of trust in the instant case, the deed in the *Kennedy* Case did specifically reserve an interest in the land in the trustor. In that event, of course, such interest would be subject to execution or attachment. But that reservation of interest was not made in the instant case.

In the case of *Le Roy v. Dunkerly*, 54 Cal. 452, cited by appellant, it is apparent that by the terms of the trust deed involved in that case, the title to the real property did not fully pass from the trustor. Clearly an interest in that property was reserved in the trustor. The court there says:

"It is a conveyance * * * upon express trusts, to be used only for such trusts, and the title to be returned to the city upon the fulfillment of the trusts. If the debts were paid by the city, or the creditors released their claims, the property would become again the property of the city in full ownership. The legal title, as in other cases of trust deeds for the security of debt, was in the grantee; the equity of redemption and residuum after the satisfaction of the trust debts, in the city."

These facts also distinguish this *Le Roy* Case from the case at bar.

In the case of *Janes v. Throckmorton*, 57 Cal. 368, cited by appellant, it appears that the deed involved conveyed the real property in question with a limited trust or purpose of

selling only so much of the property as was necessary to pay such debts as existed against the trustor which were a lien upon the property. The terms of this trust deed clearly left at least a possible interest in some of the lands involved. That was an equitable action which primarily decided that, in order to constitute an equitable conversion of real property into personalty, there must be an absolute duty on the part of the trustee to actually sell the real property. Because, under the trust deed in that case, the sale was conditional and did not necessarily cover all the real property, it was therefore held that it did not constitute a conversion.

All that the case of *Fish v. Fowlie*, 58 Cal. 373, decides, which is pertinent to this case, is that one who holds a valid contract to purchase land possesses such an interest in the real property as is subject to attachment.

So, also, in the case of *Brown v. Campbell*, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314, cited by appellant as authority for the proposition that an attachment upon an interest reserved by a trustor in real property carries with it "the right to recover these moneys, in the event of a sale of the land by the trustees was [which are] a part of the thing attached in levying upon the entire equitable interest reserved to the fraudulent grantee by the trust deed." In that case the transfer of land was made to the trustee to secure the payment of an indebtedness due to the trustee. Under such circumstances, it cannot be denied that the trustor would still retain an interest in the land. Moreover, in that case the court found that the trust deed in question was executed by the trustor to defraud creditors and was, therefore, void as against an attaching creditor.

In the case at bar there was no contention that the declaration of trust or the subsequent sale and conveyance of the land in question was fraudulent or void. In fact, the appellant in his closing brief concedes that:

"We do not question the right of *Finnie*, the respondent, to receive title to this land under his contract upon his payment of amounts due thereunder. Our whole question is as to the right of the appellant here to receive that portion of the money which would belong to *Claude Doak*."

The sole question involved is whether defendant *Walker* can maintain an attachment lien upon land sold and conveyed in good faith to a bona fide purchaser for valuable consideration merely because he holds a judgment against a beneficiary of a trust by means of which the land was conveyed to the purchaser. This doctrine would make the purchaser of land through an express trust conveyance a guarantor for the faithful performance of the obligations of the trustee, and require the purchaser to see that the purchase money actually reached the hands of the beneficiaries who are entitled to it by

the terms of a declaration of trust in which the purchaser is not concerned.

We are of the opinion that the declaration of trust in this case conveyed the title to the land in question to the trustees, and that their subsequent contract of sale to plaintiffs was valid and binding, and that plaintiffs took the title free and clear of any subsequent attachment lien on the part of a judgment creditor of the beneficiaries under the trust.

For the foregoing reasons, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

84 Cal. App. 259

SZASZ v. JOYLAND CO. (Civ. 3297.)★

District Court of Appeal, Third District, California. June 29, 1927.

Hearing Denied by Supreme Court Aug. 25, 1927.

1. Theaters and shows ⇨6—Proprietor of amusement place is responsible for negligence of concessionaires.

Proprietor of place of amusement, who leases part of premises to others for kindred purposes, is responsible for negligence of concessionaires.

2. Weapons ⇨18(1)—Great care must be exercised in use of firearms.

Firearms are dangerous, and great care must be exercised in their use.

3. Theaters and shows ⇨6—Finding that accident should have been anticipated, and that proprietor of amusement place was negligent in maintaining shooting gallery, held warranted.

In action for injury to onlooker at shooting gallery struck by part of bullet, fired by patron of gallery, deflecting from rear of gallery, evidence warranted finding that proprietor of place of amusement should have anticipated accident, and was negligent in maintaining shooting gallery.

4. Theaters and shows ⇨6—Proof held not to absolve proprietor of amusement place from liability for injuries by bullet from shooting gallery.

Where inference that concessionaire's shooting gallery was dangerous was justifiable, and danger arising therefrom ought to have been anticipated, mere proof that no such accident ever occurred before does not require finding in favor of proprietor of amusement park sued for injury to onlooker struck by part of bullet deflected from gallery.

5. Appeal and error ⇨1004(1)—Verdict will not be disturbed because excessive, unless not result of dispassionate discretion of jury.

Verdict will not be disturbed on ground that it is excessive, unless obviously so disproportionate to injury as to justify conclusion that it is not result of cool and dispassionate discretion of jury.

6. Damages ⇨132(14)—\$20,000 verdict for loss of eye held not to be disturbed as excessive.

Verdict of \$20,000 for loss of eye, pain and suffering caused thereby, humiliation to be suffered in future, and handicap therefrom, cannot be disturbed as excessive.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Frank Szasz, by Charles Szasz, his guardian ad litem, against the Joyland Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Evan J. Hughes, of Sacramento, and P. R. Lund, of San Francisco, for appellant.

Martin I. Welsh and Robert H. Schwab, both of Sacramento, for respondent.

FINCH, P. J. Plaintiff recovered judgment against the defendant for damages in the sum of \$20,000. The defendant has appealed from the judgment. The facts, which are undisputed, are accurately stated in respondent's brief as follows:

"The defendant owns and operates an amusement park in the city of Sacramento known as Joyland Park. There are numerous concessions leased by defendant to various concessionaires in and about the park, among which is a shooting gallery operated by Mrs. Earl Pappas. On the evening of the 24th day of August, 1924, plaintiff, in company with his father, mother, brother, and sister, pursuant to an advertisement in a newspaper, went to Joyland Park for the purpose of seeing a show. Upon arriving at the park the father, after paying the necessary admission for all, plaintiff included, drove his automobile into the grounds of said park. After visiting certain of the attractions about the park, all in the party went to see the show. After the show they proceeded toward the dancing pavilion. While en route to the dancing pavilion, plaintiff requested leave of his father to watch a man shooting at the shooting gallery, which adjoined the dancing pavilion, and, leave being granted, plaintiff, with his brother, Charles, went over to the shooting gallery and stood in front thereof, and, while looking in the direction of the targets, which were situated at the rear end of same, watched the man who was also standing in front of same shooting at said targets.

"While plaintiff and his brother were standing 4 or 5 feet to the rear of the man who was shooting at the targets, and to his right, the man shot once, and then shot again. Immediately after the second shot was fired, plaintiff put his hand to his eye and cried out that something had entered it. His father rushed to his side and thereupon made an examination of the eye, but, being unable to see what had entered it, because of the dim light, took plaintiff into the dance pavilion and later to the hospital, where treatment was given him pursuant to the doctor's orders. It was determined subsequently by X-ray that some foreign substance had entered the eyeball. Thereupon the doctor made several attempts to remove this foreign substance from the eyeball, but found it impossible to do

so, which therefore necessitated the removal of same to save the other eye. Several months thereafter the eyeball was removed. It was then found that the foreign substance was a small piece of lead similar to the lead used in the bullets at the shooting gallery. The gun used was a special shooting gallery gun, called the Winchester .22, short rifle. The ammunition used was a Remington U. M. C. .22 short, smokeless, greased bullet made of soft lead.

"The shooting gallery was one story in height. It had a ground floor. Its exterior was made of wood. It was 35 or 40 feet wide and about 35 feet long. It had two wooden sides and a wooden end. The front end was open. At the front end there was a counter about 3 or 4 feet high, the top thereof being about 12 or 14 inches wide. The counter ran the full width of the front end of the shooting gallery.

"At the rear end thereof there was a sheet of iron backing which ran the full width and height of same. Half of the sides were iron. Against this backing the bullets shot by the patrons of the shooting gallery struck, if they were not intercepted in their flight by either the targets or the edges of the flat iron bars in the iron rack hereinafter described. Between the iron backing referred to and the iron rack there was a space of about 2 feet. The iron rack was made of iron rods and flat iron bars. The iron rods stood in a perpendicular manner and were used to support the flat iron bars which were lying one above the other in a horizontal manner. The flat iron bars were made of one and one-half or two-inch material and were a quarter of an inch thick and were situated one above the other about 4 or 5 inches apart. This iron rack ran the full width of the shooting gallery and almost the full height of same. The flat iron bars in the iron rack were used as shelves to set little iron targets made to represent little birds. These little targets were placed closely together, the full length and height of the iron rack; in other words, they were placed there unattached as targets for the shooters to shoot at if they chose. If any of these iron birds were struck by a bullet, they would be knocked off the rack. Suspended from the ceiling of the shooting gallery and 4 inches in front of and near the iron rack was a swinging target. It was about 14 or 16 inches in diameter. It was perfectly round. It was made to represent a clown's face. This swinging target at the time of the shooting was in motion and swung back and forth like the pendulum of an old clock. Attached to the swinging target and to the ceiling was a three quarter-inch iron pipe which held the target in position and swung back and forth with it. At different positions in front of the iron rack were a series of targets."

[1, 2] Appellant contends that the evidence is insufficient to show negligence and that the verdict is excessive in amount. In appellant's opening brief it is correctly stated that:

"The uncontradicted testimony in this case is that the shooting gallery in question has been operated, without change in character of equipment or manner of operation for over 11 years, and that neither before or after the accident upon which this action is based has there been a single injury to patrons or spectators, save that alleged by plaintiff."

Appellant concedes:

"That the proprietor of a place of amusement, who leases part of his premises to others for kindred purposes, is responsible for the negligence of his concessionaires."

It has been so decided. *Johnstone v. Panama-Pacific I. E. Co.*, 187 Cal. 323, 202 P. 34; *Harvey v. Machtig*, 73 Cal. App. 667, 239 P. 78; *Whyte v. Idora Park Co.*, 29 Cal. App. 342, 155 P. 1018. As firearms are dangerous, great care must be exercised in their use. *Rudd v. Byrnes*, 156 Cal. 636, 640, 105 P. 957, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124.

[3, 4] The plaintiff was standing in the rear and to the right of the man who fired the rifle and therefore could not have been struck by the bullet in its direct course; but the evidence clearly shows that he was hit by a fragment of the bullet. Of course, the path of the bullet was not discernible to the eye of any witness, but the whole situation was such as reasonably to establish the probable manner in which the accident occurred. The rear wall of the gallery was of iron, as were also the rear halves of the side walls. About 2 feet in front of the rear iron wall stood the iron rack, consisting, according to the photographs in evidence, of at least 11 horizontal bars supported by 8 or more vertical rods, equidistant apart. A bullet glancing against any one of these rods or bars might readily fly off in such an oblique direction as to strike the rear iron wall at a very acute angle and be deflected thence at a similar angle to one of the iron side walls or to one of the bars or rods in the rack, glancing thence towards the place from which it was fired. The number of courses which such a ricocheting bullet might take through the network of iron rods and bars and against the iron background is infinite. The bullet would probably be broken into fragments which would fly out in different directions. It cannot be held that the evidence does not warrant a finding that the defendant should have anticipated the happening of such an accident and that it was negligent in maintaining the arrangement described. Since it is a justifiable inference that such arrangement was dangerous, and that the danger arising therefrom ought to have been anticipated, mere proof that no such accident ever occurred before does not require a finding in favor of defendant.

[5] There remains the question whether the verdict is excessive in amount. In addition to the pain and suffering caused by the injury and the mortification and humiliation which will naturally be suffered in the future, the plaintiff will be seriously handicapped through life by the loss of his eye. In refusing to disturb a verdict of \$15,000 for the loss of a foot in *Darling v. Pacific Electric Ry. Co.*, 197 Cal. 702, 715, 242 P. 703, 709, the plaintiff not being engaged in any gainful occupation, the court said: "Courts have re-

peatedly refrained from attempting to establish any precise rule for the measurement of damages in actions for personal injuries, but, rather from necessity, leave the measurement to the sound sense and fair judgment of the jury," and that a verdict will not be disturbed on the ground that it is excessive, unless obviously so disproportionate to the injury as to justify the conclusion that it is not the result of the cool and dispassionate discretion of the jury. In *Kelley v. Hodge Transportation System*, 197 Cal. 598, 610, 242 P. 76, 81, a verdict was upheld for \$15,000 on account of damages consisting largely of "facial disfigurements," no organs of the body being permanently disabled. The court said:

"Unless we are able to say that the award of damages made by the jury and sustained by the trial court was so grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision."

[6] For like reasons, the verdict of the jury in this case cannot be disturbed. Numerous cases bearing upon the question of verdicts claimed to be excessive are collected in notes as follows: 46 A. L. R. 1282, L. R. A. 1915F, 196, Ann. Cas. 1913A, 1376, and 16 Ann. Cas. 39.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

84 Cal. App. 174

PETERSON et al. v. LARQUIER.
(Civ. 5050.)

District Court of Appeal, Second District, Division 2, California. June 27, 1927.

1. Landlord and tenant §22(1)—Contract reciting \$500 deposit and agreement to pay additional sums at stated times for lease of 40-room apartment house at \$15 per room per month held sufficiently definite.

Written accepted proposal, reciting deposit of \$500 for lease of 40-room apartment house, to be commenced within 30 days, and agreement to pay additional sums, to be placed in escrow, when lease was ready for execution and notice of completion filed, the total to be applied as rent for first and last two months of 10-year lease at \$15 per room, held sufficiently definite as to time, place, parties, and subject-matter to sustain judgment for damages for breach of contract to execute lease.

2. Landlord and tenant §22(4)—Refusal to execute lease within five days held no defense to action for breach of contract requiring return of deposit if unable to execute lease within such time.

Refusal to execute lease within five days, pursuant to contract requiring return of de-

posit if "unable" to produce leases for execution within such time, held no defense to action for breach of contract to execute lease.

3. Landlord and tenant §22(1)—Contract provision for return of deposit, if unable to produce leases for execution within five days, held to bind lessor, not lessees, to produce lease.

Contract for lease, providing for return of deposit "if within five days you are unable to produce to me leases for execution" held to bind prospective lessor, not lessees, to produce lease.

4. Landlord and tenant §22(4)—Evidence of enhanced rental value held sufficient evidence of damage sustained by breach of contract to execute lease.

Evidence that rental value of 40-room apartment house was over \$1 per room per month more at time of repudiation of contract to execute lease thereof than at time of execution of agreement held sufficient proof of damage sustained by prospective lessees.

5. Landlord and tenant §22(5)—Measure of damages for breach of contract to execute lease is difference between agreed rental and rental value for term.

The measure of damages for breach of a contract to execute a lease is the difference between the rental agreed to be paid and the rental value of the premises for the term.

6. Damages §1—Party aggrieved by breach should be put in same position as if contract were performed.

The law seeks to put the party aggrieved by breach of contract in same position as if contract had been performed.

7. Damages §68—Interest is not allowable in action for unliquidated damages as for breach of contract to execute lease.

Interest is not allowable in an action for unliquidated damages as for breach of contract to execute a lease.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by May Peterson and another against Anna T. Larquier. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

H. G. Weyse, of Los Angeles, for appellant.
Harry Lyons, of Los Angeles, for respondents.

CRAIG, Acting P. J. It appears that prior to November 8, 1922, the appellant authorized and requested one James D. Seely to lease for her certain real property situated in the city of Los Angeles, of which she was the owner, and upon which she proposed to construct an apartment house; that in compliance with such authorization and request Seely personally presented to appellant a written communication in the nature of a proposal, signed by the respondents, and re-

citing, "I hand you herewith \$500 as a deposit for the lease of an apartment house to be erected" (upon appellant's property), construction to commence within 30 days, and that when said lease should be ready for execution, "I will hand you the sum of \$700 which with the above deposit is to be placed in escrow, together with the lease"; that upon the filing of a notice of completion "I will hand you an additional sum of \$1,200, which is to be also placed in escrow"; and that the escrow instructions should require that upon notice of completion the foregoing amounts, together with the lease, would be delivered, and that the total of \$2,400 should be applied as rent for the first two months and the last two months of a 10-year lease. It was also proposed that the house should consist of 40 rooms, and that the rate of rental would be \$15 per room; that upon the failure of the respondents to pay either of said sums as provided for in the document mentioned, they would forfeit all moneys theretofore deposited, and that the first or \$500 payment should be returned if within five days appellant was unable to produce a lease ready for execution. Beneath the signatures of the respondents appears the following:

"Accepted and agree to pay Boyce-Seely Construction Co. the sum of one thousand dollars (\$1,000) commission for securing above lease. 11/11/22. [Signed] Mrs. Anna T. Larquier."

Appellant having thereafter refused to lease to the respondents the premises in question, this action was commenced, praying specific performance or damages. Upon the rendition of judgment in the sum of \$4,800 damages, together with interest and costs, for the plaintiffs, Mrs. Larquier appealed.

From the testimony of Seely and the respondent Peterson, it appears that the prospective lessees were at all times ready, able, and willing to lease the premises in controversy, and that they signed the foregoing instrument, deposited in escrow all of the above amounts of money, and demanded that appellant execute a lease which Seely had prepared in conformity with the specifications of the first instrument; that Seely wrote to appellant, and visited her upon several occasions, both alone and with Mr. Peterson, requesting that appellant sign the lease, but that upon each such occasion she declined to do so, stating that she had not yet received from the Bank of Italy her papers, or her building contract; that on or about November 23, 1922, appellant wrote a letter to Seely stating that the \$500 had not been handed to her, and that the agreement was therefore "null and void." Seely testified that he explained to Mrs. Larquier that under the escrow instructions he was not permitted to pay the money to appellant in per-

son until she should have complied therewith, and that he urged her to go through with the escrow and enable him to deliver the lease to respondents. Mrs. Larquier testified that when the first document was presented to her respondents had not signed it; "that there was not a signature on it;" that the acceptance had been written over her signature thereafter; and that she did not agree to pay the commission therein mentioned. Appellant's excuse for refusing to sign the lease, when she testified at the trial, was that the proposed lessees were "not suitable and responsible." Beyond this, however, she swore that she was unable to remember any of the dates, correspondence, conversations, or transactions, except that her husband may have written the letter repudiating the agreement upon the ground that the initial payment had not been handed to her personally, and she accounted for her asserted fickle recollection by the fact that it had been "a long time" since the occurrence. Seely testified, however, that he personally wrote the acceptance upon the contract in appellant's presence at her residence, following a thorough discussion with her, and that she signed the instrument exactly as it appeared when introduced in evidence; that during his subsequent visits appellant instructed him to "tell Mrs. Peterson everything will be all right." It is admitted that during that same month, and while these negotiations were pending, Mrs. Larquier leased the same property to another party for a term of ten years at the rate of \$16 per room, and erected an apartment house thereon, which was completed in May, 1923.

During the examination of appellant under section 2055 of the Code of Civil Procedure, counsel for respondents offered for identification the document dated November 8, 1922, to which appellant interposed an objection. The contract was ordered "marked Plaintiffs' Exhibit 1 for identification," and thereafter during the direct examination of the respondent Peterson, the instrument was offered and received in evidence as Plaintiffs' Exhibit 1, without objection. Appellant insists that the contract was but a mere memorandum for a lease; that it was incomplete, uncertain and ambiguous; that it was unenforceable as against either party, for the reason that it was not personally delivered to appellant, and the lease was not executed within five days as agreed; and that said instrument was therefore erroneously admitted in evidence by the trial court. It is argued that the respondents were not bound by the terms of the contract to do anything, and that merely depositing money in escrow did not constitute an act which would have enabled the appellant to compel a specific performance had she cared to do so.

[1] Appellant devotes her principal argument to an attempt to establish certain legal

principles governing the specific performance of contracts. This is all beside the subject, since the court did not render a judgment for specific performance, but only for damages. It is further claimed that the instrument which the parties signed was a mere memorandum, and not a contract at all, because too indefinite and incomplete. The objections along that line are untenable. A number of specifications of indefiniteness are attempted to be made—for example, it is said that the “plaintiffs do not agree to pay any definite sum as rent for ten years.” It is admitted that the lease agreed upon was to be for the period of 10 years, at a rental of \$15 per room, or \$600 per month, and that the entire amount thus provided would be \$72,000. And yet, it is said, the plaintiffs did not agree to pay that sum. Merely to state this and other similar objections to the agreement is to show their fallacy. The respondents made a certain definite proposal which the court found had been accepted, and the evidence clearly sustains that finding. We think the writing sufficiently definite as to time and place, parties and subject-matter to sustain a judgment for damages for breach of contract.

It is argued that the court erred in admitting the agreement in evidence. As above indicated, it was admitted without objection.

[2, 3] It is also seriously insisted that there was no enforceable contract for the reason that the lease provided therein to be made was not in fact executed within the five-day limit fixed in the offer. The provision in question is: “The above deposit of \$500.00 to be returned to me if within five days you are unable to produce to me leases for execution.” It appears that the appellant did not in fact execute any lease within the 5-day limit, or at all, but to maintain that her refusal to carry out her contract in that behalf may be a defense in an action against her for breach of her contract is a novel theory, and amounts to an attempt to profit by her own wrong. It is said that this clause did not bind the defendant to produce a lease, but that the provision intended that the plaintiffs do so. There is nothing in the agreement to that effect, that such a construction contradicts the plain language of the writing. It is clear that the intention of the

parties was that if it should not be within the power of the appellant to produce a lease within five days, then the transaction would be ended and the \$500 returned to the respondents, but there is nothing in evidence to indicate that she was “unable” to lease the premises as provided in the contract, but merely that she refused to do so. The fact that she did lease the premises establishes her ability to produce the lease contemplated.

[4-6] Concerning the claim that there was no proof that respondents sustained damage, it is sufficient to say that the court found that at the time of the execution of the agreement between respondents and appellant the reasonable rental value of the premises was \$15 per room on a ten-year lease, and that on or about November 22, 1922, at the time when appellant repudiated and breached her contract and refused to execute a lease as provided by the agreement, the rental value of the property in question had enhanced in excess of \$1 per room per month for such a lease. This finding is amply supported by the evidence. The measure of damages in such a case is the difference between the rental agreed to be paid and the rental value of the premises for the term; for in this way only can the law compensate an aggrieved party and put him in the same position as if a contract had been performed, which, of course, the law seeks to do. *Coburn v. California Portland Cement Co.*, 144 Cal. 81, 77 P. 771.

[7] The court erred in one respect. It allowed interest against appellant from November 22, 1922, apparently upon the theory that interest should begin at the time of the breach of the contract. However, in an action for damages, where judgment is rendered in favor of the plaintiff, and where, as here, the plaintiff's claim is unliquidated, the law does not authorize the allowance of interest. *Brady v. Wilcoxson*, 44 Cal. 239; *Ferreira v. Chabot*, 121 Cal. 233, 53 P. 689, 1092. It appears that the judgment thus erroneously allows interest from November 22, 1922, until the rendition of judgment. This provision is directed to be stricken out, and, as thus modified, the judgment is affirmed.

Judgment affirmed.

We concur: THOMPSON, J.; MURPHEY, Justice pro tem.

84 Cal. App. 295

Ex parte CULVER. (Cr. 1418.)

District Court of Appeal, First District, Division 1, California. July 1, 1927.

1. Constitutional law $\S$ 250, 265—Statute providing that two or more different offenses of same class of crimes may be charged in one information held not to violate due process and equal protection clauses of Constitution (Pen. Code, $\S$ 954).

Pen. Code, $\S$ 954, providing that one information may charge two or more offenses of same class of crimes under separate counts, and that two or more informations filed in such cases may be consolidated by court's order, held not invalid as violating "due process of law" and "equal protection of law" clauses of state and federal Constitutions.

2. Constitutional law $\S$ 48—Law is not unconstitutional because it vests in officers authority which might be arbitrarily or unfairly exercised.

Law is not to be held unconstitutional merely because it vests in certain officers authority which might be arbitrarily or unfairly exercised, since it is not to be assumed that such officers will act otherwise than in pursuance of sound discretion.

3. Statutes $\S$ 68, 71—General and uniform laws need be enacted only where they can be made applicable.

Constitution demands that general and uniform laws be enacted only where they can be made applicable.

4. Constitutional law $\S$ 211—To declare law unconstitutional as discriminatory, it must appear that it is not founded on natural, intrinsic, or constitutional distinction.

In order to declare law unconstitutional as being discriminatory, it must appear that it is not founded on natural, intrinsic, or constitutional distinction.

5. Habeas corpus $\S$ 4—Irregularities which should be taken advantage of by appeal from conviction furnish no basis for release on habeas corpus.

After conviction, defendant cannot secure release on habeas corpus because of irregularities which should have been taken advantage of by appeal.

Application by Lawrence Culver for a writ of habeas corpus, prayed to be directed to the Warden of San Quentin State Prison to secure the release of petitioner from custody on the ground of improper consolidation of charges. Writ denied.

Ernest B. D. Spagnoli, of San Francisco, for petitioner.

KNIGHT, J. The petitioner herein, Lawrence Culver, is a prisoner confined in the state prison, and has applied for a writ of habeas corpus. It appears from his petition that he was charged in the superior court in and for Los Angeles county, in two informa-

tions, with seven distinct felonies, consisting of lewd and lascivious acts with a child under 14 years of age, sex perversion, and the infamous crime against nature; that pursuant to section 954 of the Penal Code, the trial court ordered the informations consolidated, and upon trial before a jury he was found guilty on all seven charges and sentenced accordingly.

[1-4] Said section 954 provides, among other things, that one information "may" charge two or more different offenses of the same class of crimes under separate counts; also that if two or more informations are filed in such cases the court "may" order them to be consolidated. Petitioner contends that since the power conferred upon the district attorney and the court respectively by the foregoing section is a discretionary one, which may or may not be exercised in all cases, said section "is contrary to the inhibitions contained in the 'due process of law' and 'equal protection of law' clauses of the state and federal Constitutions." It is well settled, however, that a law is not to be held unconstitutional merely because it vests in certain officers an authority which might be arbitrarily or unfairly exercised, for the reason that it is not to be assumed that such officers will act in such manner or otherwise than in pursuance of sound discretion. In *re* Holmes, 187 Cal. 640, 203 P. 398; In *re* Flaherty, 105 Cal. 558, 38 P. 981, 27 L. R. A. 529. Moreover, the Constitution demands that general and uniform laws be enacted only where they can be made applicable (*Argyle Dredging Co. v. Chambers*, 40 Cal. App. 332, 181 P. 84); and in order to declare a law unconstitutional as being discriminatory, it must appear that it is not founded upon a natural, intrinsic, or constitutional distinction (*Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604; *People v. Schomig*, 74 Cal. App. 109, 239 P. 413).

It requires no discussion, we think, to prove that it would be quite impossible in the orderly administration of the criminal laws to require that in every case all criminal charges which might be brought against a person be inserted in one accusation, or that if there were two or more accusations, they be tried together. The effect of a law establishing such procedure would obviously operate injuriously and prejudicially against the prosecution and defense alike. On the other hand, the interests of justice require that in many cases such course be followed. It would therefore seem that the procedure prescribed in the present law is the only feasible and practical one which could be adopted.

Petitioner further contends that different offenses, not of the same class, were charged in one information; that the two informations charged different offenses not of the

same class; that the minutes of the trial fail to show that the verdicts were read to the jury and that inquiry was made as to whether or not the same were their verdicts; that the minutes also fail to show that before judgment of sentence was pronounced the court inquired whether or not petitioner had any legal cause to show why judgment should not be pronounced.

[5] It is apparent that the points thus made relate to alleged irregularities occurring prior to and at the time of conviction, and it has been repeatedly held that after conviction a defendant cannot secure his release on habeas corpus upon irregularities which should have been taken advantage of by an appeal. 13 Cal. Jur. p. 218, note 15.

The application is denied.

We concur: TYLER, P. J.; CASHIN, J.

84 Cal. App. 180

BROWN et al. v. DAVIS. (Civ. 3266.)

District Court of Appeal, Third District, California. June 27, 1927.

1. Evidence ⚡588—Jury need not accept as true explanation of sole eyewitness as to cause of accident.

Jury is not bound to accept witness' explanation of cause of accident, in action for injuries, though witness was sole person present who testified.

2. Appeal and error ⚡933(4)—Order granting new trial which does not specify grounds is presumed not to have been granted for insufficiency of evidence (Code Civ. Proc. § 657).

Where order granting new trial does not specify whether it was granted on ground of insufficiency of evidence, it is presumed that order was not based on that ground, under Code Civ. Proc. § 657.

3. Negligence ⚡68—Invited guest, knowing of excessive speed of automobile, is not guilty of contributory negligence in failing to remonstrate with driver.

Invited guest riding in automobile is not guilty of contributory negligence by reason of failure to remonstrate with driver going at excessive or dangerous rate of speed, though fact is known to guest or is plainly obvious to reasonable person in his situation.

4. Negligence ⚡121(2)—Presumption of negligence arose on death of guest from overturning of automobile in exclusive control of defendant (Civ. Code, § 2096).

In action for death of invited guest in automobile resulting from overturning of car while in exclusive operation and control of defendant, presumption of defendant's negligence arose from such overturning, though only ordinary care need be exercised by carrier of persons without reward, under Civ. Code, § 2096.

5. Courts ⚡95(1)—Decisions of courts of other states not in harmony with decisions of local courts need not be considered.

Decisions of other state courts need not be considered, where they are not in harmony with decisions of courts of local state.

6. Negligence ⚡121(2)—Presumption of negligence may arise, though injury was caused by some other agency.

Fact that injury may have been caused by some other agency than defendant does not prevent presumption of defendant's negligence arising under doctrine of *res ipsa loquitur*.

7. Negligence ⚡136(12)—Whether presumption of negligence is overcome by circumstances is generally question for jury.

Whether presumption of negligence under doctrine of *res ipsa loquitur* has been offset by evidence of facts and circumstances attending accident is ordinarily question of fact for jury in action for injuries.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Almer Brown and others against Will Davis. Judgment for defendant. From an order granting plaintiffs' motion for a new trial, defendant appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

Edward Bickmore, of Merced, for respondents.

FINCH, P. J. This action was brought to recover damages for the death of the wife of plaintiff Brown, caused by the overturning of the defendant's automobile while he was driving it and in which Mrs. Brown was riding as his invited guest. The jury returned a verdict in favor of defendant and the court granted plaintiffs' motion for a new trial. This appeal is from the order granting a new trial.

[1, 2] Mrs. Brown and several others were riding in the automobile at the time of the accident, which occurred late at night. None of the occupants of the machine, except the defendant, were witnesses at the trial. He testified that immediately before the accident "there was a car coming * * * on the other side and what made me pull out of the road, the car was coming on the other side of the road with no lights"; that he thereupon drove off the graveled part of the road and as he attempted to pull back again the right rear wheel collapsed and his automobile overturned. The wheel had broken off at the hub. The defendant testified that before turning off the graveled road he was traveling at the rate of 25 to 30 miles an hour and that he continued at that speed until the accident occurred. In confused and uncertain terms he testified that when the machine left the traveled part of the road, the shoulder thereof evidently being sidelining, Mrs. Brown threw her arms around him and there-

by caused him to lose control of the automobile. There is neither allegation nor evidence that the defendant was driving at an excessive or dangerous rate of speed. The jurors, of course, were not bound to accept the defendant's explanation of the cause of the accident. The order granting a new trial does not specify whether it was granted upon the ground of insufficiency of the evidence to sustain the verdict, and therefore it is "presumed that the order was not based upon that ground." Code Civ. Proc. § 657. Negligence is charged in the complaint in general terms only.

[3] The court instructed the jury, in effect, that if the defendant was driving at an excessive or dangerous rate of speed and that fact was known to the deceased "or was plainly obvious to a reasonable person in her situation," and that she failed to remonstrate with the defendant, she was guilty of contributory negligence. The instruction is so clearly erroneous that it is deemed sufficient to cite *Dowd v. Atlas T. & A. Service*, 187 Cal. 523, 202 P. 870, and *Curran v. Earle C. Anthony, Inc.* (Cal. App.) 247 P. 236, wherein the duty of a passenger in case of a driver's negligence is considered.

[4] The court instructed the jury to the effect that the doctrine of *res ipsa loquitur* is applicable to the facts of the case and also that it is not applicable thereto. The doctrine has often been stated in this and other states in the language of *Earle, C. J.*, in *Scott v. London Dock Co.*, 3 Hurl. & C. 596, decided in 1865. The plaintiff in that case, an officer of customs, while in the discharge of his official duties in the defendant's warehouse, was injured by the unexplained fall upon him of six bags of sugar. In the opinion it is said:

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The question here is whether a presumption of negligence arose from proof merely that the automobile overturned while in the exclusive operation and control of the defendant. The answer must be in the affirmative if the foregoing doctrine is to be applied literally. The doctrine is applicable in cases of carriers by automobile for hire. *Scarborough v. Urgo*, 191 Cal. 341, 346, 216 P. 584; *Dowd v. Atlas T. & A. Service*, supra. "A carrier of persons for reward must use the utmost care and diligence for their safe carriage." Civ. Code, § 2100. "A carrier of persons without reward must use ordinary care and diligence for their safe carriage." Civ. Code, § 2096; *Nichols v. Pacific Electric Ry. Co.*, 178 Cal. 630, 174 P. 319; *Sheean v. Foster* (Cal.

App.) 251 P. 235; *Curran v. Earle C. Anthony, Inc.*, supra; *Spring v. McCabe*, 53 Cal. App. 330, 200 P. 41. Does this difference in the degree of care required of the two classes of carriers justify a distinction in the application of the doctrine of *res ipsa loquitur*? In holding the doctrine applicable to an explosion of nitroglycerine in process of manufacture into dynamite, it is said:

"As was well said by the court in *Rose v. Stephens, etc., Co.* [C. C.] 11 F 438: 'Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties.' The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care toward this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the relations existing between the party injuring and the party injured. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown." *Judson v. Giant Powder Co.*, 107 Cal. 549, 555. 40 P. 1020, 1021 (29 L. R. A. 718, 48 Am. St. Rep. 146).

It is not perceived that the probability of injury being the result of negligence is any less in case of a carriage without reward than one for reward. The doctrine has been held applicable in cases in which the injuring party was bound to the exercise of ordinary care only. *Harlow v. Standard Improvement Co.*, 145 Cal. 477, 480, 78 P. 1045; *Bauhofer v. Crawford*, 16 Cal. App. 676, 678, 117 P. 931; *Onell v. Chappell*, 38 Cal. App. 375, 376, 176 P. 370; *John v. Northern Pac. Ry. Co.*, 42 Mont. 18, 111 P. 632, 32 L. R. A. (N. S.) 85; *Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829, 1 A. L. R. 835; *Whitwell v. Wolf*, 127 Minn. 529, 149 N. W. 299; *Berry on Automobiles* (5th Ed.) § 512; *Huddy on Automobiles* (8th Ed.) § 345. The doctrine has been applied in cases of injury to invited guests, caused by the operation of automobiles. *Berry on Automobiles* (5th Ed.) § 648; *Masten v. Cousins*, 216 Ill. App. 268; *MacKenzie v. Oakley*, 94 N. J. Law, 66, 108 A. 771.

[5] There are cases holding to the contrary in states in which an invited guest riding in an automobile is deemed a mere licensee.

Such cases, of course, are not in harmony with the decisions in this state and need not be considered. In *Ferrell v. Solski*, 278 Pa. 565, 123 A. 493, cited by appellant, it is said:

"From the mere happening of the accident, no presumption of negligence arises."

The court there, however, appears to have been considering the effect of the whole evidence, rather than mere proof of the happening of the accident, for it is further said:

"The evidence justifies the statement that the driver was advancing with reasonable care on an open country highway without other vehicles in sight. There was nothing shown in this case which can fairly be said to have put Solski on his guard as to impending danger, and, though inferences as to proper handling, to be drawn from the circumstances, are ordinarily for a jury, * * * yet, if the undisputed facts show the injury to be accidental, and without negligence, liability should not be imposed merely because loss has been sustained."

The same is true of *Simpson v. Jones*, 284 Pa. 596, 131 A. 541. Appellant relies particularly on *Klein v. Beeten*, 169 Wis. 385, 172 N. W. 736, 5 A. L. R. 1237. In that case a guest who was riding in a Ford automobile driven by one of the defendants at 15 miles an hour was killed by the overturning of the automobile. The driver "was unable to give any explanation of the cause of the accident, other than that the automobile suddenly sheered to the left and went into the gutter. He could assign no reason for its so doing. * * * The left-hand front tire was deflated." The court said:

"It is not at all beyond the realm of possibility that the accident might have happened by reason of this blow-out. * * * It is familiar knowledge that the blow-out of the front tire of an automobile is a dangerous occurrence, the degree of danger, of course, depending upon the rate of speed, and, we apprehend, somewhat upon the character of the car. * * * Granting that the accident might have been the result of negligent operation of the car, the evidence certainly discloses a possibility that the accident might have been the result of the blow-out. * * * The jury could have done no more than guess as to whether the accident was the result of careless and negligent operation of the car or of the blow-out. Verdicts cannot rest upon guess or conjecture. It is the duty of the plaintiff to prove negligence affirmatively, and while the inferences allowed by the rule or doctrine of *res ipsa loquitur* constitute such proof, it is only where the circumstances leave no room for a different presumption that the maxim applies."

[6, 7] It is to be inferred from the last sentence quoted that from mere proof of the overturning of the automobile while it was being operated by one of the defendants a presumption of negligence arose, but that this presumption was overcome by proof of the

blow-out. In this state it has been held that—

"Such a presumption is evidence in the case, but it has no greater or different effect than the testimony of witnesses. * * * When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff." *Scarborough v. Urgo*, supra, page 346 (216 P. 586).

"The presumption of defendant's negligence arises regardless of the fact that the injury may have been caused by some other agency." *Osgood v. Los Angeles, etc., Co.*, 137 Cal. 280, 283, 70 P. 169, 170 (92 Am. St. Rep. 171); *Housel v. Pacific Electric Ry. Co.*, 167 Cal. 245, 248, 139 P. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665; *Willard v. Valley Gas, etc., Co.*, 180 Cal. 561, 564, 182 P. 32.

Whether the presumption of negligence in such a case has been offset by the facts and circumstances attending the accident is ordinarily a question of fact for the jury.

The order granting a new trial is affirmed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

84 Cal. App. 308

RODRIGUEZ v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 5699.)

District Court of Appeal, Second District, Division 1, California. July 1, 1927.

1. Master and servant ⇨419—Evidence held to support finding as to termination of compensation claimant's disability (Workmen's Compensation Act).

In proceedings to amend award, under Workmen's Compensation Act (St. 1917, p. 831), evidence held to support finding of Industrial Accident Commission as to cessation of claimant's disability over period during which compensation had been allowed.

2. Master and servant ⇨419—Power of commission to amend award by withdrawing compensation awarded held not impaired by delay of insurance carrier in filing petition (Workmen's Compensation, Insurance, and Safety Act 1917, § 20[d]).

Delay of insurance carrier in filing petition to terminate employee's award for disability held not to deprive Industrial Accident Commission of authority to withdraw compensation previously awarded, which had accrued at time of filing petition, under Workmen's Compensation, Insurance, and Safety Act 1917, § 20(d) (St. 1917, p. 850).

3. Master and servant ⇨419—Industrial Accident Commission has authority to increase, diminish, or terminate award granted (Workmen's Compensation, Insurance, and Safety Act 1917, § 20[d]).

Industrial Accident Commission at time of amendment of award has authority upon good cause shown therefor, under Workmen's Compensation, Insurance, and Safety Act 1917, §

20(d) (St. 1917, p. 850), to increase, diminish, or terminate award granted by its prior order.

Certiorari to review an order of the Industrial Accident Commission.

Proceeding by E. Rodriguez under the Workmen's Compensation Act. Order of the Industrial Accident Commission of the State of California, amending a former award in claimant's favor and allowing compensation as for partial disability, and claimant applies for certiorari. Writ denied.

S. Santilli and B. A. Hayne, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CONREY, P. J. On December 23, 1924, petitioner sustained injuries and resulting disability, for which he filed claim for compensation against his employer and its insurance carrier.

On October 28, 1925, an award was made by the commission granting to applicant compensation on a basis of temporary total disability, and providing for weekly payments to continue until the termination of the disability or until the further order of the commission.

On August 13, 1926, the insurance carrier filed petition for order terminating disability as of November 5, 1925. After a hearing and evidence received, the commission on January 3, 1927, made its order amending the former award, so that petitioner be allowed compensation as for partial disability on November 6, 1925, and until further order. On petition by the insurance carrier for a rehearing, that petition was granted, and on March 18, 1927, the commission on the same evidence theretofore received amended its award, so as to deny compensation from December 5, 1925, to November 12, 1926, but to allow compensation as for partial disability from November 12, 1926, until further order of the commission. A rehearing after this last amendment to the award was demanded by petitioner and was denied. Thereupon, he filed this petition for a writ of review.

[1] It thus appears that the principal subject-matter of petitioner's complaint is that he was denied any compensation for the period extending between November 6, 1925, and November 12, 1926. The evidence as set forth in the petition herein, as contained in the report of Dr. Phillips, which was received as evidence in the proceeding, was sufficient to support a finding that the disability had ceased on November 6, 1925. Dr. Phillips stated as the result of his examination on that date that the patient had apparently recovered entirely from the effects of the injury, and in the opinion of the physician was able to do his former work. Nevertheless, from the evidence produced at the later hear-

ing, there was found to exist on November 12, 1926, a partial disability resulting from some renewal of the pathological symptoms resulting from the original injury. We cannot say that there is any inconsistency between these contrasting facts which would require us to hold that there necessarily was any disability during the intervening period for which compensation has been denied.

[2, 3] In addition to his contention that the evidence is insufficient to support the amendment to the award, counsel for petitioner contends that, since the petition of the insurance carrier to terminate disability as of November 5, 1925, was not filed until August 13, 1926, therefore the commission was without authority to deprive him of that part of the compensation previously awarded, and which by the terms of the original award had accrued on August 13, 1926. It seems, however, that, under the provisions of section 20(d) of the Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 850), the commission at the time of the amendment to the award had authority upon good cause appearing therefor to increase, diminish, or terminate the award granted by its prior order. *National Engineering Corporation v. Ind. Acc. Com.*, 193 Cal. 422, 225 P. 2; *Miller Creamery v. Ind. Acc. Com.*, 66 Cal. App. 404, 226 P. 402. This being so, there is no apparent reason against application of this authority so that it shall relate to the very time when, under the facts, the change in rating should have been made.

The petition for writ of review is denied.

We concur: HOUSER, J.; YORK, J.

84 Cal. App. 186

Ex parte OTTO. (Cr. 989.)

District Court of Appeal, Third District, California. June 27, 1927.

Criminal law — § 1207—Sentence under Indeterminate Sentence Law for crime committed before it went into effect held void (Pen. Code, § 1168, as added by St. 1917, p. 665).

Sentence under Indeterminate Sentence Law (Pen. Code, § 1168, as added by St. 1917, p. 665), is void where defendant committed crime of escaping from prison two days before such law went into effect.

Original habeas corpus by Carl Otto against the Warden of Folsom State Prison to secure the release of the petitioner from custody on the ground of illegal sentence. Petitioner remanded.

Carl Otto, in pro. per.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

PER CURIAM. The petitioner was received into the state prison February 7, 1913,

under sentence of seven years each on two charges of burglary of the first degree, the terms to run consecutively. July 25, 1917, he escaped from the prison, but was later returned thereto. He was thereafter tried in the superior court of Marin county and convicted of the crime of so escaping. He was thereupon sentenced by said court to imprisonment in the state prison "for the term of indeterminate sentence as provided in section 1168 of the Penal Code, said term to commence at expiration of present sentence." The Indeterminate Sentence Law (Stats. 1917, p. 665), did not go into effect until July 27, 1917, two days after the petitioner's escape from prison. Under the authority of *In re Lee*, 177 Cal. 690, 171 P. 958, and numerous subsequent decisions, the sentence is void. The terms for which the petitioner was sentenced on the charges of burglary have expired, and he is now imprisoned under the sentence upon the charge of escaping. The other grounds upon which petitioner asks to be released are without merit.

It is ordered that the warden of the state prison at Folsom deliver the petitioner to the sheriff of the county of Marin, to whose custody he is remanded, for judgment by the superior court upon the conviction.

84 Cal. App. 267

Ex parte PARSONS. (Cr. 1417.)

District Court of Appeal, First District, Division 1, California. June 30, 1927.

1. Criminal law ☞999(1)—Recital in commitment to penitentiary for sex perversion sufficiently identified crime to enable prison board to exercise jurisdiction in fixing term (Pen. Code, § 1168; § 288a, as re-enacted by St. 1921, p. 1633).

Recital in commitment to penitentiary that defendant pleaded guilty to, and was sentenced to prison for, crime of felony, "sex perversion," when read in connection with title of Pen. Code, § 288a, as re-enacted by St. 1921, p. 1633, declaring commission of acts described therein to be sex perversion, held to sufficiently identify crime with that section to enable prison board to exercise its jurisdiction under section 1168 in fixing term of imprisonment.

2. Criminal law ☞991(3)—Sentence for sex perversion of not more than fifteen years following terms of statute held valid (Pen. Code, § 288a, as re-enacted by St. 1921, p. 1633).

Sentence to prison on plea of guilty to crime of sex perversion held not invalidated by inclusion therein of maximum of not more than 15 years, in that terms of sentence are identical with those fixed by Pen. Code, § 288a, as re-enacted by St. 1921, p. 1633; no minimum penalty being therein stated.

Original application of H. G. Parsons for a writ of habeas corpus, prayed to be directed to the Warden of San Quentin Prison to secure petitioner's release on ground of improper sentence. Writ denied.

Ernest B. D. Spagnoli, of San Francisco, for petitioner.

KNIGHT, J. Application for a writ of habeas corpus. The petitioner is now being imprisoned in the state prison under a commitment issued out of the superior court in and for the county of Imperial, which shows that he was charged in said court with "the crime of felony, to wit, sex perversion," and upon arraignment entered a plea of "guilty of the offense charged in the information." The commitment then reads:

"That whereas, the said H. G. Parsons having been duly convicted in this court of the crime of felony, sex perversion, it is therefore ordered, adjudged, and decreed that the said H. G. Parsons be punished by imprisonment at San Quentin, in the state prison of the state of California, for the term of not more than fifteen years."

Petitioner contends that:

The "sentence and judgment are void for the following reasons: (1) Because the same fixes or names the maximum penalty; and (2) because the same does not name the felony offense with such particularity as would enable the state prison board to determine what the minimum and maximum terms of imprisonment for the offense of which petitioner was convicted consisted of."

In re-establishing section 288a of the Penal Code (Stats. 1921, p. 1633), the Legislature has, in effect, declared the commission of the acts described in said section to be "sex perversion," the title of the legislative enactment of said section being, "An act * * * prohibiting sex perversion and prescribing a penalty for violation of the provisions hereof"; and it does not appear that the expression mentioned has been employed by the Legislature in connection with the enactment of any other penal statute.

Necessarily the name of the felony of which petitioner stood convicted and for which he was sentenced could not have been inserted in the commitment, because in the section itself no legal appellation was given to the acts denounced therein as a crime; the Legislature having merely described them, and declared that any person participating in them was "punishable by imprisonment in the state prison for not more than fifteen years." The intentional omission to name the crime in the section itself is accounted for by the fact that, in framing the previous Code section, of which the present one is a re-enactment, the Legislature sought to name the crime without describing the acts constituting the same, and the section was de-

clared to be unconstitutional. In *re Lockett*, 179 Cal. 581, 178 P. 134.

[1] For the reasons stated, we are of the opinion that the recital in the commitment that petitioner was charged with, pleaded guilty to, and was sentenced to prison for, the crime of "felony, to wit, sex perversion," when read in connection with the title to the legislative enactment of said section 288a, sufficiently identified the crime with that section to enable the prison board to exercise its jurisdiction, under section 1168 of said Code, in fixing the term of imprisonment.

[2] The sentence imposed upon petitioner was not invalidated by the inclusion therein of the maximum of "not more than fifteen years." The terms of the court's sentence are identical with those fixed by said section 288a, no minimum penalty being stated and consequently the instant case is differentiated from the case of *People v. Lee*, 36 Cal. App. 323, 172 P. 158, upon which petitioner seems to rely. Conceding that the judgment of sentence may have consisted merely of a recital of the offense of which petitioner stood convicted and a designation of the state prison to which he was committed (*People v. Mendosa*, 178 Cal. 510, 173 P. 998), the fact that the trial court followed the terms of the statute did not interfere in any manner with the operation of the indeterminate sentence law nor with the jurisdiction of the prison board in the matter of fixing the period of imprisonment, and therefore the sentence imposed was not erroneous.

The application is denied.

We concur: TYLER, P. J.; CASHIN, J.

84 Cal. App. 187

PHILBROOK v. MERCANTILE TRUST CO. OF CALIFORNIA. (Civ. 5123.)★

District Court of Appeal, First District, Division 1, California. June 28, 1927.

Hearing Denied by Supreme Court Aug. 25, 1927.

1. Garnishment ⚡41—Obligation under building contract arises from rendition of service, not from architect's certificate, within law of garnishment (Code Civ. Proc. § 544).

Obligation to pay for work done under a building contract arises from rendition of service, so as to render the debt due and owing, within Code Civ. Proc. § 544, relating to garnishment, even though an architect's certificate has not been presented to trustee of mortgage money, as required by contract.

2. Garnishment ⚡41—Architect's certificate authorizing trustee to disburse mortgage money to building owner held evidentiary merely, not consideration of obligation to pay for work.

As respects garnishment, architect's certificate which, under contract, was to be conclusive evidence for trustee of performance of

work, so as to authorize him to disburse to building owner proceeds of mortgage bonds, held evidentiary; the rendition of services, not production of certificate, being consideration giving rise to obligation to pay for work done under the contract.

3. Garnishment ⚡41—Architect's certificate held unnecessary to authorize trustee of mortgage money to disburse funds to building owner to extent of judgment against owner for work on building (Code Civ. Proc. § 544).

Architect's certificate to authorize trustee of mortgage money to disburse funds to building owner held unnecessary, where judgment against owner for services on the work became final; the judgment being sufficient evidence of performance to render the mortgage money to the extent thereof due owner, within Code Civ. Proc. § 544, relating to garnishment.

4. Garnishment ⚡41—Debt, to be "due or owing" within law of garnishment, need not be immediately payable (Code Civ. Proc. § 544).

Debt, in order to be "due or owing," within Code Civ. Proc. § 544, relating to garnishment, is not necessarily immediately payable, but may be for money fully earned, but not payable until a future time.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Due and Owing.]

5. Garnishment ⚡41—Parties to building contract will not be presumed to have intended architect's caprice in withholding certificate should cause forfeiture of contractor's right to compensation.

As respects garnishment, it will not be presumed that parties to a building contract requiring production to trustee of mortgage money of architect's certificate, in order for money to be payable, intended that money rightfully due for services on the work should be forfeited by contractor on the caprice of the architect in withholding certificate.

6. Contracts ⚡289—Building contractor may collect money, notwithstanding architect arbitrarily withholds certificate.

Where an architect's certificate is refused without cause, the contractor may nevertheless collect his money.

7. Garnishment ⚡41—Architect's certificate to authorize trustee to disburse mortgage money to building owner held solely for trustee's protection.

As respects garnishment, architect's certificate under building contract providing that it should be conclusive evidence of performance of work authorizing trustee to disburse mortgage money to building owner held solely for trustee's benefit, and not prerequisite to recovery for services by one contracting with owner.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action for money by Ida B. Philbrook, individually and as administratrix with the will annexed of the estate of Carleton A. Philbrook, deceased, against the Mercantile Trust Company of California. Judgment for plaintiff, and defendant appeals. Affirmed.

Brobeck, Phleger & Harrison, of San Francisco (J. F. Shuman, of San Francisco, of counsel), for appellant.

Bert Schlesinger, of San Francisco, Jerome H. Boyer, of Oakland, and Ida B. Philbrook, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment in favor of respondent and against appellant in the sum of \$5,601.98.

On July 1, 1911, the Down Town Realty Company leased from Mary Prior and others a parcel of real property at the southwest corner of Mason and Eddy streets in San Francisco. The lease covered a term of 30 years, commencing on April 1, 1912, and provided, among other things, for the immediate erection of a building upon the demised premises by the lessee at its own expense. In pursuance of this latter provision the Down Town Realty Company on July 25, 1911, entered into a written agreement with two construction engineers, Taylor and Johnson by name, whereby the Down Town Realty Company employed these men to superintend the erection of a building on the leased premises and agreed to compensate them for their services in a certain total amount made payable at successive stages in the construction of the contemplated building. On the day of the execution of this agreement Taylor assigned all of his interest thereunder to one Carleton A. Philbrook. This assignment was forthwith consented to and ratified by both Taylor and the Down Town Realty Company, and at all times thereafter Carleton A. Philbrook was treated by all interested parties as a party to the agreement in place of Taylor. Immediately upon the execution of the agreement Johnson and Philbrook commenced the performance of their duties thereunder and continued such performance at all times thereafter up to June 4, 1912. Between December 1, 1911, and June 4, 1912, the Down Town Realty Company failed to furnish the labor, material, and money requisite to the construction of the contemplated building. Finally, on June 4, 1912, all work was entirely stopped and prevented by virtue of the failure of the Down Town Realty Company to furnish the commodities mentioned. On August 12, 1912, Philbrook and Johnson mutually severed and dissolved all of their business relations. Throughout all of the foregoing transactions the Down Town Realty Company assured Philbrook that it would compensate him for his services.

Meanwhile, on the 15th day of November, 1911, the Down Town Realty Company created a bonded indebtedness and to secure the same executed a "mortgage" or "deed of trust." Under this document the company conveyed, granted, mortgaged, and pledged to the Mercantile Trust Company, styled in the document as "trustee," all of its right, ti-

tle, and interest in and to the demised premises aforementioned, together with the building and improvements to be erected thereon during the term of the lease, and also all other property, real and personal, of every kind and nature whatsoever, and wheresoever the same may be situated, whether owned by and belonging to the company at the date of the mortgage or deed of trust or thereafter in any manner acquired by the company during the life or term of the mortgage or deed of trust. This document also provided that all money received as the purchase price of bonds delivered should be held by the "trustee" subject to the lien of the mortgage or deed of trust, to be disbursed in the manner therein specified. The manner of disbursement of these moneys is set forth in article XVIII of the document, which reads as follows:

"Bonds of the issue herein mentioned shall be certified and delivered by the trustee in accordance with the provisions of this article and not otherwise.

"The trustee shall deliver said bonds or any part thereof to the company or its order or to the purchasers thereof upon the payment to the trustee of the par value thereof, together with all accrued interest thereon, but all moneys so received shall be held by the trustee, subject to the lien of this mortgage, or deed of trust, to be disbursed in the manner hereinafter specified. Such moneys while on deposit with the trustee shall bear no interest.

"On the fifteenth day of each and every month there shall be paid to the company from the proceeds of said bonds, or in said bonds at their par value and accrued interest thereon, eighty (80%) per cent. of the cost of the work actually done on said buildings between the date of such payment and the last payment made by the trustee to the company hereunder upon production of a certificate of the architect in charge of said building or buildings showing the actual cost of the work done on said buildings between the date of said certificate and the date of the last payment made to the company by the trustee hereunder; and such architect's certificate shall be conclusive as to the cost of the work so done and shall be full warrant and authority to the trustee for making such payment to the company.

"It is further understood and agreed that the balance of the proceeds of said bonds or of said bonds remaining in the hands of the trustee upon the completion of said building or buildings after making the payments to the company hereinbefore provided for shall be paid to the company thirty-five days after the completion of said building or buildings; it being understood, however, that said balance of the cost of the hotel portion of said building shall be paid thirty-five days after the completion of said portion of said buildings, and that the balance of the cost of the theater portion of said building shall be paid thirty-five days after the completion thereof, provided, however, that the total amount of all payments in said bonds or the proceeds thereof to be made on account of the cost of the construction of the hotel portion of the building shall not exceed the sum of seventy-five thousand (\$75,000) dollars, and that the total

amount of all payments to be made in said bonds or the proceeds thereof on account of the cost of the theater portion of said buildings shall not exceed one hundred and twenty-five thousand (\$125,000) dollars.

"The payments above provided to be made from the proceeds of said bonds or in said bonds at their par value shall be made only upon the order of the company and under its corporate seal by its president or vice president and secretary, and shall be accompanied by a certificate of Earl B. Scott, or his successor, as architect of said building, showing that the necessary work had been done to entitle the company to the payment requested to be made in its order or orders. Such order and such certificate shall be full warrant and authority to the trustee for making the payment in money or bonds as hereinbefore provided, and said certificate of said architect shall be conclusive evidence for the trustee of the performance of the work therein stated to be done.

"Payments herein provided shall be made from the proceeds of the sale of said bonds first to the extent that such proceeds are available and then by said bonds at their par value."

For the recovery of moneys due him under his agreement with the Down Town Realty Company and for services rendered by him in connection with the construction of the contemplated building on the demised premises Carleton A. Philbrook filed suit against the company in the superior court of the state of California in and for the city and county of San Francisco. That suit was entitled "C. A. Philbrook v. Down Town Realty Co." On November 14, 1912, a writ of attachment issued in that action, and on the same day the sheriff of the city and county of San Francisco duly attached and levied upon all goods, credits, effects, debts due or owing, or other personal property in the possession of or under the control of the Mercantile Trust Company belonging to the Down Town Realty Company. At the time of this attachment and levy the Mercantile Trust Company admittedly held in its hands the sum of \$33,482.16, which represented moneys received as the purchase price of bonds issued by the Down Town Realty Company and which moneys it claims to have held under and pursuant to the terms of the mortgage or deed of trust. Upon the making and levy of attachment the sheriff demanded a statement, and the Mercantile Trust Company made no answer. On October 27, 1914, a judgment in favor of Carleton A. Philbrook was made and entered in the case of "C. A. Philbrook v. Down Town Realty Company," for the sum of \$3,325.55, together with interest at the rate of 7 per cent. per annum from the date thereof until paid, and costs in the sum of \$49.25. Upon this judgment a writ of execution issued on November 7, 1914. When this writ was served upon the Mercantile Trust Company it answered that it had no funds of the Down Town Realty Company and refused to allow any moneys to be ap-

plied or paid in satisfaction of that judgment. On January 8, 1915, the sheriff of the city and county of San Francisco returned the writ of execution wholly unsatisfied.

In August, 1915, Carleton A. Philbrook died and thereafter his widow, Ida B. Philbrook, individually and as administratrix with the will annexed of his estate, filed this suit against the Mercantile Trust Company as garnishee under section 544 of the Code of Civil Procedure of the state of California, upon the theory that the sum of \$33,482.16, which at the time of attachment the Mercantile Trust Company held in its possession under and pursuant to the terms of the mortgage or deed of trust, represented property or credit owned by the Down Town Realty Company.

The lower court gave judgment for the plaintiff, finding, among other things, the following:

"That at the time of said levy of attachment, as stated in plaintiff's complaint, upon the moneys held by said Mercantile Trust Company of San Francisco under and by virtue of said instrument of date November 15, 1911 (that being the deed of trust from Down Town Realty Company to Mercantile Trust Company of San Francisco), no architect's certificate as therein defined in said instrument was presented to the said Mercantile Trust Company of San Francisco."

The court further found that:

"The said written instrument mutually signed and executed on the 15th day of November, 1911, by Down Town Realty Company and by Mercantile Trust Company of San Francisco, as aforesaid (being the deed of trust from Down Town Realty Company to Mercantile Trust Company of San Francisco), was made by the said parties thereto with intent to delay and defraud Carleton A. Philbrook of all his demands as a creditor of said Down Town Realty Company, and out of all his rights and claims as such creditor."

The appellant claims that there is no evidence to support a finding that on November 14, 1912 (the date the garnishment was made), it had any moneys, goods, credits, or effects due or owing to Down Town Realty Company, or that it had in its possession or control any personal property belonging to Down Town Realty Company; and it further contends that there is no testimony on which the court could base a finding that the trust agreement from Down Town Realty Company to Mercantile Trust Company of San Francisco was in fraud of creditors.

The questions then presented are: Did the Mercantile Trust Company on November 14, 1912, have any money, goods, credits, or effects in its possession due or owing to the Down Town Realty Company? Was the certificate of the architect showing the actual cost of the work done a prerequisite to the money becoming due and owing for work done or services performed? and, Was the trust agreement in fraud of creditors?

There is no issue as to the work being done or the service performed—this question has been adjudicated and a judgment entered to that effect—appellant's position being that, as the contract provides "there shall be paid to the company from the proceeds of said bonds or in said bonds at their par value and accrued interest thereon eighty (80%) per cent. of the cost of the work actually done on said building between the date of such payment and the last payment made by the trustee to the company hereunder, upon production of a certificate of the architect in charge of said building or buildings showing the actual cost of the work done * * * and such architect's certificate shall be full warrant and authority to the trustee for making such payment to the company," no money was due and owing until the production of the architect's certificate.

[1, 2] It would seem that whatever lien attached to the purchase money paid for the bonds was discharged when and to the extent that the construction of the building approached completion. The real consideration for the release of these moneys or any part thereof was the creation of an equivalent value in terms of building construction. This is made clear by the provisions of article XVIII of the mortgage or deed of trust quoted. The production of the architect's certificate required by this article does not represent the consideration for the release of these moneys to the Down Town Realty Company, but merely the required form of evidence of the work done. The purely evidentiary function of the requirement of the architect's certificate is particularly emphasized by a subsequent provision of the same article as follows:

"The payments above provided to be made from the sale of said bonds or in said bonds at their par value shall be made only upon the order of the company and under its corporate seal by its president or vice president and secretary, and shall be accompanied by a certificate of Earl B. Scott, or his successor, as architect of said building, showing that the necessary work has been done to entitle the company to the payment requested to be made in its order or orders. Such order and such certificate shall be *full warrant and authority* to the trustee for making the payment in money or bonds as hereinbefore provided and said certificate of said architect shall be *conclusive evidence for the trustee* of the performance of the work therein stated to be done."

It is obvious from the foregoing that the production of the architect's certificate was a formal condition inserted primarily for the protection of the Mercantile Trust Company and giving to it "*full warrant and authority*" for the making of the payments. Neither the bondholders nor the Down Town Realty Company were interested in the architect's certificates. The former wanted only value

in construction work equivalent to moneys released, and the latter wanted only the equivalent in money for the work done.

[3] That Carleton A. Philbrook performed services in connection with the construction of the contemplated building and pursuant to the terms of the agreement entered into with the Down Town Realty Company is not denied. Nor is it denied that he was not paid for the services performed. These facts were adjudicated in the action of C. A. Philbrook v. Down Town Realty Company. The judgment in that case has become final. The judgment of a court of competent jurisdiction adjudicating the fact that the service had been performed by Carleton A. Philbrook having been entered, the Down Town Realty Company was entitled to receive the money due from the Mercantile Trust Company to it in payment of such service as "cost of the work actually done on said building." The production of the architect's certificates required does not represent the consideration for the release of these moneys to the Down Town Realty Company, but merely the required form of evidence of the work done, which is rendered unnecessary when the fact that the work has been performed has been adjudicated and is evidenced by the solemn judgment of a court of record. That there existed at the time of the garnishment an action for debt by Down Town Realty Company against Mercantile Trust Company—that there was a valid obligation or debt owing to Down Town Realty Company is evident.

The question involved here was passed upon in *Brainard v. Rogers*, 74 Cal. App. 247, 239 P. 1095. There the garnishee was a fire insurance company and the debtor an insured whose loss was covered by the policy issued. At the time of the garnishment the loss had not been adjusted, nor had the proofs of loss been filed as required by the policy. The architect's certificate in the instant case served a purely evidentiary purpose, whereas the proof of loss in the *Brainard Case* was a condition of the insurance contract. If, therefore, the right of garnishment existed in the *Brainard Case* a fortiori, the right of garnishment existed here. In that case, with reference to the sections of the Code relating to the liability and the procedure for citation for the garnishee, the court says:

"It will be noted that throughout these sections the expressions 'belonging to' and 'owing' are used in the disjunctive. But one conclusion may be drawn from this and that is that the Legislature intended to authorize the attachment of moneys * * * as well as * * * other properties belonging to the debtor which the garnishee then had in his possession. Looking at the Code sections in this light it follows that moneys which are owing the debtor, though not yet due, are subject to garnishment because the term 'owing' includes an immature as well as a mature obligation."

See, also, *Ransom v. Bidwell*, 89 Conn. 137, 93 A. 135.

[4] When work is done pursuant to the terms of a building contract the presentation of an architect's certificate is not a prerequisite to the inception of an obligation or debt due and owing, notwithstanding that the contract requires the production of such certificate. The rendition of the service itself gives rise to the obligation "due and owing" for the compensation of services rendered. The word "due" upon which a claim is founded as applied to a debt or obligation to pay money does not always mean that the money is then immediately payable. It may be so used, but it often merely denotes the idea of a complete debt, an existing obligation, or money fully earned, but not payable until a future time or until the happening of another event. Webster's Dictionary. "This question was decided by the District Court of Appeal in *Hettinger v. Thiele*, 15 Cal. App. 1, 113 P. 121. In that case the facts were the same as in the case at bar, except that the fifth clause, instead of declaring that certain sums were to be paid when certain parts of the work were finished, provided that 75 per cent. of the price should be paid as the work progressed. It contained the same proviso requiring the certificate from the architect before money for work done was payable. In that respect its language was identical with the contract here sued on, as also was the twelfth clause. It was held that the loss payable by the owner, upon a total destruction, included the amount due for the work done at that time, and that the issuance of a certificate by the architect was unnecessary to the accrual of a cause of action therefor." *Ahlgren v. Walsh*, 173 Cal. 29, 158 P. 752, Ann. Cas. 1918E, 751.

[5] Here Carleton A. Philbrook on July 25, 1911, commenced to work and render service and so continued until on June 4, 1912, when all work on the building was stopped and prevented because of the failure of the Down Town Realty Company to furnish labor, materials, and money requisite to the construction of the contemplated building, and no work was done on such building up to November 14, 1912, when the writ of attachment was issued—a period of over five months, and no certificate of the architect was presented showing the work or service performed by Philbrook which, however, the court in the action of *C. A. Philbrook v. Down Town Realty Company* found was performed by him. If, as claimed by appellant, no money was due from the trustee to the Down Town Realty Company with which to pay Philbrook until the certificate of the architect was presented and such certificate was never presented, irrespective of the amount of bonds sold by the trustee or the labor performed or services rendered, no money would ever be due to compensate Phil-

brook for such services. This cannot be the rule. It is not presumed that the parties intended that money rightfully belonging to the party to whom it is due or owing shall be forfeited upon the arbitrary will or caprice of the architect in withholding the certificate. *Wyman v. Hooker*, 2 Cal. App. 38, 83 P. 79.

[6] Philbrook entered into the agreement not with the Mercantile Trust Company, but with the Down Town Realty Company; therefore he could directly assert his rights thereunder only against the Down Town Realty Company. This he did. But the Down Town Realty Company had already transferred all of its assets to the Mercantile Trust Company with the understanding that the obligations incurred by the former in the construction of the building would be discharged by the latter under the terms of the mortgage or deed of trust. The mortgage or deed of trust was not made in behalf of the bondholders any more than the Down Town Realty Company. The company under the terms of the mortgage or deed of trust in effect consented to the withholding of these moneys upon the understanding that they would be used to discharge the obligation which it incurred in the construction of the building. The Mercantile Trust Company had notice of the suit brought by Philbrook by means of the attachment process served upon it. It did not elect to intervene. The architect's certificate, if issued, would have meant nothing more than evidence of work done by Philbrook and the validity of his claim. That evidence was afforded in just as conclusive and effective form by the judgment of the superior court in the case of *C. A. Philbrook v. Down Town Realty Company*. "The court found that there was a completion of the work, and in that case there was no legal ground left upon which an architect's certificate might be refused. Where a certificate is refused without cause, the contractor may not be forever debarred from collecting his money." *Kling v. Bucher*, 32 Cal. App. 679, 163 P. 871.

Appellant, in support of its contention that there is no evidence to support the findings that on the date of the garnishment the trustee had moneys due and owing to Down Town Realty Company, has cited us to *Hassie v. God Is With Us Congregation*, 35 Cal. 378; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *Redondo Beach Co. v. Brewer*, 101 Cal. 322, 35 P. 896; *Aigeltinger Co. v. Healy-Tibbitts Construction Co.*, 23 Cal. App. 608, 139 P. 436, 438; *Early v. Town of Redwood City*, 57 Cal. 193; *Maier v. Freeman*, 112 Cal. 8, 44 P. 357, 53 Am. St. Rep. 151; and *Gow v. Marshall*, 90 Cal. 565, 27 P. 422. These cases, however, are distinguishable from the case at bar. In the *Hassie Case* there is no consideration of the question whether a valid garnishment can be made of

a debt due and owing, though perhaps not presently payable at the time of the garnishment, the court holding:

"That Kincaid could not have maintained an action at law against the defendant at the time the attachment was served upon the latter, is very clear. There was no privity of contract between them. The defendant had never undertaken or promised, expressly or impliedly, to pay the money to Kincaid; the relation of debtor and creditor did not therefore exist between them. Kincaid was in no sense the assignee of the contract between Davis and the defendant."

The Grain Case does not involve the subject of garnishment. It discusses merely the validity of the assignment of a part of an entire demand and in that connection mentions the Hassie Case. The Redondo Beach Company Case was an action in which the vendee of real property elected to declare a contract forfeited. Subsequent to the election a creditor of the vendee garnished the moneys which had been paid to the vendor by the vendee under the contract of sale. There the court expressed the opinion that the vendee still had some claim against the vendor for the moneys paid in spite of the default, but that such claim was subject to the vendor's right to recoup damages for the breach of the contract, and at best was a mere equity, and therefore not subject to garnishment. In the Aigeltinger Case the contract provided that payments should be made upon the 15th day of each month covering the value of 75 per cent. of the work performed. The defendant was paid for all work done up to June 1, 1920, and defaulted on June 20, 1920. On the day following a creditor of defendant levied a garnishment on the garnishee. The court held in effect that, when on June 20th the defendant abandoned his contract, he waived all rights to compensation under his contract, and that, therefore, when the garnishment was levied on June 21st, there was nothing due from the garnishee to defendant; that when, however, on June 23d, subsequent to the garnishment, the defendant accepted the surrender and cancellation of the contract, it became obligated to pay for the reasonable value of services performed during the month of June. This acceptance of the surrender created a new relation between the parties, and, inasmuch as it occurred subsequent to the garnishment, is without effect upon it. The Supreme Court, in denying a transfer of the case, used this language:

"On those facts, it appears that there was, at the date of the garnishment, no debt, matured

or unmatured, due the plaintiff. This being so, there was clearly nothing subject to attachment. We do not express any opinion on the correctness of the broader declaration of the District Court of Appeal that there must be, at the date of the garnishment, a present right of action; in other words, that a debt which is due, but not yet payable, may not be attached."

Early v. Town of Redwood City is a case wherein there appears to have been an absence of obligation from the garnishee to the defendant at the time of garnishment, for no money was owing to the defendant unless and until the services required by the contract were completed, and at the time of the garnishment the work was incomplete. In the Maier Case the court merely held that the garnishment of the purchase price before the sale was completed was ineffective because at that time no credit existed and there was no assurance that it ever would exist; and in the Gow Case the court merely draws the distinction between a debt and credit as subjects of garnishment, the court stating:

"A 'debt' is money owing by the garnishee to the defendant which may be paid over to the sheriff, while credits are something belonging to the defendant, but in the possession and under the control of the garnishee, such as promissory notes or other evidences of indebtedness of third parties, which may be delivered up or transferred to the sheriff."

[7] There is nothing in the contract between Philbrook and Down Town Realty Company requiring him to procure the architect's certificate. This certificate is solely for the benefit of and as a protection to the trustee. *Rusling v. Union Pipe & Const. Co.*, 5 App. Div. 448, 39 N. Y. S. 217. Philbrook was in no wise responsible for the abandonment of the work. He performed the services, and payment for such services was due and owing under the trust agreement from Mercantile Trust Company to Down Town Realty Company at the time the garnishment was made.

It is not essential to an affirmance of the judgment in view of the conclusion we have reached upon the question discussed to pass upon the remaining objection urged that there is no evidence to support the finding that the trust agreement was in fraud of creditors, and therefore upon that question we express no opinion.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 269

Ex parte BOCCI. (Cr. 1402.)

District Court of Appeal, First District, Division 1, California. June 30, 1927.

1. Pleading $\S$ 8(6)—Allegation in petition for habeas corpus that petitioner was unlawfully imprisoned under town marshal's complaint charging misdemeanor held mere conclusion.

Allegation in petition for habeas corpus that petitioner "is unlawfully imprisoned, detained, confined, and restrained of his liberty," held mere legal conclusion, where followed by allegation that illegality consisted in town marshal's swearing to complaint charging petitioner with misdemeanor.

2. Habeas corpus $\S$ 11—Habeas corpus will be denied, where imprisonment is invited or voluntarily submitted to for purpose of testing validity of law.

If imprisonment is invited or voluntarily submitted to for purpose of testing validity of law, or if petitioner, after being admitted to bail, is surrendered by bondsmen solely for purpose of making out case for writ of habeas corpus, writ should be denied.

3. Habeas corpus $\S$ 11—Petitioner, claiming to be imprisoned under invalid ordinance, held not entitled to habeas corpus to test its validity, where custody or involuntary restraint was not shown.

Petitioner alleging unlawful imprisonment for maintaining place of business on Sunday for manufacture and sale of monuments held not entitled to test validity of ordinance by writ of habeas corpus, where it did not appear petitioner was in actual custody or under involuntary restraint at time of issuance of writ.

Application by Nello Bocci for writ of habeas corpus, prayed to be directed to the Marshal of Lawndale to secure petitioner's release from custody on a warrant charging keeping open on Sunday a place of business for the manufacture and sale of gravestones. Writ discharged.

Grant & Zimdars, of San Francisco, for petitioner.

Joseph E. O'Donnell and E. R. Hoerchner, both of San Francisco, for respondent.

KNIGHT, J. Petitioner herein applied for a writ of habeas corpus, alleging in his petition that he was being unlawfully "imprisoned, detained, confined, and restrained of his liberty" by the marshal of the town of Lawndale, San Mateo county, under a charge of misdemeanor, to wit, opening and keeping open on Sunday a place of business for the manufacture and sale of gravestones and monuments, in violation of an ordinance of said town, which ordinance petitioner claims is unconstitutional. The writ was issued, and in response thereto the marshal filed a return, from which it appears that at the time the application for this writ was made

petitioner was neither imprisoned nor involuntarily restrained of his liberty.

[1] With respect thereto, the return discloses that on the day the complaint was filed against petitioner in the town recorder's court, which was about two weeks prior to the filing of the application for this writ, the recorder ordered petitioner released "on his own recognizance" pending trial; and nothing further is set forth in the return to show that he was thereafter taken or ordered into custody. Moreover, the record does not show with any degree of certainty that petitioner was ever placed under arrest on said charge. In this connection the return sets forth that "by virtue of a complaint and a warrant of arrest, copies of which are hereunto annexed, marked respectively 'Exhibits A and B,' petitioner herein, Nello Bocci, was accused of violation of Ordinance 28" of said town. But Exhibit B does not purport to be a warrant of arrest; it is merely an order signed by the recorder to the effect that, it appearing to him that the offense charged had been committed and that there was sufficient cause to believe petitioner guilty thereof, petitioner "be held to answer to the same" and committed "to the marshal of the town of Lawndale, and that he be admitted to bail on his own recognizance." (Italics ours.) The return further sets forth that petitioner "was arrested as alleged in his petition herein"; but the petition contains no allegation of arrest. It does allege that petitioner "is unlawfully imprisoned, detained, confined, and restrained of his liberty" by said marshal, but such allegation amounts to no more than a legal conclusion in view of the allegation immediately following it to the effect that "said imprisonment, detention, confinement, and restraint are illegal, * * * in this, to wit, that on March 23, 1927, said Joe Cavalli, as the town marshal, * * * swore to a complaint charging petitioner with the crime of misdemeanor. * * *

[2] In re Gow, 139 Cal. 242, 73 P. 145, holds that, when a person accused of violating an ordinance has been allowed to go at large on his own recognizance, he will not be permitted to test the legality of his subsequent imprisonment upon a writ of habeas corpus, where it appears that such subsequent restraint was invited and voluntarily submitted to before trial for that purpose only, without any actual imprisonment or restraint, and his nominal imprisonment remains such only so long as it is necessary to file the petition and procure the order for the writ; that in such case the proceeding upon the writ will be dismissed. In conformity with the rule established in the case above cited, it has been repeatedly held, even in cases where there is actual imprisonment, that, if such imprisonment be invited or is voluntarily submitted to for the purpose of testing the validity of

a law, or if, after having been admitted to bail the petitioner is surrendered by his bondsmen solely for the purpose of making out a case to support the issuance of a writ of habeas corpus, said writ should be denied. In re Bernson, 35 Cal. App. 344, 169 P. 916; In re Miller, 13 Cal. App. 564, 110 P. 139; Matter of Ford, 160 Cal. 334, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; Ex parte Schmitz, 150 Cal. 663, 89 P. 438.

[3] The attack upon the constitutionality of the ordinance which petitioner is alleged to have violated doubtless presents a number of interesting and serious legal problems, but, since it appears from the record before us that the petitioner was not in actual custody or under involuntary restraint at the time of the issuance of the writ, and in view of the fact that the law affords him ample remedy, after trial and conviction, to test the validity of the ordinance, we do not feel warranted in deviating from the rule of practice adhered to in the cases above cited; and therefore the writ is discharged and the proceeding dismissed.

We concur: TYLER, P. J.; CASHIN, J.

84 Cal. App. 165

CHRISTERSON v. CHASE et al. (Civ. 4544.)

District Court of Appeal, Second District, Division 2, California. June 25, 1927.

Judgment  **801—Suit to foreclose judgment lien four years after reinstatement held barred by laches, where prior mortgage had been foreclosed and property sold by holder of sheriff's deed.**

Judgment creditor, who delayed suit to foreclose judgment lien for period of nearly four years after time of judgment's reinstatement, held precluded by laches from enforcement of lien against property, where in meantime property had been sold under foreclosure sale of prior mortgage, and conveyed by holder of sheriff's deed.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. E. Christerson against Warren Chase and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

Wetherhorn, Hoyt & Jones, of Los Angeles, for appellant.

Charles H. Brock and Earl E. Johnson, both of Los Angeles, for respondents.

MURPHEY, Justice pro tem. This appeal is by the plaintiff from a judgment of dismissal following an order of the trial court sustaining a demurrer without leave to amend. The record discloses the following situation: The defendants' predecessor,

French, was the owner of the real estate described in the complaint for some time prior to the year 1915 and up to the time of his death; in 1914 he mortgaged the property described in the complaint to Chapin for \$5,000; in 1915 the plaintiff procured and docketed in the proper county a judgment against French for \$5,800. More than six months after the judgment was entered the superior court set aside the judgment, and from such order setting aside the judgment plaintiff appealed. The order was reversed upon the ground that it had been erroneously made, and the remittitur was filed in August, 1919, the Supreme Court declaring that said judgment shall be in full force and effect as though the same had never been disturbed, and further declaring that said judgment be re-entered nunc pro tunc as of August 4, 1915. Pending the appeal the defendant French died, and in 1917 Chapin, the mortgagee above named, brought suit on the mortgage, procured a judgment of foreclosure and order of sale, under which the property was sold and bought in by Chapin, who received the deed therefor from the sheriff in 1918. In 1920 Chapin sold and conveyed the property to Van Vrankin, who in October, 1922, conveyed it to Chase and wife, two of the defendants in this suit; the other defendant being the mortgagee of the property under the Chases. In April, 1923, the plaintiff entered the instant suit against the Chases and the bank to foreclose the judgment lien docketed in 1915, and for sale of the property to satisfy that lien.

A summary of the foregoing record will disclose these outstanding facts: The plaintiff procured and docketed a judgment against French in 1915. In 1923 he brought suit to foreclose the judgment lien based thereon, contending that under the law he is allowed to deduct from the toll of the statute the three years intervening between the time when the original judgment was set aside until its reinstatement by the judgment of reversal in the Supreme Court. We are of the opinion that this position is untenable. We are entirely satisfied that the cases relied upon by appellant, *Dewey v. Latson*, 6 Cal. 130; *Englund v. Lewis*, 25 Cal. 337, and section 671 of the Code of Civil Procedure as it read prior to its amendment in 1873 (Amendments to the Codes 1873-74, p. 320), do not speak the law of this state on this subject-matter since that time. Since the case of *Solomon v. Maguire*, 29 Cal. 227, and *Rogers v. Druffel*, 46 Cal. 654, in which the Supreme Court directly held that the existence of the judgment lien was in no respect affected by an order staying execution, there are no cases supporting appellant's position. However, we do not deem it necessary to ground our decision on this phase of the case, as we are convinced that there is no merit whatever in the appeal. The superior court entered a

judgment *nunc pro tunc* in 1919 reinstating the original judgment as directed by the Supreme Court. At that time Chapin, the owner of the mortgage lien existing when the appellant's original judgment was docketed, was the owner of the property under foreclosure sale and deed. There was absolutely nothing then in the way of enforcement and no apparent legal complications or any other legitimate cause to deter plaintiff from proceeding to enforce this alleged judgment lien. Nevertheless the entire matter was permitted to lie dormant for nearly four years, during which time the property in 1920 was conveyed by the purchaser under the foreclosure proceedings to Van Vrankin, who in turn in 1922 conveyed the property to the defendants Chase in this action. In 1923 the appellant instituted this action to enforce his lien. In our judgment the above recital of the sequence of events as it appears on the record is conclusive evidence of unwarranted and unconscionable laches.

Judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

84 Cal. App. 214

HANDLEMAN v. PICKERILL et al.
(Civ. 4860.)

District Court of Appeal, Second District, Division 1, California. June 28, 1927.

1. Landlord and tenant ⚡37—Technical meaning of words used in lease gives way to manifest intent of parties.

Technical meaning of words will give way to manifest intent of parties in construing lease, even though technical term to contrary be used.

2. Landlord and tenant ⚡80(1)—No privity of contract exists between sublessee and original lessor.

As between sublessee and original lessor, there is no privity of contract or estate.

3. Landlord and tenant ⚡80(3)—Sublessee has no right to enforce covenants contained in original lease.

Since there is no privity of contract or estate between original lessor and sublessee, sublessee does not as general rule acquire by virtue of sublease alone any right to enforce covenants or agreements contained in original lease.

4. Landlord and tenant ⚡80(3)—Sublessee in suit against lessor to restrain obstruction of show window held not entitled to benefit of covenant of original lease excepting space for entrance way.

Sublessee in suit against original lessor to restrain obstruction of show window held not entitled to benefit of covenant of lessor in original lease excepting from ground floor sufficient space for entrance to upstairs of building, claimed to give right to unobstructed window facing entrance way.

5. Landlord and tenant ⚡80(3)—Rights of sublessee against lessor are limited by lessee's rights as fixed by terms and conditions of original lease.

Subtenant is charged with notice of existence of original lease, and is bound by its terms and conditions, and cannot acquire greater rights against lessor than those given by original lessor to his lessee.

6. Landlord and tenant ⚡134(5)—Lessees had no right of action against lessor for obstructing display window, facing entranceway, constructed by lessees without lessors' consent.

Where plans and specifications provided for solid wall in entrance to upstairs of building, and where display window was constructed by lessees facing entranceway over protest of lessors and without their consent, lessees had no right of action against lessor for obstructing such display window.

7. Landlord and tenant ⚡80(3)—Sublessee of premises on which building was being erected was bound by plans and specifications agreed to between lessor and lessees.

Sublessee of premises on which new building was being erected under plans and specifications by agreement between lessor and lessees was bound by provisions of plans and specifications, as were original lessees.

8. Estoppel ⚡63—Lessor held not estopped as against sublessee to obstruct display window constructed by lessees without lessor's consent.

Lessor held not estopped to obstruct display window facing entrance to lobby in building as against sublessee, where specifications called for building solid wall, and display window was constructed by original lessees over lessor's protest with understanding that maintenance thereof should not interfere with lessor's free and uninterrupted use of lobby and entrance.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Louis Handleman against J. R. Pickerill, B. M. Scott, and Galen H. Welch, copartners doing business as Pickerill, Scott & Welch, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Adolph B. Rosenfield, of Long Beach, for appellant.

John H. Burke, of Long Beach, for respondent Charles Zimmerman.

Daly, Daly & Todd, of Long Beach, for other respondents.

McLUCAS, Justice pro tem. Plaintiff, as sublessee, brought suit against the defendants for injunction from obstructing a show window and for damages. Judgment was rendered for defendants, and plaintiff brings this appeal.

On October 21, 1919, the defendants Pickerill and Scott entered into a written lease with California Chocolate Shops, letting the

ground or street floor of a building to be erected by the lessors. The lease contained the following language:

"Excepting from said ground floor sufficient space at the west end thereof for an entrance to the upstairs of said building, and to the elevators to be constructed therein, said excepted space not to exceed in dimensions fifteen (15) feet frontage on West First street by fifty (50) feet in depth."

The term of the lease was for 15 years, commencing on the 1st day of April, 1920. On the date of execution, the lease in duplicate was deposited in escrow under instructions executed by the parties thereto, providing for the delivery of said copies of the lease to the respective parties when the escrow agent should be notified in writing by said parties that the plans and specifications for the building to be erected upon said premises had been agreed upon by both parties thereto. On December 12, 1919, the plans and specifications were duly approved by the parties to said lease, and the escrow agent was authorized and directed by written instructions to deliver to the respective parties copies of said lease. The said lease provided that:

"The lessee covenants and agrees, at its own cost and expense, to install in and upon the premises demised, that is to say, upon the ground floor of said building, all show windows, display fronts. * * *"

It was further provided by said lease that:

"The lessors shall, at their own cost and expense, construct the entrance hereinabove provided for, and all of the equipment and interior thereof, and the lessee shall not be put to any expense whatsoever for or in connection with such entrance, the construction or equipment thereof."

It was further provided that:

"The lessee shall not make or permit to be made any changes or alterations in or additions to said demised premises which affect an integral part of said building without first having obtained the written consent of the lessors there-to."

The lease further provided:

"The lessee is hereby expressly given and granted the right to sub-let the whole or any portion of the premises herein demised."

It was further provided that:

"Each and all of the terms, covenants and conditions of this lease shall be binding upon, and each and all of the benefits hereunder shall inure to the heirs, executors, administrators, successors and assigns of the respective parties hereto."

The lease was delivered on the 12th day of December, 1919, upon approval of the plans and specifications for the building. After the delivery of the lease the defendants Pickerill, Scott, and Welch formed a copartner-

ship, and the defendants Pickerill and Scott assigned said lease to the said copartnership. Thereafter a building was constructed upon the leased premises by the copartnership. The California Chocolate Shops, on or about the 11th day of October, 1920, entered into possession of the ground floor thereof as tenants of Pickerill, Scott, and Welch. Pursuant to the authority contained in said lease, the California Chocolate Shops, on or about the 1st day of August, 1920, entered into a written lease with the plaintiff for a storeroom, which was a part of the ground floor of the premises referred to in the first lease hereinabove mentioned. The term of the last-named lease was for five years commencing on the 1st day of August, 1920. The California Chocolate Shop so constructed the said store front that the same consisted of a show window, the side of which was improved with a pane of glass 3 feet in width and 7 feet high, commencing 18 inches above the floor of the entrance of said building, and the interior of said show window could be readily seen through the said pane of glass by persons using the vestibule and entrance to said building. The court found, from evidence which was sufficient upon which to base its findings:

"That said show window was not so placed or constructed by plaintiff's said lessor, with the knowledge, consent, acquiescence or approval of the defendants Pickerill, Scott & Welch, or either of them, except that during the construction thereof, upon an objection being interposed by the said defendants Pickerill, Scott & Welch, it was agreed between said defendants and California Chocolate Shops that said window might be constructed so as to open into said lobby upon the express condition that the use of said window and the maintenance thereof should not in any wise interfere with the free and uninterrupted use of said lobby and entrance by said defendants Pickerill, Scott & Welch, in such manner and to such extent for business purposes, or otherwise, as they might desire at any time. That said show window did not appear upon the plans and specifications for the construction of said building so approved by said defendants Pickerill, Scott & Welch and California Chocolate Shops, and the construction, use and maintenance thereof was expressly conditioned upon the right of the defendants Pickerill, Scott & Welch to close said window, and to use said lobby and entrance in such manner as they might desire at any time during the term of the lease mentioned in paragraph II hereof."

On October 31, 1920, plaintiff entered into possession of said storeroom and installed therein a shoe store, and in the conduct of his business used the said show window to display his shoes for sale. Defendants Scott and Welch testified that prior to the 31st day of October, 1920, defendants had no notice or knowledge, either actual or constructive, of the execution of said lease between plaintiff and the California Chocolate Shops. On March 1, 1921, defendants Pickerill, Scott

and Welch leased to the defendant Charles Zimmerman a space in said entrance and vestibule, and defendant Zimmerman erected a booth in front of the westerly pane of said display window, by reason of which observation of plaintiff's show window was prevented in part and merchandise therein could not be clearly seen from the west by persons using said entrance. Over the objection of plaintiff, two of the defendants' witnesses were permitted to testify as to conversations had between the original lessors and the agent for California Chocolate Shops, the original lessee. Also, the plans and specifications for the construction of the building were admitted in evidence over plaintiff's objection. These plans and specifications did not provide for any show window between the storeroom and the entrance lobby, but showed a solid partition. During the course of construction, the general contractor employed by the original lessors, under instruction of the agent of the original lessee, California Chocolate Shops, left a space in this partition for a show window. Defendant Welch testified that upon observing this opening in the partition he protested to the original lessee's agent, saying, "You know, Mr. Swan, we have intended all the time to lease that for a cigar stand or some other business purpose, and we don't want to have difficulty or trouble with your tenants;" and that Mr. Swan said, "Well, you go ahead with this, and any time that you get a tenant there that we can't make arrangements with to satisfy him, you can close us up;" and that Welch said, "We would do just that very thing." This conversation was confirmed by the testimony of defendant Scott. It was testified that this conversation was held about ten days before plaintiff went into possession of the storeroom.

[1-4] Appellant contends that the language contained in said lease, as follows: "Excepting from said ground floor sufficient space at the west end thereof for an entrance to the upstairs of said building, and to the elevators to be constructed therein"—is to be construed as a reservation and not as an exception. Technically, the term "excepting" "applies to something which constitutes a part of the thing described as granted and which would pass but for the excepting clause, the office of which is to exclude it from the thing described, and the title to the thing excepted remains in the grantor. The difference between the term 'excepting' and 'reserving' is so slight and shadowy that in common parlance they are used interchangeably, 'and the technical meaning will give way to the manifest intent, even though the technical term to the contrary be used.' 13 Cyc. 674." *Van Slyke v. Arrowhead, etc., Power Co.*, 155 Cal. 675, 680, 102 P. 816. See, also, *Pitcairn v. Harkness*, 10 Cal. App. 295, 101 P. 809. However, for the purpose of the decision of this

case, we do not find it necessary to determine whether this is an exception or a reservation, since even if the language be construed as a reservation and a covenant to use the space exclusively for an entrance, it would not be enforceable by a subtenant against the original lessor, as no privity of contract or estate exists between the sublessee and the original lessor. 15 Cal. Jur. p. 766; *Ericksen v. Rhee*, 181 Cal. 562, 567, 185 P. 847; *Bailey v. Richardson*, 66 Cal. 416, 421, 5 P. 910; *City Investment Co. v. Pringle*, 73 Cal. App. 782, 788, 239 P. 302; *Buttner v. Kasser*, 19 Cal. App. 755, 127 P. 811.

"As between the original lessor and the sublessee there is no privity of contract or estate, and therefore the sublessee does not acquire, as a general rule, by virtue of the sublease merely, any right to enforce the covenants or agreements of the lessor contained in the original lease." 16 *Ruling Case Law*, p. 877; *Audubon Hotel Co. v. Braunnig*, 120 La. 1089, 46 So. 33, 124 Am. St. Rep. 456.

It follows, therefore, in this case that the plaintiff as a subtenant had no right of action as against the landlord to enforce any covenant or agreement that may have been contained in the original lease to maintain an entrance unobstructed.

[5-8] Appellant argues that defendants are estopped by their conduct and silence from closing this window. A sublessee can in no event have any greater rights against the lessor than are given by the original lease to the lessee. 35 *Corpus Juris*, 1002. It is the duty of a person contracting for a sublease to ascertain the provisions of the original lease, as a subtenant is charged with notice of the existence of the original lease and is bound by its terms and conditions. 15 Cal. Juris. 767; *Baranov v. Scudder*, 177 Cal. 458, 170 P. 1122; *Georgous v. Lewis*, 20 Cal. App. 255, 128 P. 768. In the case at bar, while the original lease gave the right to the original lessee to construct the display windows, nothing was said about their location. Ordinarily, display windows are placed in the front of the storeroom, although such windows are often built facing entrances or lobbies on the side of the storeroom. Under the evidence showing the delivery of the original lease only after agreement of the parties on plans and specifications providing for a solid wall, with no display window fronting toward the entrance, and under further evidence showing that this display window was constructed under orders of the original lessee over the protest of the lessors and without their consent, the original lessee would have no right of action against the lessors for closing up the window. A sublessee can have no right superior to that of the lessee. The building was under process of construction when the subtenant executed his lease. Plaintiff must have known that the building was being erected under plans

and specifications and he was bound by their provisions, as was the original lessee. We find nothing in the conduct of the defendants estopping them from closing this window in accordance with their declared intention.

Appellant in his reply brief states that the action is not based on any covenant in the lease to keep the window open, but on the rights acquired in the window against all the world, including the landlord. But under the evidence the original lessee never acquired any right to keep the window open, and plaintiff as subtenant could acquire no rights superior to those of his landlord, the lessee.

Other points raised by appellant are necessarily disposed of by the foregoing conclusions.

It is ordered that the judgment be affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

84 Cal. App. 265

MAYER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO. (Civ. 5906.)

District Court of Appeal, First District, Division 1, California. June 30, 1927.

Certiorari ⇨5(1)—Order refusing to vacate order for publishing summons may be reviewed on appeal from default judgment, and cannot be reviewed by certiorari (Code Civ. Proc. § 412).

Defendant, in action to annul marriage, may have reviewed order refusing to quash order for publication of summons on ground that there was no showing that cause of action existed as required by Code Civ. Proc. § 412, on appeal from adverse judgment, which may be rendered on trial, though judgment by default be entered, and hence certiorari to review order refusing to vacate order for publication of summons should be denied.

Application for certiorari by Jack Mayer to review an order of the Superior Court of the State of California, in and for the City and County of San Francisco, James M. Troutt, Judge, refusing to vacate order for publication of summons. Application denied.

Goldman, Nye & Spicer, of San Francisco, for petitioner.

TYLER, P. J. Petition for writ of review. It is recited therein that on March 22, 1927, respondent court made an order for the publication of summons in an action for the annulment of a marriage. It is alleged that the summons has been published and that the court will enter judgment in said cause upon default, unless petitioner herein enters a general appearance and contests the same; that defendant in said action duly gave no-

tice of special appearance for motion to vacate and set aside the order of publication and to quash service on the ground that no proper showing was made as a basis for the order, for the reason that it did not sufficiently appear, either by verified complaint or by affidavit, that a cause of action existed against defendant, as required by section 412 of the Code of Civil Procedure; that respondent court denied petitioner's motion. It is then claimed that there is no appeal from said order, for which reason petitioner prays that a writ of review be issued out of this court requiring the superior court to certify its proceedings and that thereupon this court issue its order annulling the said order of publication. We are of the opinion that the application should be denied, for the reason that petitioner may have the alleged error reviewed on an appeal from any adverse judgment which may be rendered upon trial, even though a judgment by default be entered. *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, 71 P. 498; *Lima v. Lima*, 26 Cal. App. 1, 147 P. 233, 237.

The application is denied.

We concur: KNIGHT, J.; CASHIN, J.

84 Cal. App. 248

In re FAHLMAN. (Civ. 3279.)

District Court of Appeal, Third District, California. June 29, 1927.

1. Adoption ⇨15—Order of adoption will not be set aside because of fact of relationship, except for clear abuse of discretion (Civ. Code, §§ 224-227).

Since Civ. Code, §§ 224-227, relating to adoption of minor, gives no preference to relatives or other persons, order of adoption will not be set aside only on fact of relationship except for clear abuse of discretion, when proceeding was taken and had according to procedure specified by the Code.

2. Adoption ⇨15—Appellate court cannot declare determination of trial court granting letters of adoption erroneous, though persons opposing it were fit and proper persons.

An appellate court is confined to record, and when record shows nothing reflecting on persons to whom letters of adoption had been awarded, determination of trial court cannot be declared erroneous, though all persons opposing granting of letters may likewise be fit and proper persons.

3. Adoption ⇨1—Adoption proceedings are statutory.

Adoption proceedings are purely statutory.

4. Adoption ⇨15—That 11 year old child was not questioned in adoption proceedings does not require reversal.

Fact that 11 year old child was not placed on witness stand and questioned in proceedings for adoption furnishes no ground for reversal,

since interrogating child under 12 years of age is entirely discretionary with trial court.

5. Appeal and error 533(1)—Trial court's opinion cannot be considered on appeal.

Opinion of trial court rendered in decision of cause is not a part of record which can be considered on appeal.

6. Adoption 15—That trial court entertained prejudice or bias against grandparent opposing adoption will not require reversal.

Even though court in adoption proceedings entertained prejudice or bias against grandparent opposing granting of letters of adoption it will not require reversal, unless it be shown that court erred in granting letters of adoption to another and that welfare of minor was not best subserved by order.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Proceedings by Walter S. Joy and wife for the adoption of Margaret Fahlman, a minor child. From an order of adoption, F. O. Burlin and wife, grandparents of said minor, appeal. Affirmed.

G. B. Hjelm, of Turlock, for appellants.

H. K. Landram, of Merced, for respondents.

PLUMMER, J. This matter is before the court upon an appeal from an order of adoption made in the above-entitled matter, whereby the petition of Walter S. Joy and Annia Joy, his wife, for the adoption of said minor, was granted.

The transcript shows that on or about September, 1924, the father of said minor, Carl E. Fahlman, died in the county of Merced, state of California, leaving said minor daughter of the age of 10 years. After the death of said Carl E. Fahlman, F. O. Burlin and Sophia Burlin, maternal grandparents of said minor, applied to the superior court of the county of Merced for letters of guardianship of the person and estate of said minor. At about the same time Oscar Fahlman, a brother of said Carl Fahlman, deceased, applied to the same court for letters of guardianship. The two petitions for letters of guardianship for said minor came on for hearing in said superior court in the month of October, 1924, and the hearing of said petitions was regularly continued from time to time until about April 27, 1925. On the latter date, Walter S. Joy and Annia Joy, his wife, filed a petition in the superior court of Merced county seeking an order of said court permitting their adoption of said minor child. Notice of this hearing was regularly given, and notice was also given to the said F. O. Burlin and Sophia Burlin. The hearing of the petition for adoption was set for May 8, 1925. At said hearing F. O. Burlin and Sophia Burlin appeared and filed an opposition to the granting of the petition for adoption theretofore filed

by the said Walter S. Joy and Annia Joy. Between the date of the filing of the petition by Walter S. Joy and Annia Joy, his wife, for the adoption of said minor and the hearing thereof, the said F. O. Burlin and Sophia Burlin filed a like petition in the superior court of the county of Stanislaus, praying for an order permitting their adoption of said minor. This petition, however, was not before the superior court of the county of Merced, and we have only to do with the petition filed by Walter S. Joy and Annia Joy, and the opposition filed thereto by F. O. Burlin and Sophia Burlin. At the conclusion of the hearing upon the petition filed for the adoption of said minor by Walter S. Joy and Annia Joy, the court made its order granting the same, and from this order F. O. Burlin and Sophia Burlin appeal.

Upon this appeal no question whatever is made as to the fitness of Walter S. Joy and Annia Joy as persons to whom might be granted an order authorizing the adoption of said minor child Margaret Fahlman.

The testimony set forth by the appellants in their brief refers only to the fitness of F. O. Burlin. This testimony, however, we do not need to review, for the simple fact that under the law, whether F. O. Burlin was or was not, or is or is not, a fit and proper person to be permitted to adopt said minor child, cannot be held as bearing upon any of the issues tendered for determination. The court, as we have said, determined that Walter S. Joy and Annia Joy, his wife, were such fit and proper persons and that the interests and welfare of the minor in question would be best subserved by granting the petition for adoption filed by them.

[1] The record shows that Walter S. Joy and his wife were both less than 50 years of age and that F. O. Burlin and his wife were both over the age of 70 years, that the minor child was of the age of only 11 years. The trial court, in addition to oral testimony as to the fitness and capacity of the persons applying for adoption of the minor, had before it the individuals making the application and also the individuals filing the opposition thereto, and as sections 224, 225, 226, and 227 of the Civil Code, relating to adoption of minors, give no preference whatever to relatives, or other persons, making application for adoption, it would require a very clear case of the abuse of the judicial discretion vested in the trial court to authorize an appellate court to set aside an order of adoption, where the proceeding is shown to be taken and had according to the procedure specified by the Codes, and the fact of relationship only is urged as a cause for reversal.

[2] In guardianship proceedings, where both the estates and custody of minors may be involved, the Codes set forth certain preferences as to who may be appointed, but when

it comes to the matter of adoption, the future welfare of the minor is the only matter for consideration. Under such circumstances, the Legislature has left such determination to the judicial discretion of the trial court. In the case at bar, there is absolutely nothing presented in the record upon which we could predicate error of the trial court, as to whom the right of adoption should be awarded. There is nothing which shows the unfitness of any of the parties, so far as the testimony set forth in the transcript is concerned, save and except, as the difference in ages of the respective parties applying for and opposing the adoption of said minor child might be deemed a proper matter for consideration. Ordinarily speaking, the conclusion would seem proper that the welfare of a minor would be best served by granting letters of adoption, where the parties applying are under 50 years of age, rather than sustaining the opposition or granting letters of adoption to persons over 70 years of age. Here, again, the presence of all the parties in court, their conduct and their actions, are matters vital to be considered by the trial court, and are matters of which an appellate court can have absolutely no knowledge. An appellate court is confined to the record, and when the record shows nothing reflecting upon the persons to whom the letters have been awarded, an appellate court cannot declare the determination of the trial court erroneous, even though all the persons opposing the granting of letters may likewise be fit and proper persons to whom adoption letters might be granted.

[3] Upon first impression it would seem that grandparents should be given preferential rights in matters of adoption, but the Legislature has omitted so to provide, and has made the welfare of the child the dominant factor, and not the wishes or desires of any one who might, perchance, be a relative. As stated in the cases of *Adoption of Cozza*, 163 Cal. 514, 126 P. 161, Ann. Cas. 1914A, 214, and *In re Johnson*, 98 Cal. 531, 33 P. 460, 21 L. R. A. 380, adoption proceedings are purely statutory, and as an examination of the sections of the Codes shows that the Legislature has scrupulously refrained from giving preferential rights to any one, it would simply be a matter of judicial legislation for an appellate court to do so.

[4] It does appear from the record that the 11 year old child was not placed upon the witness stand and questioned upon the hearing. This, however, furnishes no ground for reversal. In *re Johnson*, 98 Cal. 531, 33 P. 460, 21 L. R. A. 380; In *re Williams*, 102 Cal. 80, 36 P. 407, 41 Am. St. Rep. 163. These cases hold that where the child is under 12 years of age, interrogating the child is entirely discretionary with the trial court.

[5, 6] It is further urged that in the opin-

ion of the trial court, orally announced upon the conclusion of the hearing upon the application for adoption by Walter S. Joy and his wife, the trial court used language indicating bias or prejudice against F. O. Burlin. The opinion of the trial court rendered in the decision of the cause is not a part of the record which we can consider upon appeal. 2 Cal. Jur. p. 488. In addition to this we may add that even though the court, for some cause or other, entertained a prejudice or bias against F. O. Burlin, unless it be shown that the court erred in granting letters of adoption to the petitioner, and, further, that the welfare of the minor was not best subserved by the court's order, no cause would be made to appear justifying a reversal.

In addition to what we have said, it appears from the record that the deceased father of the minor had, just prior to his death, expressed himself as being opposed to the custody of his minor child being in any manner granted to either F. O. Burlin or Sophia Burlin. The record however, is silent whether the father had any valid reasons for entertaining such views prior to his death.

The Legislature not having given preferential rights to relatives in the matter of adoption, and no cases having been called to our attention establishing such a rule of decision, and nothing being shown in the record indicating that the welfare of the minor has not been best subserved by the order of the trial court made herein, it follows that the order of the trial court must be and the same is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

84 Cal. App. 228

UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA. (Civ. 5600.)

District Court of Appeal, Second District, Division 1, California. June 28, 1927.

1. Master and servant ☞417(7)—Award by Industrial Accident Commission, sustained by evidence, is conclusive.

If evidence is sufficient to sustain finding on which award of Industrial Accident Commission is founded, the award will not be disturbed on appeal.

2. Master and servant ☞405(1)—Evidence held to sustain finding insurance carrier was not prejudiced by employee's failure to give timely notice of injury (Workmen's Compensation, Insurance, and Safety Act, § 15).

In proceeding for compensation, under the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), evidence held sufficient to sustain ultimate finding of Industrial Accident Commission that insurance carrier was not prejudiced in making its defense by employee's failure to give notice of injury in accordance with section 15 of the act.

3. Trial ☞397(3)—Express finding is not required on ultimate fact, not made issue.

No express finding was required on ultimate fact, which was not made an issue by pleadings.

4. Master and servant ☞403—Employer has burden of proving prejudice by reason of employee's failure to give timely notice of injury (Workmen's Compensation, Insurance, and Safety Act, §§ 15, 19[d]).

Prejudice to employer by employee's failure to give notice of injury within 30 days after its occurrence, in accordance with Workmen's Compensation, Insurance, and Safety Act, § 15 (St. 1917, p. 831), is an affirmative defense, and burden of proof thereof rests on employer under section 19(d).

5. Master and servant ☞405(6)—Evidence held to sustain finding that employee's injury was not caused, continued, or aggravated by unreasonable refusal to submit to treatment (Workmen's Compensation, Insurance, and Safety Act).

In proceeding under the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), evidence held to sustain finding that employee's disability was not caused, continued, or aggravated by unreasonable refusal to submit to medical or surgical treatment.

Proceeding under the Workmen's Compensation, Insurance, and Safety Act by an employee of the Julian Petroleum Corporation, opposed by the United States Fidelity & Guaranty Company, insurer. From an award by the Industrial Accident Commission, the insurer brings certiorari. Affirmed.

Edward C. Mills and Harold J. Hunter, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent.

HOUSER, J. By this proceeding petitioner seeks to have reviewed an award made by respondent, Industrial Accident Commission, to an employee of the Julian Petroleum Corporation, of which corporation petitioner was the insurer.

The principal facts are as follows: On February 9, 1926, the date on which the employee started his employment at a service station of the Julian Petroleum Corporation, he sustained an injury to his left knee. Not suffering immediately therefrom to any considerable extent, he finished the day's work. That evening, however, he told his uncle, who was the sales manager of his employer, of the accident which had befallen him, and on the same evening consulted his personal physician regarding the injury which he had sustained. At that time the knee showed no swelling or discoloration. The next day he returned to his work, the knee then being slightly swollen and painful. From that date and continuously thereafter to the 5th day of May following, the employee continued to

work, during all of which time he was under the medical care of his own physician—on which latter date he told the superintendent of the service station, who was the immediate superior of the employee, of his injury and the date on which it had been received. From May 5th to June 1st, on account of the injury which he had sustained, the employee was neither able to nor did work at his occupation. On June 1st he again returned to his work and so continued until July 15th, at which time and ever since he has been unable to work on account of said injury. No medical treatment was ever offered to the employee by his employer or by any other corporation or person in its behalf.

Petitioner urges that because the employer was not notified by the employee of the injury sustained by him until nearly three months had elapsed after the accident causing the injury had happened, and because the employee did not follow the advice given to him by his own physician, the award should be annulled.

Section 15 of the Workmen's Compensation, Insurance, and Safety Act (Stats. 1917, p. 831), among other things, provides in effect that, unless within 30 days after the occurrence of the injury the employer be notified thereof, no claim to recover compensation therefor shall be maintained: "Provided, further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact in the proceedings for the collection of the claim that there was no intention to mislead or prejudice the employer in making his defense, and that he was not in fact so misled or prejudiced thereby."

On the hearing of the application for compensation, the respondent commission, among other things, found as a fact that:

"Neither of the defendants had notice or knowledge of said injury as defined in section 15 of said act, but the insurance carrier has not been prejudiced in making its defense. The employee obtained medical treatment on the same day of said injury and thereafter, and the evidence does not show that the employee's disability was or is caused, continued, or aggravated by an unreasonable refusal to submit to medical treatment, or to any surgical treatment."

Considering the evidence produced at the hearing of the application by the employee for compensation for his injuries, the effect of such finding includes the implied facts that neither the employer nor its insurer, the petitioner herein, was prejudiced in making its defense to the claim of the employee by reason of the failure of such employee, within 30 days after the date of the accident, to give the required statutory notice thereof; and that because of the fact that the em-

ployee had competent medical advice and treatment for the injury on the date on which the injury was sustained by him and continuously thereafter, which advice was substantially followed by the employee, the disability of the employee was not caused, continued, or aggravated by an unreasonable refusal to submit to medical or surgical treatment.

[1] The rule is well established that if the evidence is sufficient to sustain the finding upon which the award is founded, the petitioner has no solid ground upon which to base the relief for which it prays. The substantial question, then, presented for determination is whether from the evidence the respondent commission was justified in making such finding.

The only evidence contained in the record to which the attention of this court has been directed, which would tend to show that the employee had intentionally misled the employer regarding the accident, was that wherein the employee made the statement that prior to May 5th he did not inform the employer of the fact that he had been injured, "because I had just got the job, I was only working about two weeks, and I knew how hard it was for me to find work; and I thought it would get progressively better instead of worse. At that time when it was absolutely necessary for me to go away I told my employer about it, and he gave me a leave of absence, and said when I came back he would fix me up, and I didn't see him after that."

[2-4] Giving to such statement its broadest significance, and conceding that it is some evidence of an intention on the part of the employee to conceal from the employer the fact that an accident had occurred through which the employee had sustained an injury, nevertheless the entire evidence, and especially the admitted fact that the employee was treated continuously by a competent physician from the date of the injury to the date of the hearing before the respondent commission, is sufficient, we think, to sustain the ultimate finding by respondent that the insurance carrier was not prejudiced in making its defense. Moreover, it appears that no direct issue was presented by the answer of the petitioner here to the application of the employee for compensation with reference to the intent of the employee in failing to notify his employer of the happening of the accident, and consequently that no express finding was required on such ultimate fact not made an issue by the pleadings. Prejudice to the employer, by reason of such failure to give notice, is an affirmative defense, and the burden of proof thereof rests upon the employer. Section 19(d), Workmen's Compensation, Insurance, and Safety Act (Stats. 1917, p. 831).

In the case of San Francisco-Oakland Ter-

minal Railways v. Industrial Accident Commission, 180 Cal. 121, 127, 179 P. 386, it is held that, in view of the fact that prejudice to the employer by reason of the failure of the employee to give notice is an affirmative defense and that the burden of proof rests upon the employer therein, and because of a finding by the Industrial Accident Commission that there was no intention on the part of the employee to mislead or prejudice the employer in making his defense and that the employer was not in fact misled or prejudiced thereby—the failure by the employee to serve the employer with a written notice of the injury, within 30 days after the injury was received, did not bar a recovery of compensation.

It may be noted that on May 5th, when the condition of the injured knee had become so bad that the employee was unable to continue in his employment, although the employer was then directly notified of the injury sustained by the employee, the employer did nothing to relieve the situation. But the petitioner contends that had the employee followed the advice given him by his personal physician, to the effect that the employee "keep off the leg," he would have recovered from the injury, and consequently, that, owing to his neglect and implied refusal to obey the directions of his own physician in that regard, the disability was aggravated to such an extent that the final condition of the knee cannot be charged to the petitioner.

As hereinbefore indicated, after the employer had received notice of the injury, although the opportunity to assist the employee was then afforded, neither the employer nor its insurer took any action in the premises. In addition thereto, it manifestly appears that from the beginning the employee had medical care, and the record contains no evidence which casts any criticism upon the ability of the physician who was treating the employee. Indeed, the expert physician called by petitioner to testify in its behalf placed his stamp of approval upon the treatment prescribed by the physician in attendance upon the employee when he testified:

"I think that Dr. Rose (the attending physician) had outlined adequate treatment for him (the employee) * * * but [he added] I do not think that he accepted it."

It therefore becomes apparent that, excepting for the statement made by the physician called by petitioner to the effect that he thought the employee did not accept the prescribed treatment (which, of course, is immaterial), and excepting for the possibility that the employee failed to follow the directions given him by the physician, the treatment which he received was "adequate"; from which fact it follows that in all probability the physician for the insurer could have done

no better for the employee than did the physician actually in attendance, and therefore that no actual prejudice resulted to the employer or its insurer from the circumstance that the employee had his own physician to look after his condition rather than the physician employed by the insurer of the employer.

As to that part of the evidence which affects the failure of the employee to "keep off the leg," in accordance with the directions of his physician, the record discloses that if any such direction was ever given the employee, at first the injury showed no indication of a serious development and the doctor's directions were more in the nature of a suggestion than a real direction, and that later, when the doctor advised the employee "very strongly," he promptly accepted such advice and gave up his employment. Although the testimony given by the doctor with reference to the matter was not altogether clear nor free from inconsistencies, it included the following:

"Q. He (the employee) continued to work up to May 1st, didn't he—the first part of May? A. Something in that neighborhood.

"Q. And you strenuously objected to that, didn't you, as a doctor, knowing this man had a bad knee? A. To a certain extent.

"Q. Did you or did you not advise him to work? A. The first part I did not advise him strongly, the latter part I advised him very strongly. I says, 'If you don't stay off the knee and go to the hospital, you will lose that knee.'

"Q. And he kept on working? A. No; he went away after I told him that.

"Q. That was the first part of May? A. Yes.

"Q. Didn't he work some part of June, Doctor? The testimony is that he worked two weeks in July. A. That is right; he came back from the springs and felt better after the rest, and he thought he could continue his work.

"Q. Now, Doctor, in fairness to you don't you think that this man would have made better progress had he stayed off his knee? A. I do believe he would.

"Q. Why, certainly. And don't you think he should have quit work as soon as the condition became severe? A. In the beginning there was no indication to quit work and no indication of any serious development.

"Q. Did he limp on his knee? A. Not in the beginning; later on he started to limp, with a temperature."

[5] While some evidence appears in the record from which a conclusion contrary to that expressed in the finding in question might have been reached by the respondent commission, from the foregoing it is apparent that it was within the province of the respondent commission to make the finding on the evidence that the disability of the employee was not "caused, continued, or aggravated by an unreasonable refusal to submit to medical treatment, or to surgical treatment."

Other questions are presented for determination by this court, but as each of those suggested by petitioner depends upon a decision in its favor of the questions hereinbefore considered, it becomes unnecessary to devote to them the consideration which otherwise they would deserve.

The award is affirmed.

We concur: CONREY, P. J.; YORK, J.

84 Cal. App. 220

SHUMWAY v. WOOLWINE et al.
(Civ. 4861.)

District Court of Appeal, Second District, Division 1, California. June 28, 1927.

1. **Mechanics' liens** $\S$ 281(1)—Evidence held to support finding that residence erected, except for completion of interior decorating, was substantially completed.

In suit for foreclosure of mechanic's lien, evidence held to support finding that residence erected was substantially completed and that imperfection was trivial, where sole work remaining to be done was completion of interior decorating.

2. **Contracts** $\S$ 295(1)—Substantial completion of building entitles contractor to recover on contract.

Substantial completion of building under contract for its erection amounts to completion for purpose of determining right of contractor to recover on contract.

3. **Appeal and error** $\S$ 1008(1)—Ultimate findings control where inconsistent with probative findings.

Where probative findings are inconsistent with ultimate findings of trial court, ultimate findings control.

4. **Mechanics' liens** $\S$ 93—Constructive completion of building may arise from occupancy and use thereof by owner (Code Civ. Proc. $\S$ 1187).

Occupation of uncompleted building may constitute constructive completion, under Code Civ. Proc. $\S$ 1187, providing that occupation and use of building by owner for more than 30 days, accompanied by cessation of labor thereon, shall be deemed equivalent to completion.

5. **Mechanics' liens** $\S$ 288(3)—What constitutes trivial imperfection under building contract is question for court in suit to foreclose mechanic's lien.

In suit to foreclose mechanic's lien, question of what constitutes trivial imperfection in completion of building is question of fact to be determined by trial court under conditions and circumstances.

6. **Appeal and error** $\S$ 1010(1)—Findings are not disturbed, if supported by any substantial evidence.

Findings of trial court can be overturned only where unsupported by any substantial evidence.

7. Mechanics' liens $\hookrightarrow$ 157(1)—Finding that erroneous inclusion of cost of uncompleted work in mechanic's lien was inadvertent held not error where plaintiff disclaimed sum at trial.

Finding of trial court that plaintiff, in suit for foreclosure of mechanic's lien, erroneously included cost of uncompleted work through inadvertence held not error where plaintiff made no claim therefor at trial.

8. Mechanics' liens $\hookrightarrow$ 157(4)—Inadvertent claim in lien for work not performed, where not willful, does not forfeit lien (Code Civ. Proc. §§ 1187, 1202).

Error in advertently including improper sum in mechanic's lien does not forfeit lien claimed, under Code Civ. Proc. § 1187, unless excessive claim was willfully included, under section 1202.

9. Contracts $\hookrightarrow$ 335(2)—Performance of contract may be alleged, instead of pleading non-performance and excuse, where contract has been substantially performed.

Rule that one who relies upon excuse for nonperformance of contract should plead both nonperformance and excuse, instead of alleging performance, does not apply in case of substantial performance, where incompleteness is trivial in character.

Appeal from Superior Court, Los Angeles County; Edward I. Butler, Judge.

Suit by W. H. Shumway against Lauraine Woolwine and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Porter C. Blackburn, of Los Angeles, and H. H. Atkinson, of Reno, Nev., for appellants.

Courtney A. Teel, of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Defendants appeal from a judgment in a suit for foreclosure of a mechanic's lien.

Plaintiff entered into a cost plus agreement with defendants for the construction of a residence, under the terms of which plaintiff was to receive as compensation 10 per cent. of the total cost of labor and material. On April 8, 1922, defendants Woolwine moved into and took possession of the residence, when some of the fixtures were not installed and some of the interior decorating had not been completed by reason of the dampness of the walls. It was agreed the decorators would finish this work during the summer after the walls had dried out. According to the evidence, this decorating was an extra contract, the original contract providing for plain tinting only. Mrs. Woolwine testified that she contracted with the painters for the extra decorating. The installation of the fixtures was completed soon after April 8th, but the decorating was never completed, although the decorators offered to finish the work after plaintiff had filed his

lien on June 22, 1922. No notice of completion was ever filed.

The complaint alleges completion of the work on April 8, 1922. The court found:

"That pursuant to the terms of said contract and as directed by the said defendants Lauraine Woolwine, J. E. Woolwine and B. L. Harding, plaintiff caused said building and improvements to be constructed to the state of completion, and that plaintiff duly performed pursuant to said contract all things upon his part to have been performed, and that said building and improvements were not entirely finished and completed on the 25th day of April, 1922; that defendants Lauraine Woolwine and J. E. Woolwine took possession of and occupied and used said building and improvements on or about the 8th day of April, 1922, and have continued said use and occupancy at all times since said April 8, 1922; that said use and occupancy has been entire and exclusive since said April 25, 1922; that all work and labor on said building and improvements completely ceased on said last-mentioned date, and that no notice of completion thereof has ever been filed by defendants, or any of them, or by any one else.

"That prior to aforesaid completion and during the course of the construction of said building and improvements, defendant Lauraine Woolwine personally had dealings with and gave orders and instructions to the painters and decorators on said building and improvements for the performance of about \$800 worth of extra work over and above the original contract for same; that on or about April 7, 1922, defendant Lauraine Woolwine and said painting and decorating contractors agreed, with the approval of plaintiff, to temporarily finish said painting and decorating otherwise than as provided by said extra contract for same, and the said painters and decorators agreed with defendant Lauraine Woolwine to refinish and complete same as agreed in and by said extra contract, during the summer of 1922; that through no fault of plaintiffs, said painters have not completed said painting and decorating; that said painters offered so to do during August of 1922, but defendant Lauraine Woolwine refused to permit them to refinish said painting and decorating pursuant to said extra contract as aforesaid, or at all; that the reasonable value of said painting and decorating agreed to be done during said summer of 1922 was and is the sum of \$160, which said sum was withheld by defendants from said painting and decorating contractors as aforesaid; that said noncompletion of said building and painting is trivial in character, and that defendants can be compensated therefor by an allowance of said sum of \$160.

"That plaintiff by inadvertence included within his claim of lien aforesaid amount of \$160; that said claim for work and materials not furnished was not willfully made, nor was said claim made with any intent to falsify nor to defraud defendants, or any of them."

[1, 2] Appellants urge that plaintiff failed to complete the work undertaken, and therefore cannot recover. We cannot agree with this contention. Under the evidence, the work of the original contract was substantially completed when defendants Woolwine

entered into possession. Substantial completion is completion. In *J. Musto, etc., Co. v. Pacific States Corporation*, 48 Cal. App. 452, at page 458, 192 P. 138, 140, the court said:

"As to such character of contracts the law is well settled that a substantial performance of all the essential parts thereof, had in good faith, will entitle the contractor to recover the contract price, less compensation to the owner by way of recoupment for any damage resulting from trivial defects and imperfections due to inadvertence and not affecting substantive parts of the contract. This is especially true where, as in this case, the owner has received the benefit of what has been done and is enjoying the fruits of the work. *Connell v. Higgins*, 170 Cal. 556, 150 P. 769; *Rischard v. Miller*, 182 Cal. 351, 188 P. 50; *Collins v. Ramish*, 182 Cal. 360, 188 P. 550; *Morris v. Hokosona*, 26 Colo. App. 251, 143 P. 826; *Omaha Water Co. v. City of Omaha*, 156 F. 922, 85 C. C. A. 54."

To the same effect, see *Hallensleben v. Heine Piano Co.*, 54 Cal. App. 925, 201 P. 942; *Thomas Haverty Co. v. Jones*, 185 Cal. 285, 289, 197 P. 105; *Hammond Lumber Co. v. Yeager*, 185 Cal. 355, 197 P. 111.

[3] Appellants urge that the special finding that the building was not entirely completed on the 25th day of April, 1922, will control the general finding of completion. Even though the probative findings were inconsistent with the ultimate findings of completion in accordance with the contract, the latter would control. *J. Musto, etc., Co. v. Pacific States Corporation*, supra; *Perry v. Quackenbush*, 105 Cal. 299, 38 P. 740.

[4] Appellants' next contention is that there is no evidence to justify the finding of a constructive completion of the building for the reason that occupation of an uncompleted building does not constitute constructive completion. Section 1187 of the Code of Civil Procedure provides that the occupation and use of a building by the owner for more than 30 days, accompanied by cessation of labor thereon, shall be deemed equivalent to completion. Appellants' argument that the lien was premature is based upon the assumption that the work was not completed. As we have seen, there was sufficient evidence to support the finding of the court that the building was substantially completed, and there was occupancy, together with cessation of labor, for more than 30 days before the filing of the lien.

[5, 6] It is claimed by appellants that there is no evidence to support the finding that the building was completed. Such claim is without merit, where the evidence shows that the work was substantially finished except the contract for extra decorating entered into directly by one of the defendants and the decorators. Under the circumstances in the case at bar, where the unfinished work was to be done under a contract for extras which could not be performed until the dampened walls had dried out, and where it appeared that the

reasonable value of the unfinished decorating was the sum of \$160, as compared with the sum of approximately \$22,000 as the reasonable value of the entire work done under the contract, we conclude that the trial court was justified in finding that the said noncompletion was trivial in character. What constitutes a trivial imperfection is a question of fact to be determined by the trial court under the conditions and circumstances of each case; and this finding can only be overturned when it can be said that there is no substantial evidence to support it. *Hammond Lumber Co. v. Yeager*, 185 Cal. 355, 358, 197 P. 111.

[7, 8] Plaintiff erroneously included the cost of the uncompleted work in his lien. As plaintiff made no claim for this sum at the trial, we see no error in the finding of the trial court that this claim had been made inadvertently. Neither did the filing of such lien inadvertently including the said sum invalidate the lien, as there was no evidence that this amount was willfully included. Under the provisions of section 1202 of the Code of Civil Procedure a lien is not forfeited unless a person shall willfully include in his claim, under section 1187, Code of Civil Procedure, work or materials not performed or furnished for the property described in the claim.

[9] Appellants rely upon an alleged fatal variance between the pleadings and the proof. The complaint alleged that plaintiff duly performed all things provided in said agreement to be performed on his part. In addition to the general finding of completion of the building, the court found specially that defendant Lauraine Woolwine ordered extras from the painters and decorators, as appears from the findings hereinbefore quoted. Appellants cite the case of *Herdal v. Sheehy*, 173 Cal. 165, 159 P. 422, as authority for the rule that if the plaintiff relies upon an excuse for nonperformance, he should plead both the nonperformance and the excuse, instead of alleging performance. This rule does not apply to a case of substantial performance where the incompletion is trivial in character, as in the case at bar. *Smith v. Mathews Construction Co.*, 179 Cal. 797, 179 P. 205; *Conrad v. Foerst*, 54 Cal. App. 277, 201 P. 795.

An examination of the record discloses that appellants' claim that there is no evidence to justify the finding of contractual relation for extra work between defendant Lauraine Woolwine and the decorators is without merit. Neither do we find any variance between the lien and the proof. The evidence supported the finding of the court that there was substantial completion. The finding was upon the express contract, as stated in the lien, and not upon quantum meruit, as claimed by appellants.

Appellants further contend that there is no

evidence to justify the court's findings that plaintiff performed all things on his part to have been performed, and that there was a fatal inconsistency in the findings for the reason that the court found that the uncompleted portions of the contract were trivial in character. A discussion of these further contentions becomes unnecessary by reason of our conclusions heretofore stated.

It is ordered that the judgment be affirmed.

We concur: HOUSER, Acting P. J.;
YORK, J.

84 Cal. App. 298

JURI v. KOSTER. (Civ. 5234.)★

District Court of Appeal, First District, Division 2, California. July 1, 1927.

Hearing Denied by Supreme Court Aug. 29, 1927.

1. Pleading ⇨204(3)—Complaint stating distinct causes of action is not generally demurrable if one is good cause of action.

General demurrer cannot be sustained to a complaint, where one of several distinctly framed causes of action states a good cause of action.

2. Corporations ⇨547(1)—Agreement between corporation, trustees, and subscribers to fund for benefit of corporate creditors held enforceable by assignee of subscriber expressly made beneficiary (Civ. Code, § 1559).

Agreement whereby certain parties of the third part severally agreed to pay specified amounts to enable trustees to adjust claims of creditors of a corporation, specifically providing that one of subscribers, a creditor, should be paid in full, held enforceable by that subscriber, under Civ. Code, § 1559, permitting a third person to enforce a contract made for his benefit.

3. Parties ⇨7(2)—Trustees and other creditors held not necessary parties plaintiff to action on subscription contract for benefit of creditors by subscriber and creditor who assumed several liability (Code Civ. Proc. § 383).

Third person, both a subscriber to an agreement to raise funds to adjust claims of creditors of a corporation and creditor thereof, could, under Code Civ. Proc. § 383, bring an action on the agreement without joining as plaintiffs the corporation and the trustees or the other creditors, where he had undertaken a several liability.

4. Parties ⇨7(1), 22—Trustees under subscription agreement for creditors' benefit held not "united in interest" with debtor corporation, within statute, so as to be necessary plaintiff or defendant in subscriber's action thereon (Code Civ. Proc. § 382).

Trustees, under an agreement between debtor corporation, trustees for creditors, and subscribers to a fund for adjusting claims of creditors, were not united in interest, within the meaning of Code Civ. Proc. § 382, so as to require them to be joined as plaintiffs or de-

fendants in an action on the agreement by the assignee of one who was both subscriber and creditor.

5. Parties ⇨30—Creditors held not necessary parties plaintiff to action on subscription contract by assignee of subscriber, who was also beneficiary of fund for creditors' benefit.

Creditors, who were not parties to agreement executed by a corporation, trustees, and subscribers to a fund for benefit of creditors, were not necessary parties to an action for breach thereof by the assignee of one of the subscribers who was also a creditor, where the agreement contained provisions solely for the benefit of plaintiff's assignor.

6. Parties ⇨30—Creditors who were not necessary plaintiffs in action on subscription contract by subbeneficiary of fund for creditors' benefit held not necessary defendants.

Creditors were not necessary parties defendant to an action on an agreement to subscribe fund to enable trustees to adjust corporation's debts, brought by assignee of subscriber who was also a creditor and an express beneficiary, where they were not necessary parties plaintiff.

7. Parties ⇨30—Subscription agreement held to authorize suit thereon by subscriber, who was also beneficiary, without joining other subscribers.

Provision in agreement between corporation, trustees, and subscribers to provide funds for adjustment with creditors, authorizing suit against any defaulting party in favor of plaintiff's assignor who was both a subscriber and express beneficiary, held to make it unnecessary to join other subscribers as defendants in action on agreement.

8. Pleading ⇨18—Complaint on contract, stating essential facts, is sufficient against objection to uncertainty in matters of legal interpretation.

Complaint stating essential facts of nature of the cause of action is sufficient against objection that it is uncertain, where alleged uncertainties are matters of legal interpretation of contract.

9. Pleading ⇨207—Uncertainty in contract is not matter for special demurrer by party promisor to complaint thereon (Civ. Code, § 1654).

Uncertainty in contract is not a matter for special demurrer by a party promisor, to a complaint on the contract, since, under Civ. Code, § 1654, the contract must be interpreted most strongly against him.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action for breach of contract by E. Juri against H. Koster. Judgment for plaintiff, and defendant appeals. Affirmed.

Lloyd Macomber, of San Francisco, for appellant.

A. H. Ricketts, of San Francisco, for respondent.

NOURSE, J. [1] The appeal is from a judgment in favor of the plaintiff following defendant's failure to answer after his demurrer to the amended complaint had been overruled. The action is one for the breach of a written contract, which is set out in full as a part of the amended complaint. The demurrer is both general and special, but as the amended complaint was framed in three distinct causes of action, the third of which pleaded an account stated as to which no general demurrer was interposed, it will be necessary to consider the grounds of the special demurrer only because, if the amended complaint pleaded one good cause of action, the general demurrer could not have been sustained to the pleading.

The written agreement upon which the litigation is based was executed by the Pacific Alloy & Steel Company, a corporation, as party of the first part, three named trustees, parties of the second part, and sixteen individual parties of the third part who severally agreed to pay to these trustees the amounts specified as subscriptions opposite their respective names. The purpose of the agreement was to raise funds to enable the trustees to adjust the claims of creditors of the corporation of which plaintiff's assignor was the principal one, but inasmuch as this assignor also joined in the agreement and obligated himself to pay something over \$13,000 monthly to the trustees it was expressly agreed that his claim of \$162,676.77, being much in excess of the total monthly payments required to be paid by him and consisting entirely of loans and advancements made by him to the corporation for its use and benefit, "the payment of his account in full shall be assured and guaranteed." For this purpose the parties of the second part, the trustees, jointly, in their individual capacity as well as representatives of the other parties to the agreement, guaranteed the payment of this account in full.

[2] The agreement also provided that no default on the part of any subscriber should affect the rights of plaintiff's assignor under the agreement, and that the trustees should jointly and severally have the right to sue for and collect any sums due from any subscriber. From this it is argued that the plaintiff did not have legal capacity to sue, but that the suit should have been brought by the trustees. But the complaint alleged that demand had been made upon the trustees, and that they had refused to bring the suit. The point is answered by the agreement itself, which picks out plaintiff's assignor from all the other creditors and declares that his claim alone shall be paid in full while all others are subject to adjustment. By thus acknowledging his claim and providing that it should be paid in full irrespective of what arrangements might be made with the other creditors, the agreement made him an express beneficiary, en-

titling him to sue under the terms of section 1559, Civil Code, which reads:

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

[3, 4] It is argued that there is a defect of parties plaintiff in that neither the corporation nor the trustees or the other creditors were joined as such. Though the corporation was the principal in the execution of the contract, the defendant undertook a several liability upon which he was liable to be sued without joining his principal either as a party plaintiff or as a party defendant. Code Civ. Proc. § 383. As to the trustees, they were not united in interest, within the meaning of section 382, Code of Civil Procedure, and hence were not required to be joined as either plaintiffs or defendants. *San Diego Water Co. v. Flume Co.*, 108 Cal. 549, 557, 41 P. 495, 29 L. R. A. 839.

[5] The creditors, other than plaintiff's assignor, were not parties to the agreement and, though it was executed partly for their benefit, paragraph 8 thereof was distinctly and solely for the benefit of plaintiff's assignor. It is for the breach of this portion of the agreement that this suit was commenced, and we can see no reason for joining the other creditors, particularly as it does not appear from the complaint that any one of them has an enforceable claim against either the corporation or the subscribers in the agreement at the time this suit was begun.

[6, 7] It is argued that there is a defect of parties defendant because of the failure to join as such the other creditors and the other subscribers. If we are right in our conclusion that the other creditors need not have been joined as parties plaintiff, then, of course, they are not necessary parties defendant because it is only on the theory that they are necessary plaintiffs and refuse to join as such that the defendant may claim that they should be joined as defendants. As to the other subscribers, the point is completely answered by the special terms of the agreement which authorize suit against any defaulting party in favor of plaintiff's assignor.

[8, 9] The defendant urges that the complaint is uncertain, unintelligible, and ambiguous in a number of particulars. It is not necessary to consider these specifications because the complaint does plead the essential facts to acquaint the defendant with the nature of the cause of action. These specifications of uncertainty are really not matters of uncertain pleading, but are matters going to the legal interpretation of the rights and the liabilities of the respective parties under the contract. As the defendant was a party promisor in the contract, which therefore must be interpreted most strongly against him (Civ. Code, § 1654), any uncertainty in the contract is not a matter for special demurrer to the complaint because the means

of clearing that uncertainty are with the defendant, and he is presumed to be the party who caused the uncertainty to exist (Id.).

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

84 Cal. App. 168

PEOPLE v. BENNING. (Cr. 1399.)

District Court of Appeal, First District,
Division 2, California. June 27, 1927.

1. Homicide §244(1)—Evidence held to support conviction for manslaughter as against contention of self-defense.

Evidence held sufficient to support conviction for manslaughter, where defendant killed deceased during discussion of latter's improper relations with defendant's wife, claiming that he thought deceased was about to draw gun.

2. Criminal law §554—Jury may disregard defendant's uncontradicted statement of facts leading up to crime when circumstances warrant it.

Uncontradicted statement of defendant, made in his own defense in prosecution for homicide, need not be accepted as proof of facts leading up to commission of crime, when other circumstances justify jury in disregarding such testimony.

3. Criminal law §703—District attorney's opening statement in murder case, offering to prove defendant's threat to get deceased, and that deceased made no demonstration against defendant, held not error, in view of evidence.

In prosecution for murder, in which defendant pleaded self-defense, opening statement of district attorney offering to prove that deceased was making no demonstration against defendant, and that defendant had threatened to get deceased, held not error, where evidence was offered in support of both statements.

4. Criminal law §1178—Assignments on admission of testimony need not be considered, where no reasons were given in brief and no authorities cited.

Assignments complaining of admission and rejection of testimony during course of trial need not be considered, where no reasons are given in brief why rulings are wrong, and no authorities are cited.

5. Criminal law §763, 764(23) — Instruction on self-defense, warning jurors to consider whether reasonable man would have fired fatal shot under circumstances, held not "comment on evidence."

In prosecution for homicide, in which defendant pleaded self-defense, instruction on self-defense, warning jurors to consider whether under circumstances reasonable man would have fired fatal shot, held not objectionable as "comment on evidence."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Comment.]

6. Homicide §340(4)—Any error in instructions relating to malice and justification for shooting in heat of passion held harmless, where defendant was convicted of manslaughter.

In prosecution for homicide, any error in instructions relating to malice and justification for shooting, if done in heat of passion, is not reversible, where defendant was convicted of manslaughter only.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Alexander Ray Benning was convicted of manslaughter, and he appeals. Affirmed.

Harry Houser, of San Jose, John T. Lewis, of Hollister, and Wm. R. Biaggi, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried on an information charging the crime of murder, and was found guilty of manslaughter. From the judgment following the verdict and from the order refusing a new trial the defendant has appealed on a typewritten record.

The facts of the case, briefly stated, are that the defendant shot and killed one John Bena in the city of San Jose on the 16th day of August, 1926, at about 6 p. m. Ill feeling had arisen between the defendant and the deceased growing out of information coming to the defendant of improper relations between the deceased and the defendant's wife. Some time prior to the killing the defendant had warned the deceased to cease his attentions to his wife, but a short time thereafter the defendant's wife informed him that the association still continued. On a number of occasions immediately prior to the killing friends and neighbors had informed the defendant concerning these relations. This information, it is claimed, influenced the defendant to seek out the deceased in order to give him additional warnings, and, as the defendant started out upon this mission, he procured from one of his friends a loaded revolver, which he testified he took along merely for the purpose of scaring the deceased and to protect himself in the event the deceased and his associates made an attack upon him. The defendant found the deceased in a pool hall, but, not wishing to approach him in company with his associates, he (the defendant) waited in his automobile on the other side of the street directly in front of the entrance of the pool hall until the deceased came out. As the deceased started to walk down the street, the defendant moved his car to the other side of the street and engaged the deceased in conversation. The only testimony as to what occurred at that time comes from the lips of the defendant. This testimony is that the defendant accused the deceased of having improper

relations with his wife, and insisted that he come down with him to the home of one Orlo King, a friend of the defendant, in order that he may make proof of his assertions; that he informed the deceased that defendant's wife had made a complete confession to him of these relations; that the deceased refused to go with him to King's, whereupon the defendant told him that he had a gun in his car, which he displayed to the deceased. It is then in the testimony that the defendant thought the deceased made a motion with his right hand to draw a gun from his hip pocket, whereupon the defendant immediately shot the deceased through the right breast, from which he died some twenty-four hours thereafter without having made any statement as to the circumstances of the shooting. In a confession made on the night of the shooting the defendant stated that he told the deceased: " * * * We will go to King's and they will back it up; then I am going to beat you up."

The entire case of the defendant before the jury was one of self-defense, and was based on his testimony that a motion was made by the deceased to draw a weapon, from which the defendant thought his life was in danger. Two witnesses were offered by the prosecution, who were passing the automobile immediately prior to the shooting, and who testified that they did not see the deceased make any motion indicating an intention to draw a gun, but that as they passed the car the deceased had both hands on the door of the automobile.

[1, 2] The appellant argues that the evidence is insufficient to support the verdict. The point is that, as no direct testimony was offered to disprove appellant's testimony that the deceased made a motion indicating an intention to draw a gun, the jury was bound to accept appellant's claim that he felt he was in imminent danger and shot the deceased in self-defense. *People v. Estrada*, 60 Cal. App. 477, 213 P. 67, is cited in support of the argument. In that case the court reversed a judgment of manslaughter on the ground that all the evidence tended to show a justification for the killing, and that there were no conflicting circumstances. The case differs from the facts in evidence here, because in the *Estrada* Case the evidence showed that the deceased was the aggressor, and struck the first blow; that the defendant was not armed, and did not anticipate a quarrel with the deceased; but that, after resisting the assault of the deceased, he struck the fatal blow with a weapon which he took from the deceased.

Thus all the circumstances in evidence coincided with the defendant's direct testimony that he felt himself in imminent danger and struck the fatal blow in defense of his own life. Here the circumstances are that the defendant purposely sought out the deceased for the purpose of picking a quarrel

and was the aggressor throughout the controversy; that the deceased was not armed, and did not anticipate a quarrel with the defendant; that the deceased was standing beside the automobile in which the defendant was sitting, and had both hands resting upon the door of the machine with his head and shoulders protruding inside the car; and that the range of the bullet showed that the fatal shot was fired while the deceased was standing in this stooping position with both shoulders on a line with the door of the automobile. From these circumstances the jury could well have drawn the inference that, whatever motion the deceased made with his right hand, it was not one for the purpose of drawing a weapon, but that, if he had intended to draw a weapon, he would have thrown his right shoulder back, and at the same time withdrawn his head and shoulders from the inside of the car. There was the additional circumstance that the deceased made no effort to seize the gun in the defendant's hand, and that the defendant made no effort to prevent the deceased from attacking him, but shot without warning. These circumstances, balanced against the direct testimony of the defendant that he *thought* the deceased was about to draw a weapon, and that he fired in self-defense, were sufficient to justify the jury in finding that the defendant was not in imminent real or apparent danger at the time he fired the fatal shot, and that the plea of self-defense was not proved. The general rule is that the jury may disregard the testimony of the defendant when other circumstances warrant it, and we have found no authorities holding that the uncontradicted statement of a defendant made in his own defense must always be accepted as proof of the facts leading up to the commission of the crime. To so hold would mean that circumstantial evidence must always give way to the direct testimony of the defendant, who, in cases like this, would be the only eyewitness to the actual commission of the crime.

[3] Complaint is made of the conduct of the district attorney in his opening statement to the jury when he offered to prove that the defendant had threatened to get the deceased, and that, at the time of the shooting, the deceased was making no demonstration against the defendant. It was said that the district attorney knew that these facts could not be proved, and that his statement was prejudicial to the defendant. Evidence was given to show that shortly before the shooting the defendant had made threats that he was going out to look for the deceased, and that he was going to beat him up. The prosecution attempted to show through the testimony of two witnesses that the deceased made no motion to draw a gun. The testimony of these witnesses was merely that they saw no such motion, and, though on cross-examination both were shown to have

been in such a position at the time of the shooting that they could not have seen the deceased, there was no error in offering this testimony, and, of course, no error in stating that such showing would be made.

[4] Complaint is made as to numerous rulings on the admission and rejection of testimony during the course of the trial. No reasons are given in the brief why the rulings were wrong, and no authorities are cited. For this reason it is not necessary to consider the assignments here. *People v. McLean*, 135 Cal. 306, 67 P. 770.

[5, 6] Criticism is made of some of the instructions given by the trial judge. After instructing the jury fully on the issue of self-defense, the trial judge warned the jurors to consider whether, under the circumstances of this case, a reasonable man would have covered the deceased with his gun, but not have fired the fatal shot. It is said that this is a comment on the evidence, and objectionable for that reason. We cannot see it in that light.

Other instructions relating to malice and justification for the shooting, if done in the heat of passion, are also complained of. These instructions were given, because the defendant was on trial on a charge of murder, and, inasmuch as the verdict was manslaughter, we cannot see how the defendant has in any way been prejudiced by these instructions.

We have examined the entire record, and find that the defendant was fairly tried and convicted.

Judgment and order affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

84 Cal. App. 311

DAILEY v. GLASSELL. (Civ. 4472.)

District Court of Appeal, Second District, Division 2, California. July 1, 1927.

1. Appeal and error $\S$ 770(1)—Appellant's failure to submit brief on question whether action survived death of respondent held abandonment of appeal.

Where respondent died pending appeal and appellate court ordered briefs submitted on question whether action survived his death, *held* appellant's failure to file brief or to take any step to substitute a party in place of respondent constituted abandonment of appeal.

2. Specific performance $\S$ 28(2)—Contract, whereby seller agreed "to install free of charge * * * graded and oiled streets and also water mains to each lot," *held* too indefinite to support specific performance.

Paragraph of contract of purchase and sale of realty, "the seller agrees to install free of charge to the purchaser graded and oiled streets

and also water mains to each lot," *held* insufficiently definite or certain to support action for specific performance.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action for specific performance of a contract for purchase and sale of real property by John H. Dailey against Andrew Glassell. From a judgment of dismissal after sustaining of demurrer to the complaint, plaintiff appeals. Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Jas. E. Hannon, of Los Angeles, for respondent.

MURPHEY, Justice pro tem. The trial court sustained a demurrer to plaintiff's first amended complaint. Plaintiff failed to further amend within the time prescribed, which resulted in a judgment of dismissal from which this appeal is prosecuted. At the hearing before this court on the May calendar the death of the defendant and respondent was suggested by his attorney in the trial court; no reply brief or other appearance having been made in this court. No substitution of the parties has been made in this court.

[1, 2] It was the contention of the respondent at the hearing that the cause of action does not survive his death. The court ordered this matter submitted upon briefs, ten, ten, and five, and directed the appellant, within that time, to take such steps as are prescribed by law to effectuate a substitution of parties. Respondent filed his opening brief as directed by the court, but no action has been taken by the appellant. No brief has been filed and no move has been made to substitute a party in the place and stead of the deceased respondent. Under such circumstances, two months having elapsed, it is our judgment that the appellant has abandoned his appeal. An inspection of the record, however, satisfies us that in reaching this conclusion the appellant has not suffered the loss of any substantial right and that the trial court is clearly right in its ruling on the demurrer. The action is predicated upon a demand for the specific performance of the following paragraph of a contract of purchase and sale of real property: "The seller agrees to install free of charge to the purchaser graded and oiled streets and also water mains to each lot." It is apparent on its face that this language is so indefinite and uncertain as to requirements, and utterly lacking in essential particulars as to be specifically unenforceable.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

84 Cal. App. 237

CHRISTENSON et al. v. CUDAHY PACKING CO. (Civ. 5757.)*

District Court of Appeal, First District, Division 2, California. June 29, 1927.

Hearing Denied by Supreme Court Aug. 25, 1927.

1. Costs ☞3—Right to costs is purely statutory.

Right to recover costs is purely statutory.

2. Costs ☞247—Party to whom costs are awarded on appeal can recover only such amounts actually paid out by him as have been necessarily incurred in action (Code Civ. Proc. §§ 1027, 1034).

Under Code Civ. Proc. §§ 1027, 1034, party to whom costs are awarded on appeal is entitled to recover only such amounts actually paid out by him as have been necessarily incurred in action.

3. Appeal and error ☞460(1)—Filing of stay bond on appeal is mere privilege, and not duty imposed upon appellant.

Filing of stay bond on appeal is not a duty imposed on appellant, but is a mere privilege.

4. Costs ☞251—Premium of surety bond to stay execution on appeal is not necessary expenditure which party to whom costs are awarded on appeal can recover (Code Civ. Proc. §§ 1027, 1034).

Party to whom costs are awarded on appeal is not entitled to premium of surety bond given to stay execution of judgment as a necessary expenditure under Code Civ. Proc. §§ 1027, 1034, expenses recoverable being filing fees, printing of transcript, charges for clerks and notarial certificates, and similar items of fixed and uniform nature.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Eleanor L. Christenson, as executrix, etc., and others, against the Cudahy Packing Company. Plaintiff recovered judgment, which the Supreme Court modified, and ordered that defendant recover his costs on appeal. From an order striking certain items from cost bill, defendant appeals. Affirmed.

Casper A. Ornbaun and Robert Duncan, both of San Francisco, for appellant.

Thomas, Beedy, Presley & Paramore, of San Francisco, for respondents.

NOURSE, J. Plaintiff had recovered a money judgment against the defendant, from which the latter appealed. The Supreme Court modified the judgment, and ordered that the defendant recover its costs on appeal. When the remittitur was sent down, the defendant, in due course, filed its memorandum of costs, in which were included four separate premiums paid on a surety bond to stay execution of that judgment. On motion of the plaintiff these items were ordered

stricken from the bill, and the appeal is taken from that order.

[1, 2] The right to recover costs is purely statutory. *Turner v. East Side Canal & Irr. Co.*, 177 Cal. 570, 573, 171 P. 299; *Estate of Gallo*, 71 Cal. App. 352, 353, 235 P. 66. Section 1027, Code of Civil Procedure, provides that the prevailing party on appeal "may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal, including the costs of printing briefs. * * *" Section 1034, Code of Civil Procedure, provides that a party seeking to recover costs awarded by an appellate court must file a memorandum of costs verified in the manner prescribed in section 1033, which relates to costs in the trial court. By the latter section it is required that the party verify the memorandum, stating that the sums listed have been necessarily expended in the action. Reading these sections together, we find that the party to whom costs are awarded on appeal is entitled to recover only such amounts actually paid out by him as have been necessarily incurred in the action.

In *Sime v. Hunter*, 55 Cal. App. 157, 202 P. 967, it was held that the prevailing party on appeal was not entitled to recover as costs the sums paid out by him for a copy of a transcript used by him in preparing the appeal, and which was not ordered by the trial court, or the sums paid out to cover the traveling expenses of his attorney to and from the hearing in the appellate court. *Turner v. East Side Canal & Irr. Co.*, 177 Cal. 570, 171 P. 299; and *Estate of Gallo*, 71 Cal. App. 352, 235 P. 66, cover the same point where the party had failed to obtain an order of court to print the transcript of testimony as required by section 274, Code of Civil Procedure. In *Arrow Garage Co. v. Kikugawa*, 69 Cal. App. 509, 231 P. 571, it was held that storage charges on an automobile held under attachment pending an appeal were not recoverable as costs under the Code section. The appellant cites several cases from other jurisdictions, but none of them aids in the interpretation of our statute.

[3] Bearing in mind that only the expenses necessarily incurred in the preparation of the appeal may be recovered, we should look at the circumstances under which the disputed items arose. The plaintiff in the litigation had recovered a money judgment upon which it was entitled to execution and sale of the defendant's property. To prevent this the defendant filed its stay bond as it was privileged to do under the statute. Because the defendant chose to employ a surety company for this purpose, it was required to pay the premiums in dispute. But the filing of the stay bond was a mere privilege, and not a duty imposed upon the defendant in connection with the appeal. *Williams v. Atchi-*

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court.

son, etc., Ry. Co., 156 Cal. 140, 141, 103 P. 885 (134 Am. St. Rep. 117, 19 Ann. Cas. 1260), where it was said:

"The filing of such an undertaking by a surety company is likewise not a necessity, but a special privilege accorded under the statute."

Furthermore, the appellant was not required to file a surety bond for this purpose, but might have filed a personal bond for which no premium would have been required.

[4] In limiting the recoverable costs to such expenses as have been necessarily incurred in connection with the appeal, the Legislature had in mind expenses such as filing fees, printing of the transcript, charges for clerks and notarial certificates, and similar items of a fixed and uniform nature. In so limiting the recoverable costs a double purpose is served—uniformity in the charge to be imposed upon unsuccessful parties, and prevention of imposition upon such parties through unnecessary and unreasonable expenditures. We are satisfied that the premium of a surety bond in a case of this kind is not a necessary expenditure within the meaning the Code section.

Order affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

34 Cal. App. 206

STANTON v. SANTA ANA SUGAR CO.
(Civ. 4720.)

District Court of Appeal, Second District,
Division 1, California. June 28, 1927.

1. Contracts ⇨338(2)—Defendant must set up rescission as affirmative defense to action on contract by third person for whose benefit it was made (Civ. Code, § 1559).

Rescission of contract, sued on by third person for whose benefit it was made, under Civ. Code, § 1559, must be set up as affirmative defense by defendant.

2. Contracts ⇨333(1)—Plaintiff need not plead nonrescission.

In suit on contract, plaintiff need not plead that contract was not rescinded.

3. Appeal and error ⇨1170(3)—Plaintiff's failure to plead that contract made for his benefit was not rescinded held not ground for reversal, in absence of claim of rescission or injury to parties' substantial rights (Civ. Code, § 1559; Code Civ. Proc. § 475).

Where third person's action, under Civ. Code, § 1559, on contract made for his benefit, was tried without claim of rescission, and parties' substantial rights were not affected by plaintiff's failure to plead negatively that no rescission was made, such neglect is not ground for reversal, under Code Civ. Proc. § 475.

4. Contracts ⇨187(1)—One not party to contract made expressly for his benefit may sue promisor (Civ. Code, § 1559).

Under Civ. Code, § 1559, third person, not party to contract made expressly for his benefit, may sue promisor thereon.

5. Landlord and tenant ⇨222—Unprofitableness of defendant's cropping contract with plaintiff's tenant held no defense to action on contract to pay rent.

That defendant's cropping contract with plaintiff's tenant proved unprofitable was no defense to action on latter's unconditional contract to pay plaintiff certain sum for rent out of no specific fund.

6. Stipulations ⇨18(1)—Stipulation that one executing contract was acting as defendant's agent foreclosed contention that contract was not binding on defendant.

Stipulation that one executing contract in defendant's behalf was acting as defendant's agent, with full authority to make contract, foreclosed contention that contract was not binding on defendant, because obligatory words were written in pencil in form provided by defendant.

7. Contracts ⇨147(2)—Parties' intent must be ascertained by contract itself.

Parties' intention in making contract is to be ascertained by contract itself.

8. Landlord and tenant ⇨231(2)—Tenant's testimony as to whether he had rent money held inadmissible in lessor's action against one contracting with assignee of lease to pay rent.

In lessor's action on defendant's contract with assignee of lease to pay rent, tenant's testimony as to whether he had any money with which to pay rentals was properly excluded.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by P. A. Stanton against the Santa Ana Sugar Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Bordwell & Mathews and J. N. Owen, all of Los Angeles, for appellant.

O'Melveny, Milliken, Tuller & Macniel, John O'Melveny, and Paul Fussell, all of Los Angeles, for respondent.

YORK, J. This is an appeal by plaintiff from a judgment of nonsuit. Plaintiff was the owner of certain land, which he leased to one Shiroishi for three years, beginning on November 1, 1920, for which Shiroishi agreed to pay plaintiff \$4,710. Payments were to be in installments, of which \$50 was to be paid on the signing of the lease, \$700 on January 5, 1921, \$250 on May 15, 1921, and \$500 on October 15, 1921. The other payments are not material in this case. On January 8, 1921, Shiroishi, with the consent of plaintiff, assigned said lease to one Sakurai, who agreed to pay all the rentals as specified in said lease. Sakurai on the 8th day of Jan-

uary, 1921, entered into a contract with defendant, wherein defendant agreed with Sakurai to pay \$1,500 of said rentals to plaintiff, and thereupon defendant paid to plaintiff \$750 and agreed to pay \$250 to plaintiff on May 15th, and \$500 thereon on October 15, 1921. Defendant thereafter paid \$200 of said sum to plaintiff and was given credit for the \$50 paid on the execution of the original contract of lease. Plaintiff prosecutes this action to recover judgment for \$500, the remainder of the said \$1,500 defendant promised Sakurai he would pay to plaintiff.

[1-4] Plaintiff's action is based upon section 1559 of the Civil Code of the state of California, which reads as follows:

"A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind."

The complaint does not allege whether the contract was rescinded by the parties to it before the action was brought. It seems to have been considered by the Supreme Court of this state as an essential allegation in the complaint in *Eriksen v. Rhee*, 181 Cal. 566, 185 P. 847. The statement in that case was, however, obiter dictum, and we do not consider it binding on us in deciding this appeal. The above is the only case where we have found any suggestion that it should be plead that no rescission of such a contract had been made. Having established that the contract was made, there was no presumption of rescission, and rescission, therefore, if it existed, should have been set up as an affirmative defense by the defendant.

Again, the action was tried without any claim of rescission having been made, and the substantial rights of the parties were not affected by failure on the part of the plaintiff to plead negatively that no rescission was made before the complaint was filed, and therefore the neglect to plead it could not be ground for reversal. Section 475, Code Civ. Proc. It will be noted that the section of the Civil Code upon which plaintiff relies for maintenance of this action used the word "expressly" and not "solely." A contract made expressly for the benefit of a third party may have been also for the benefit of one or more of the contracting parties, and has been so made in nearly all the cases where such a contract has been under consideration, since the enactment of said Civil Code provision. The contract under consideration was not to pay out of a certain fund.

Plaintiff, under the terms of his lease, was to receive his rent, whether the enterprise in which Shiroishi and Sakurai and the defendant were engaged was profitable or involved a loss. It was a contract for unconditional payment to the plaintiff of a certain sum for rent of his property. In fact, defendant paid the plaintiff \$950, which was not from any specific fund, but from defendant's moneys, without reference to the source from which the moneys came. Independent of said pro-

vision in section 1559 of our Civil Code, plaintiff could not maintain this action. Under that code section it is well settled that the "third person" may maintain an action against the promisor, although not a party to the contract, when it appears by the contract that it was made expressly for his benefit. The facts of this case make a stronger case for plaintiff than the facts in the case of *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 18 P. 858, as in this case there was an unconditional promise to pay plaintiff \$1,500. See, also, *Lewis v. Covillaud*, 21 Cal. 179 (overruling *McLaren v. Hutchinson*, 18 Cal. 80), and *Washer v. Independent Mining, etc., Co.*, 142 Cal. 702, 76 P. 654; also, *Flint v. Cadenasso*, 64 Cal. 84, 28 P. 62.

[5] In the contract under consideration it was clearly expressed that the defendant would pay plaintiff said \$1,500, and, if there were any doubt as to whether the defendant's promise was for plaintiff's benefit, it appears that plaintiff before consenting to the assignment of the lease to Sakurai required that the sugar company confirm the obligation to pay the rent. It was no defense to this action that the defendant's contract with Sakurai turned out to be unprofitable to defendant. *Washer v. Independent Mining etc., Co.*, 142 Cal. 702, 76 P. 654.

The motion for a nonsuit made herein does not point out wherein the evidence "does not constitute a cause of action," or wherein evidence is "not sufficient to show any case against the Sugar Company." The record discloses, however, that evidence was introduced or offered after the motion for nonsuit was made, and the record apparently does not disclose that the motion for nonsuit was ever restated after such additional evidence was in.

[6-8] The defendant's contention that the obligatory words of defendant's contract were written in pencil, in a form provided for such contract by defendant, were not obligatory on defendant cannot be sustained. It was stipulated during the trial that Gerhart, who executed the contract in question on behalf of defendant was acting as agent for defendant with full authority to make the contract. This stipulation, of course, forecloses defendant from making the contention that the contract was not binding on it. It is immaterial whether plaintiff was a party to the contract with defendant, in that it appears that it was made expressly for his benefit. The intention of Sakurai and defendant in making the contract is to be ascertained by the contract itself, and it is clear and free from ambiguity. This conclusion is sustained by the authorities cited by respondent. The other provisions of the contract between Sakurai and defendant in no way modify or affect the contract of defendant to pay plaintiff \$1,500, in that plaintiff's right to receive rent was in no way dependent on the cropping contract, and the defendant's promise to pay \$1,500 to the plaintiff was in no way condi-

tional on the success or failure of the beet crop. The court did not err in sustaining the objection to the question asked Shiroishi as to whether he had any money with which he could pay the rentals.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

84 Cal. App. 303

**CITY OF COLTON v. SUPERIOR COURT
IN AND FOR SAN BERNARDINO
COUNTY et al. (Civ. 5662.)**

District Court of Appeal, Second District, Division 1, California. July 1, 1927.

1. Mandamus $\S$ 57(1)—District Court of Appeal may issue writ of mandate to superior court to set aside order dismissing appeal from recorder's court.

District Court of Appeal has jurisdiction to issue a writ of mandate to the superior court to set aside an order dismissing an appeal from a recorder's court.

2. Courts $\S$ 188(1)—Jurisdiction of recorder's and police courts depends on statute, within constitutional limits.

Jurisdiction of recorder's court and police court depends entirely on legislative action, within constitutional limits.

3. Appeal and error $\S$ 417(2)—That notice of appeal from "recorder's court" to superior court was entitled "In the police court" held not ground for dismissal of appeal (Code Civ. Proc. $\S$ 475; Pen. Code, $\S$ 1461).

That notice of appeal from recorder's court to superior court was entitled "In the police court" held not ground for dismissal of appeal, in view of Code Civ. Proc. $\S$ 475, where it correctly gave parties' names, was addressed to recorder and trial justice acting for recorder named, and identified judgment as one entered by such justice "recorder's court" and "police court" being ordinarily synonymous, as indicated by Pen. Code, $\S$ 1461.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Police Court.]

Application by the City of Colton for a writ of mandate to the Superior Court of San Bernardino County, Benjamin F. Warner and Charles A. Allison, Judges, to vacate an order dismissing an appeal from the Recorder's Court. Writ granted.

Loeb L. Cossack and O'Connor & Findlay, all of Colton, for petitioner.

Hert & Mussell, of Colton, for respondents.

HOUSER, J. This is an application for a mandate for the purpose of directing the judges of the superior court of San Bernardino county to vacate an order made by them dismissing an appeal to said superior court

from a judgment theretofore rendered in a recorder's court.

[1] At the outset the respondents present a demurrer to the petition, and contend that this court is without jurisdiction to issue a writ of mandate to the superior court to set aside its order dismissing the appeal from the recorder's court. The authorities, however, do not sustain respondents in their position in that regard. *Peacock v. Superior Court*, 163 Cal. 701, 126 P. 976; *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 P. 978; *Hellner v. Superior Court*, 61 Cal. App. 785, 215 P. 709; *San Francisco-Oakland T. Rys. v. Superior Court*, 48 Cal. App. 586, 192 P. 116; *Widrin v. Superior Court*, 17 Cal. App. 93, 118 P. 550. It is therefore apparent that the demurrer should be, and it is, overruled.

The facts with reference to the matter presented by the petitioner herein are that in an action pending in the recorder's court of the city of Colton a judgment in favor of the defendant was rendered by a justice of the peace, who at the time in question was acting for and in the place of the recorder of said court; that thereafter, and within the time allowed by statute, the plaintiff in said action served upon the defendant therein and filed in the superior court in and for the county of San Bernardino his notice of appeal from such judgment; that said notice of appeal was entitled "In the Police Court of the City of Colton," etc., and was addressed, "To L. S. Lyman, Acting for James Temby, City Recorder, James Temby, City Recorder, and M. O. Hert, Attorney for Defendant." The notice itself, following the title of the action, so far as is here material, was as follows:

"You and each of you will please take notice that the plaintiff in the above-entitled action does hereby appeal from the judgment as a whole entered by Acting Judge L. S. Lyman, on the 9th day of February, 1927, against said plaintiff, in favor of said defendant. * * *

It further appears that in due course the appeal came on for hearing before the respondent superior court, at which time, on motion of the defendant, the said superior court dismissed said appeal, on the ground, as stated in the notice of motion, that the appeal "was taken from a court not in existence; that this action was tried in the recorder's court of the city of Colton, and no appeal was ever taken therefrom, and that no notice of appeal was ever served in said matter." It will thus be observed that, while the action originally was pending in the recorder's court, the notice of the appeal was entitled "In the Police Court"; and consequently, that the question here to be determined is whether such notice of appeal was sufficient in the premises.

[2] In the common acceptance, no distinc-

tion is made between a recorder's court and a police court. Each of them is an inferior court and the jurisdiction of one is frequently, if not universally, similar to, if not identical with, that of the other. The matter of jurisdiction of either of such courts within constitutional limits depends entirely upon legislative action. It is therefore apparent that cities of one class may have a recorder's court, whose jurisdiction may be identical with the jurisdiction of a police court located in an adjoining city of a different class. So general is the use of the term "police court," as applied to any of the inferior courts of municipalities, that, as applying to proceedings in the justice and police courts and appeals to superior courts, the Legislature has seen fit to enact a statute by which such courts are defined as follows:

"The term 'police courts,' as used in this and the succeeding chapter, includes police judges' courts, police courts, and all courts held by mayors or recorders in incorporated cities or towns." Pen. Code, § 1461.

In the case entitled *Ex parte Soto*, 88 Cal. 624, 626, 26 P. 530, it is said:

"But a recorder's court is none the less a police court because it happens to have been called by another name. The character of a court is determined, not by its name, but by the nature of its jurisdiction and functions, in which respect the recorders' courts of cities organized under the general Municipal Corporations Act cannot be distinguished from other police courts."

In *re Baxter*, 3 Cal. App. 716, 86 P. 998, is a case where the authorities are reviewed, and which case contains language that indicates that the words "recorder" and "police judge," or "recorder's court" and "police court," in the circumstances present in that case, were respectively used interchangeably and synonymously.

In the habeas corpus proceeding entitled *Ex parte Fil Ki*, 79 Cal. 584, 21 P. 974, it appeared that the petitioners had been convicted of contempt of court, in that they had violated an injunction in a suit in which the complaint was entitled as "In the *Supreme* Court of the county of Yuba," etc., while the other papers in the case were correctly entitled "In the *superior* court," etc. It was the contention of the petitioners therein that no action such as that in which the injunction purported to have been issued was pending in the superior court at the time the injunction was issued. While admitting that the complaint was defective, in that it did not correctly specify the name of the court in which the action was brought, it was held that the defect was one which did not affect a substantial right of the defendants in the action, and consequently that the writ of habeas corpus would not relieve them from punishment for contempt in disobeying the injunction.

The case entitled *Estate of Damke*, 133 Cal. 433, 65 P. 888, involved a question not unlike that in the instant case, in that in the notice of appeal in the case cited the title of the court was given as "In the Superior Court of *Sacramento* County," whereas the matter in which the appeal was taken had been heard in *San Joaquin* county. The respondent therein made a motion that the appeal be dismissed because of the said defect in the notice. It was held that because it was apparent from the notice that the order from which the appeal was taken was otherwise sufficiently identified, and that the respondent had not been misled by reason of the defect, the motion to dismiss the appeal should be denied.

The language of section 475 of the Code of Civil Procedure includes the following:

"The court must, in every stage of an action, disregard any * * * defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties."

As is said in *Rauer's L. & C. Co. v. Superior Court*, 10 Cal. App. 423, 102 P. 547:

"The object of the notice [of appeal] is both to apprise the opposite party of the appeal, and as to what the appeal is from."

In *Allen v. Byerly*, 32 Or. 117, 48 P. 474, it is said that:

"The appellate court should construe a notice of appeal liberally, and hold that jurisdiction is conferred by its service if, by fair construction or reasonable intendment, it can ascertain therefrom that the appeal is taken from a judgment in a particular action."

And in *State v. Hanlon*, 32 Or. 95, 48 P. 353, the following language appears:

"If the notice of appeal informs the adverse party that a party to the judgment intends to appeal therefrom to the Supreme Court, and is so specific in its description of the judgment complained of as to acquaint a stranger to the record of the judgment alluded to in the notice, it is sufficient to confer jurisdiction; and this object may be accomplished without alluding to the time when the judgment was rendered."

It is said in *Lancaster v. McDonald*, 14 Or. 265, 12 P. 375, that notice of an appeal "simply means the making known to the adverse party the fact that an appeal is taken in the particular case."

[3] In the instant case, in the notice of appeal given by petitioner, as appellant in the appeal to the superior court, the names of the parties were correctly given; the notice was addressed to the justice who presided at the trial of the action—indicating that at the time in question he was acting in the place and stead of the recorder of the court—naming him, besides again naming the recorder as one of the persons to whom the notice of appeal was addressed. In addition thereto, the language contained in the body of the notice

again identified the judgment from which the appeal was being taken as one which had been entered in the "above-entitled action * * * by Acting Judge L. S. Lyman, on the 9th day of February, 1927, against said plaintiff, in favor of said defendant. * * *

Considering the facts and inferences contained within such notice, together with the additional fact that the terms "recorder's court" and "police court" are ordinarily synonymously regarded, we think it clear that the respondent in the appeal could not have been misled by the fact that the caption of the notice was incorrect, in that the appeal on its face purported to be taken in an action theretofore pending in the "police court," rather than in the "recorder's court." It does not appear that any substantial right of the defendant in the action was affected by reason of the defect in the notice, and we are accordingly constrained to hold that the appeal should not have been dismissed.

The respondents are therefore directed to vacate the order by which the appeal in the action in question was heretofore dismissed.

We concur: CONREY, P. J.; YORK, J.

84 Cal. App. 253

TOPLEY v. MEGARRY et al. (Civ. 3289.)*

District Court of Appeal, Third District, California. June 29, 1927.

Hearing Denied by Supreme Court Aug. 25, 1927.

1. Wills $\S$ 90—Indorsement of stock to children, to be effective if indorser failed to return from trip, was not gift, but testamentary act.

Signing of indorsements on back of certificates of stock, to transfer them to children in case indorser failed to return alive from trip she was about to take, held to be testamentary act, and not act divesting her of either ownership or control of stock, since intent, as well as manual tradition, is necessary to constitute gift.

2. Wills $\S$ 90—Where indorsement of stock was testamentary act, failure of indorser to rescind indorsement for 19 years did not make such act gift.

Where indorsement of stock was testamentary act, and not gift, so that no title passed, indorser's failure to rescind indorsement for 19 years will not constitute such testamentary act a gift and transfer of title under theory of laches, since laches is such neglect to assert right as, considered with other circumstances causing prejudice to adverse party, operates as bar in court of equity.

Appeal from Superior Court, Solano County; Rolph L. Thompson, Judge.

Action by Emma S. Topley, as administratrix with the will annexed of the estate of James H. Topley, deceased, against Annie D. Topley Megarry, as executrix of the last will

and testament of Anna Topley, deceased, and others, to recover a one-third interest in certain shares of corporate stock. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank L. Coombs and Nathan F. Coombs, both of Napa, for appellant.

Joseph M. Raines, of Fairfield, and Theodore W. Chester, of Sacramento, for respondents.

PLUMMER, J. A corporation known as the Topley Company was incorporated in July, 1904, by the Topley family. Upon incorporation there was issued to James Topley, the father, two certificates, one representing 196 shares of the capital stock of said corporation and the other representing 200 shares. There was also issued to Anna Topley, the mother, 1 share and to the three children of said James Topley and Anna Topley, to wit, to James H. Topley, William H. Topley, and Annie D. Topley Megarry, 1 share each. The father conveyed certain property to the corporation in consideration of the shares issued to him. The father, James Topley, died on or about the 20th day of January, 1905, leaving a will executed in 1899, whereby he devised to his wife, Anna Topley, all of his property.

The complaint alleges that on or about the 16th day of January, 1905, the said James Topley caused said certificates of stock issued to him to be indorsed, assigned, and delivered to his wife, Anna Topley. On the 3d day of February, 1905, the said Anna Topley signed an indorsement on the back of each of the certificates issued to the said James Topley, as heretofore stated, the indorsement being as follows:

"I hereby assign all my right, title, and interest in this certificate 1, calling for 196 shares, to J. H. Topley, William H. Topley, and Annie D. Topley Megarry in equal proportions, February 3, 1905."

The indorsement on the second certificate, referred to as issued to James Topley was in the same language, save and except as to the number of shares.

The certificates referred to were not detached from the stubs in the stock book of the corporation, and after the indorsements herein referred to, the stock book, including the certificates, was placed in the safe belonging to the company in the storeroom where the company did business, which business was that of conducting and maintaining a drug store. So far as the record shows, the stock book, with certificates therein, was kept and remained in the safe belonging to the company until some time in December, 1921. The two sons remained in the employ of the company in the conduct of the drug store just referred to; James H. Topley acting as manager. In the latter part of the

year 1921, James H. Topley became ill and went to a hospital some time in December of that year. Prior to going to the hospital, James H. Topley brought to Anna Topley all the books of the corporation. Some weeks later, in examining the stock book, Anna Topley discovered her signature to the indorsements herein mentioned and proceeded to draw red ink lines through the same and to mark the indorsements "Canceled." On January 20, 1922, James H. Topley died. On November 23, 1923, Anna Topley executed her last will and testament, devising all of her property to William H. Topley and Annie D. Topley Megarry. On March 30, 1924, Anna Topley died. Thereafter the will executed by James H. Topley in 1899 was filed and admitted to probate; also the will executed by Anna Topley on November 23, 1923, was filed and admitted to probate. Thereafter this action was begun by Emma S. Topley, as administratrix with the will annexed of James H. Topley, deceased, to recover a one-third interest in the 396 shares of the corporate stock of the corporation issued to James Topley, as hereinbefore stated. The defendants had judgment, and the plaintiff appeals.

The court found that the attempted indorsement and assignment of the certificates of the capital stock of said corporation by the father, James Topley, in 1905 was void. The will of James Topley, admitted to probate, conveyed all of his interest in said certificates of stock to his wife, Anna Topley, the person to whom the assignment of said certificates of stock was attempted to be made. While the mother, Anna Topley, died preceding the actual date of the trial of this cause, her testimony was taken by way of deposition and introduced in evidence in that form. It appears from the deposition of the mother that, prior to the time when she affixed her signature to the indorsements on the back of the certificates, as stated, she had become ill and was going South for medical treatment; that just prior to her leaving for the South, on account of her health, James H. Topley brought the stock book containing the certificates of stock referred to, with the indorsements, which we have set forth herein, on the reverse side of said certificates, and in the language of the witness said:

"Mother, you are about to go South. I have a little something here that I want you to sign to protect us children if you should meet with an accident. I told him, 'No; I'll not sign.' He said: 'Mother, if you sign, I promise you on your safe return back that I put everything back just as it was before.' I signed what he gave me to sign without reading it."

So far as the record shows, James H. Topley never mentioned this transaction to either his brother or sister. Thereafter, and during the period of about 19 years, the business of the company was conducted, Anna

Topley acted as president, the son William H. Topley acted as vice president, and James H. Topley acted as secretary and treasurer. The income tax returns of the company, made out by James H. Topley, in one of its schedules, gave the name of Anna Topley as president, owning 397 shares, William H. Topley as 1 share, and James H. Topley, as 1 share. The income tax returns also set forth the respective salaries of each. The mother acted as president of the corporation, signing all papers as president, and visited the store about three times a week.

There appears no testimony in the record indicating that the mother, Anna Topley, in February, 1905, or at any other time, intended to make a present gift of her interest in the certificates of stock referred to, to her three children, or to any of them. The evidence which we have quoted of what occurred at the time of the indorsements justifies the conclusion of the trial court that there was no intention to pass title to said certificates of stock by said Anna Topley to her three children or to any of them. The finding of the court is in the following language:

"That the placing of said writings in the possession of James H. Topley was without any intention, purpose, belief, or understanding on the part of Anna Topley or James H. Topley that they would pass title to said stock, or any part thereof. Both of said parties at said time believed, understood, and intended that no title would pass thereby. That neither William H. Topley nor Annie D. Topley Megarry knew anything about said writings until some time in January, 1922, and neither of said parties ever claimed or asserted any rights thereunder. No delivery of said writings, or either of them, was ever made to said parties, or to either of them."

[1,2] We may add that the testimony which we have quoted surrounding the circumstances of the signing of the indorsements on the back of the certificates would have justified a further order finding that whatever Anna Topley then and there did was testamentary in character, and not an act divesting her of either ownership or control; it being evident that no gift or transfer was intended, unless the said Anna Topley failed to return alive. Upon this appeal the finding of the court that no present title passed from Anna Topley to her three children on the 3d day of February, 1905, appears not to be questioned. The attack upon the findings, conclusions of law, and judgment of the trial court is based entirely upon the question of laches.

It is argued that as, during the 19 years intervening between the date of placing her signature upon the certificates referred to and the erasure thereof by the said Anna Topley, nothing was done by the said Anna Topley in relation thereto, the defendants are now estopped to rely upon the fact that no present gift of the stock was intended at

the time of the indorsement and that the indorsement was only testamentary in character. The drawing of red lines through the indorsements and marking the same "Canceled" by Anna Topley in 1922 would not, of course, affect in any wise the transaction in relation to the certificate of stock in February, 1905. That act not constituting a present gift, and being only testamentary in character, and void for that reason, does the question of laches arise in this case? All the testimony set forth in the transcript is to the effect that all three of the children recognized and acknowledged the mother's ownership in and to the certificates of stock mentioned during the entire period intervening between February 3, 1905, and the date of the death of the son, James H. Topley. As set forth in 10 Cal. Jur. 520, laches is defined as:

"Such neglect or omission to assert a right, as taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity."

And as stated on page 534 of the same volume:

"The defense of laches is available whenever a demand or other preliminary action is necessary on the part of the plaintiff and such action is not taken within the period of the statute of limitations."

No title to the certificates of stock having passed in February, 1905, from Anna Topley to the three children, and no claim thereto having been made by any of the three children during the intervening period of time, and no ownership therein having been asserted by any of the three children, we do not very well perceive how the subject of laches can enter into this action and justify a holding that an act which was purely testamentary in character and therefore void in 1905, now constitutes a gift and transfer of title. The stock book said by appellant to be in the possession of James H. Topley was in the safe owned by the company, and leads us well to the conclusion that the stock book was in the possession of the company.

The complaint in this action bases the right of the plaintiff to the alleged assignment and transfer of the certificates of stock made by Anna Topley on February 3, 1905.

257 P.—58

There is no asserted claim of ownership, dominion, or anything which would indicate a claim of ownership and dominion over the stock by reason of any act or thing done or performed during the intervening 19 years, and if the testimony shows and justifies the conclusion of the trial court as we have said, that no title then and there passed, the plaintiff's action must fail. Had the deceased, James H. Topley, during the intervening period, asserted ownership to the certificate of stock, or had any of the children during said period asserted ownership, or taken any action indicating ownership of said certificates, or had any of them exercised any dominion or control over said certificates, or done anything which would have indicated to the mother, Anna Topley, that such ownership was claimed, then and in that case it might be argued that Anna Topley acquiesced in such claim of ownership by not having brought an action to have the alleged transfer of title adjudged ineffective. We do not need to review the authorities cited by appellant on the subject of laches, because the circumstances of the case which we have related in brief, show that they are inapplicable.

That the trial court was justified in finding that no title passed from Anna Topley to the three children, or any of them, under the evidence in this case, is sufficiently supported by the following authorities: Ruiz v. Dow, 113 Cal. 490, 45 P. 867; Knight v. Tripp, 121 Cal. 674, 54 P. 267; Kenney v. Parks, 137 Cal. 527, 70 P. 556; Estate of Hall, 154 Cal. 527, 98 P. 269; Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703. Practically all of the cases in California on the subject of gifts are cited in the authorities here mentioned. All the authorities unite in holding that intent as well as manual tradition are necessary to constitute a gift. This testimony shows the trial court was justified in holding as entirely wanting in the case at bar.

No reason having been called to the attention of this court as to why the judgment of the trial court should be reversed, it is hereby ordered that the judgment of the trial court be and the same is hereby affirmed.

We concur: FINCH, P. J.; GLENN, Justice pro tem.

84 Cal. App. 240

LICHT v. GALLATIN et al. (Civ. 3256.)

District Court of Appeal, Third District, California. June 29, 1927.

1. Landlord and tenant §76(1)—Covenants against subletting are strictly construed against lessor.

Covenants of lease against subletting are to be strictly construed against lessor.

2. Landlord and tenant §180(3)—Subtenancy under lease requiring lessor's consent to subletting is presumed valid.

Under lease requiring lessor's consent to subletting, subtenancy, in absence of showing to contrary, will be presumed to have been created with his consent, since it is presumed that sublease was valid.

3. Landlord and tenant §180(3)—Complaint in subtenant's action for ejectment is not insufficient for failure to allege performance of conditions subsequent or to anticipate and negative defense.

In action for damages for ejectment brought by subtenant, complaint held not insufficient for failure to allege that tenant performed lease, or that his lease was in force subsequent to its execution, or that plaintiff performed covenants of sublease, since it was unnecessary to allege performance of condition subsequent or to anticipate and negative any defense.

4. Landlord and tenant §180(3)—Subtenant's pleading in ejectment that tenant at one time had leasehold estate raised presumption of continuance of lease.

In subtenant's action for ejectment, pleading that at one time tenant had leasehold estate raised presumption of continuance of his lease.

5. Landlord and tenant §180(3)—Subtenant's complaint alleging lessor's successful appeal from order of condemnation, and subsequent destruction of property to compel plaintiff to vacate, held to state cause of action.

Complaint in subtenant's action for ejectment showing lessor's successful appeal from order of condemnation of leased property, and subsequent destruction by lessor, which "was wrongful and made with the express intent of compelling plaintiff to vacate said premises," held to state cause of action.

6. Pleading §214(8)—Demurrer admits facts of complaint only for purpose of determining its sufficiency.

While demurrer admits truth of facts alleged in complaint for purpose of determining its sufficiency, such facts are not admitted for any other purpose.

7. Appeal and error §843(2)—On appeal from judgment sustaining demurrer to complaint in ejectment, validity of ordinance involved will not be determined, where not necessary.

On appeal in ejectment, where complaint was held demurrable, as not stating cause of action, reviewing court will not determine

whether ordinance involved was unconstitutional, in reversing judgment, where such determination is unnecessary to decision, since defendants may be able to deny terms of ordinance, or show that other terms cure alleged defects.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action for damages for ejectment by Ned Licht against Malvena Gallatin and another. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Downey & Downey and George A. Work, all of Sacramento (Thomas Ashby, of Sacramento, of counsel), for appellants.

White, Miller, Needham & Harber, of Sacramento, for respondents.

FINCH, P. J. The trial court sustained the defendants' demurrer to the third amended complaint without leave to amend and judgment was thereupon entered in favor of defendants. The plaintiff has appealed from the judgment.

The following facts are alleged in said complaint: June 5, 1918, defendant Gallatin leased to George Manoles, for a term of five years, a three-story brick building in the city of Sacramento. By the terms of the lease Manoles agreed "not to let or underlet the whole or any part of said premises * * * without the written consent" of the lessor. June 21, 1918, Manoles leased a part of the ground floor of the building to the plaintiff for the full term of the lease first mentioned, subject to "all of the conditions" of the latter. Plaintiff immediately went into possession under the sublease and thereafter, until March 20, 1921, he "conducted the business of a new and secondhand clothing, jewelry, and sundry dealer on said premises." February 8, 1921, the city commissioner of public health and safety served on defendants a document, signed by him as such commissioner, containing the following:

"The undersigned, through the building inspector and the chief of the fire department of the city of Sacramento, has inspected the premises at No. 201 J street, city of Sacramento, and deems the building on said premises insecure and unsafe to life and surrounding property and that said building is liable to endanger surrounding property by fire and is not sufficiently protected from danger by fire. Said building is hereby condemned and you are hereby ordered to tear down and remove the same immediately."

On the same day the defendant Carly, acting as the agent of defendant Gallatin, appealed from the order of the commissioner to the city commission and "asked exemption from condemnation the first story of the building." On the same day the city commission made an order, by the terms of which—

"the condemnation was made effective as to the second and third stories of said building; that the said appeal was sustained as to the first story thereof, with the proviso that if, upon the removal of the second and third stories of said building, the first story should be found to be dangerous, it should be removed; that, according to the proceedings before said board on said day relating to said appeal, said first story was to be left in its then status until the second and third stories should be removed; that one of the purposes of ordering the removal of the second and third stories was to have the condition of the first story ascertained; that said order has never been revoked, modified, or set aside."

February 14, 1921, the city commissioner of public health and safety served on plaintiff a writing signed by the commissioner and addressed to the plaintiff and the defendants and Manoles, reading as follows:

"You are hereby notified that the building (of which you are the owner) or (which is occupied by you) described as that certain three-story building, No. 201 J street, * * * has been condemned by the building inspector of the city of Sacramento and has been ordered torn down by the commissioner of public health and safety, and you are further notified to tear down and remove said building within ten days after the service of this notice."

At that time "the said order of the commission * * * was in full force and effect." "There had been no change in the condition of the said building * * * between the time at which the said order of the commission was made and the time at which the notice" of February 14th was served. On the same day the defendants erected scaffolding preparatory to the demolition of the building and on the 16th of March, 1921, they had completed the removal of the second and third stories. March 18, 1921, "the defendants commenced the demolition of the first story of said building." March 19, 1921, plaintiff served on Carly, as agent of defendant Gallatin, a written notice, stating that the plaintiff, "in vacating the premises, * * * is not abandoning said lease, but expressly claiming right as lessee under said lease. And you are further notified that demand is made that repairs and particularly roof and structural repairs be made on said property * * * so as to avoid condemnation of the lower story property, and to maintain said property leased in condition for occupancy." March 20, 1921, "the plaintiff was compelled to vacate and did vacate the premises." The demolition of the first story of the building was completed July 15, 1921. "Said first story was, during all of the times mentioned herein, safe and in good condition." "No order for the condemnation of said first story was made. * * * Said first story was never condemned, and * * * the destruction thereof was wrongful and made with the express intent of compelling plaintiff to vacate said premises * * *

and for the purpose of depriving him of possession thereof." The commissioner of public health and safety "was without authority to give or have given said notice" of February 14th "or make any order with reference to said building except such as might be necessary to effectuate the order of the commission." A new building was subsequently erected upon the site of the demolished building and "leased to other parties." The plaintiff "has at all times mentioned herein been able, ready, and willing to perform the conditions of his said lease and has offered so to do. * * * The defendants have refused and still refuse to deliver possession of said premises * * * to plaintiff and have denied and now deny his right to the possession thereof." Appropriate allegations of damage are made, followed by a prayer for the amount thereof. The ordinance under which the building was condemned provides:

"Section 1. Whenever the commissioner of public health and safety, through the building inspector or the chief of the fire department of the city of Sacramento, shall deem any buildings, walls, chimneys, stacks or other structures within the limits of the city of Sacramento, to be insecure or unsafe, in any manner, to life or surrounding property, or that has been partially destroyed by fire or is liable to endanger surrounding property by fire or is not sufficiently protected from danger by fire, the commissioner of public health and safety shall notify the owner, agent, or person in possession thereof and order that the same be torn down and removed within ten days after the receipt of such notice of condemnation. * * *

"Sec. 2. The owner, agent, or person in possession shall have a right to appeal to the city commission from the order of condemnation made within ten days after the service of notice of condemnation. The city commission, upon notice of appeal being presented to it, shall set a date for the hearing of the matter and shall finally determine the course to be followed. If the action of the commissioner of public health and safety * * * be affirmed by the city commission, the owner, agent, or person in possession must within five days, after the decision of the city commission has been rendered, commence in good faith to tear down and remove said building * * * or other structures and must complete such removal within twenty days thereafter.

"Sec. 3. Upon the refusal or neglect of the owner, agent, or person in possession * * * to comply with any lawful order given under and by virtue of the provisions of this ordinance relative to the abatement or removal of said building * * * or other structure, then the commissioner of public health and safety shall proceed to tear down and remove such building * * * or other structures. All expenditures so incurred shall be charged against the owner and shall be a lien upon the lot on which said building * * * or other structure is situated."

[1, 2] The defendants demurred to the complaint on the ground that the facts stated therein are insufficient to constitute a cause

of action, and on many special grounds. No attempt is made by the respondents to justify the order sustaining the demurrer on any special ground and as there appears to be no merit in any of such special grounds it is deemed unnecessary to discuss them. The question, then, is whether the complaint states a cause of action. There is no allegation therein that the lessor consented to the subletting. "It seems to be the law that where there is a clause in a lease that it shall not be assigned without the previous consent of the lessor, and there is a breach of the covenant not to assign, the lessor has only the option to forfeit the lease for the breach of the condition, and that the assignment is not void, but passes the term, and the only remedy is for breach of the covenant." *Garcia v. Gunn*, 119 Cal. 315, 318, 51 P. 684, 685; *Potts Drug Co. v. Benedict*, 156 Cal. 322, 327, 104 P. 432, 25 L. R. A. (N. S.) 609. Covenants against subletting are to be strictly construed against the lessor. *Harrelson v. Miller & Lux, Inc.*, 182 Cal. 408, 413, 188 P. 800. "Under a lease requiring the lessor's consent to subletting, a subtenancy, in the absence of any showing to the contrary, will be presumed to have been created with his consent." 15 Cal. Jur. 766; *Stevenson Bros. Co. v. Robertson*, 21 Cal. App. 224, 227, 131 P. 326. It is to be presumed that the alleged sublease was valid rather than invalid. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 569, 112 P. 454; *Henke v. Eureka Endowment Ass'n*, 100 Cal. 429, 432, 34 P. 1089.

[3] In respondents' brief it is said:

"There is no allegation in the complaint that Manoles has performed any of the terms of his lease. There is no allegation in the complaint that the lease to Manoles was in force at any time subsequent to its execution. * * * There is no allegation that the plaintiff, Licht, performed even the covenants of his sublease from Manoles."

It was not necessary for the plaintiff to allege the performance of conditions subsequent or to anticipate and negative any defense which may be available to the defendants. *Arnold v. American Insurance Co.*, 148 Cal. 660, 668, 84 P. 182, 25 L. R. A. (N. S.) 6; *Spencer v. Commercial Co.*, 30 Wash. 520, 71 P. 53, was "an action by a tenant against his landlord for damages on account of an alleged wrongful eviction." The complaint therein contained no allegation of performance by the plaintiff and the defendant's demurrer thereto was sustained. In reversing the case, the court said:

"When the complaint alleges the execution of the lease and possession thereunder, and facts showing a wrongful eviction and damages, a cause of action is stated. The facts showing forfeiture or voluntary surrender, or any other matters of that kind, are proper to be set up in the answer."

[4, 5] Respondents say that "no presumption of continuance of Manoles' lease arises from pleading that at one time Manoles had a leasehold estate. * * * The presumption of continuance is applicable to evidence only and not to pleadings." *Fredericks v. Tracy*, 98 Cal. 658, 33 P. 750, and *McCaughy v. Schuette*, 117 Cal. 223, 46 P. 666, 48 P. 1088, 59 Am. St. Rep. 176, are cited in support of respondents' contention. The former case was an action in claim and delivery and the latter was an action to recover possession of real property. In *Curtin v. Kowalsky*, 145 Cal. 431, 432, 78 P. 962, an action by the assignee of a judgment to recover the amount due thereon, the court said:

"It was not necessary for the complaint to state that the plaintiff was the owner or holder of the judgment. Such ownership and holding was the legal result of the assignment, and that fact having been alleged, it follows as a matter of law that plaintiff thereby became the owner and holder thereof. This condition of ownership is presumed to continue, and it was not necessary to allege that plaintiff was the owner at the time the action was begun. Such an allegation, or its equivalent, is required in actions to recover the possession of specific property, but not in actions to recover on money demands."

See, also, *Pryce v. Jordan*, 69 Cal. 569, 571, 11 P. 185; *Troy v. Troy*, 72 Cal. App. 757, 761, 238 P. 143; *Hooper v. Smith*, 30 Cal. App. 460, 462, 158 P. 556; *Rock Ridge Park Co. v. Wells*, 27 Cal. App. 281, 283, 149 P. 792; *Williams v. Ashe*, 111 Cal. 180, 188, 43 P. 595, was an action in claim and delivery. The plaintiff therein alleged that "on and after the 17th day of November, 1892, he was the owner and in possession of the property." It was contended that this allegation was not sufficient to show ownership at the time of the commencement of the action. The court said:

"It was insufficient against a special demurrer, doubtless, but defendant did not demur at all. * * * It was not obnoxious to a general demurrer, for, however imperfectly pleaded, there is still by fair intendment to be gathered from the complaint that he claimed ownership and right of possession at the time of the commencement of his action."

The facts necessary to constitute a cause of action in this case may, "by fair intendment," be gathered from the complaint. "Pleadings are no longer to be strictly construed against the pleader, but are to be liberally construed with a view to promoting justice. Code Civ. Proc. § 452." *Burian v. Los Angeles Café Co.*, 173 Cal. 625, 627, 161 P. 4.

It fairly appears from the complaint that the defendants had prosecuted a successful appeal from the first order of condemnation made by the commissioner, in so far as it applied to the first story of the building; that the commissioner was without authority to

make the second order, the order of the city commission never having been "revoked, modified, or set aside"; that the first story of the building was at all times "safe and in good condition," and that "no order for the condemnation of said first story was made, and that said first story was never condemned"; and that the destruction thereof by the defendants "was wrongful and made with the express intent of compelling plaintiff to vacate said premises * * * and for the purpose of depriving him of possession thereof. It seems clear that the complaint states a cause of action for damages.

[6, 7] Appellant contends that the ordinance under which the building was condemned is unconstitutional. It is not deemed advisable to determine that question unnecessarily on this appeal. While a demurrer admits the truth of the facts alleged in a complaint for the purpose of determining the sufficiency of the complaint, such facts are not admitted for any other purpose, and the defendants may be able to deny the alleged terms of the ordinance or to show that other terms thereof cure the alleged defects therein. It would probably lead to confusion, therefore, to pass upon the constitutionality of the ordinance without a full presentation of the terms thereof.

The judgment is reversed, and the trial court is directed to overrule the demurrer.

We concur: HART, J.; PLUMMER, J.

84 Cal. App. 312

STEWART, City Superintendent of Schools, v. EAVES, County Auditor. (Civ. 4964.)

District Court of Appeal, Second District, Division 2, California. July 1, 1927.

1. Mandamus ⇨163—Where Irregularities, if existing, did not appear on face of complaint to compel auditor to pay petitioner's salary as superintendent of schools, demurrer was properly overruled.

Where irregularities, if existing, did not appear on face of complaint for writ of mandate to compel auditor to pay petitioner's salary as city superintendent of schools, demurrer was properly overruled.

2. Pleading ⇨214(1)—Demurrer admits facts as stated in petition.

By demurrer, facts were admitted as stated in petition.

3. Mandamus ⇨164(2)—Allegation that petitioner's contract of employment as superintendent of schools was wholly void in law and illegal was "conclusion of law."

In action for writ of mandate to require auditor to draw warrants in payment of petitioner's salary as city superintendent of schools, allegation in answer that petitioner's contract of employment for \$5,600 per annum commencing

July 1st was wholly void in law and illegal was pure "conclusion of law."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conclusion of Law.]

4. Mandamus ⇨164(2)—Allegation that petitioner's contract of employment as superintendent of schools was void because at time he was serving as superintendent under valid, subsisting, unrevoked contract, was conclusion of law.

In action for writ of mandate to require defendant to draw warrants in payment of petitioner's salary as city superintendent of schools, allegation in answer that contract of employment was void because at time of its execution petitioner was serving as city superintendent of schools under valid, subsisting, and unrevoked contract, was conclusion of law.

5. Schools and school districts ⇨63(5)—As regards fixing of compensation, city superintendents of schools are employees, not "public officers" (Pol. Code, §§ 1609, 1793, subsec. 2).

Under Pol. Code, §§ 1609, 1793, subsec. 2, city superintendents of schools are employees and not "public officers," as regards right to fix compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

6. Schools and school districts ⇨63(1)—City superintendent of schools and board of education could rescind existing contract of employment by mutual consent.

Under charter provision of Santa Barbara clothing board of education with entire control and management of public schools in accordance with Constitution and general laws of state, city superintendent of schools and board of education could rescind existing contract of employment by mutual consent.

7. Schools and school districts ⇨63(1)—Permitting board of education to accept resignation of city superintendent of schools does not nullify statute providing that he shall be elected for term of 4 years (Pol. Code, § 1793).

Permitting board of education to accept resignation of city superintendent of schools during time for which he was appointed does not nullify effect of Pol. Code, § 1793, providing that city superintendents elected by city boards of education shall be elected for term of 4 years, since statute does not provide specific time for commencement or ending of term, and one elected to succeed retiring employee is elected for 4-year term.

Appeal from Superior Court, Santa Barbara County; J. A. Bardin, Judge.

Action by Paul E. Stewart, City Superintendent of Schools of Santa Barbara, against Albert T. Eaves, as County Auditor of the County of Santa Barbara, for writ of mandate to require defendant to draw warrants in payment of petitioner's salary. From the judgment, defendant appeals. Affirmed.

Clarence C. Ward, of Santa Barbara, for appellant.

Schauer & Ryon, of Santa Barbara, and Cushing & Cushing and Delger Trowbridge, all of San Francisco, for respondent.

MURPHEY, Justice pro tem. This is an appeal by the defendant, county auditor of Santa Barbara county, from a judgment of the superior court granting a writ of mandamus to plaintiff and directing the auditor to draw his warrants in favor of the respondent as city superintendent of schools of the city of Santa Barbara for the sum of \$466.66 as salary for the months of November and December, 1923. On July 10, 1917, A. C. Olney was employed as such city superintendent for a 4-year term at \$3,500 per annum. On the 23d of January, 1919, Olney resigned, his resignation to be effective on January 31st, and the respondent herein was employed as city superintendent, to take effect February 1, 1919. On May 31st of the same year respondent's salary was fixed at \$4,000 per annum, effective July 1, 1919. On June 3, 1920, the respondent resigned as such city superintendent, his resignation to be effective June 30th of that year, which resignation was regularly accepted, and on the same day the respondent was employed by the board of education for a full term at \$5,000 per year, effective on the 1st day of July, 1920. On June 7, 1923, respondent again resigned as city superintendent of schools, to take effect June 30th of that year, and on the same day was employed as such superintendent for a 4-year term at a salary of \$5,600 per annum, commencing on the 1st day of July.

The city superintendent of schools of the city of Santa Barbara is appointed by the joint action of the high school board and the board of education of the Santa Barbara school district; the membership of the two boards being identical in personnel. On January 29, 1924, orders were duly drawn by the proper official of the board of education for the salary of respondent at the rate of \$5,600 per year for the months of November and December, 1923. They were regularly countersigned in the manner required by law by the county superintendent of schools and were presented to the appellant herein as county auditor of the county of Santa Barbara, with the request that he draw his warrants thereon in the manner provided by law for the payment of said salary of the respondent, which he refused to do and still refuses so to do.

This action was brought to compel the performance of that duty. The city superintendent of schools is elected under paragraph 1793, § 2, of the Political Code, reading as follows:

"City superintendents of public schools, elected by city boards of education, shall be elected for a term of four years, and said city boards of education shall have full power to fix the salary of all employees."

Section 1609 of the Political Code provides as follows:

"Boards of school trustees, and city * * * boards of education shall have power and it shall be their duty: * * * In each city school district governed by a city board of education, such board may employ a city superintendent of schools. * * *"

Section 1726 of the Political Code provides:

"In every high school district formed and existing in an incorporated city or town, or in a single school district, the board of education or board of school trustees of such incorporated city or town or school district shall constitute the high school board, and shall have the management and control of the high school in said district. * * *"

Section 1741 of the Political Code provides as follows:

"Except as in this article, or in article XV of this chapter, otherwise provided, the powers and duties of high school boards shall be such as are now or may hereafter be assigned by law to boards of education or boards of school trustees in school districts."

Section 56 of the charter of the city of Santa Barbara provides:

"The board of education shall have the entire control and management of the public schools in the city in accordance with the Constitution and general laws of the state, and is hereby vested with all the powers and charged with all the duties of such control and management."

The appellant contends: First, that the court erred in overruling the demurrer of defendant to plaintiff's petition for writ of mandate; second, that the evidence does not support the finding contained in paragraph 16 of the decision that the allegations in paragraph 7 of defendant's second defense are untrue; third, that the evidence does not support the finding in paragraph 17 of the decision that the allegations in the defendant's third defense are untrue; fourth, that the plaintiff is a public officer and that his compensation could not be increased after his election or during his term of office; fifth, that the board of education had no power or authority to cancel the contract entered into between said board of education and said Paul E. Stewart on the 3d day of June, 1920, or to enter into the contract of June 7, 1923, for the performance of the same duties as covered by the contract of June 3, 1920, or to allow extra compensation therefor while the terms and conditions of the contract of June 3, 1920, yet remained to be kept and performed.

Taken in the order in which they are assigned in support of his contention that the demurrer to the petition should have been sustained, defendant cites the case of *Cook v. Reid*, 39 Cal. App. 453, 183 P. 820. In that

case the complaint is in substance as follows:

"The plaintiff is, and at all times named in the complaint he was, the owner and holder of a certain order and requisition of the Rannell's school district, county of Riverside, dated May 11, 1916, payable to W. H. Cook or order for the sum of \$75 from the school fund of said district, and signed by two trustees of said district on that date. On June 30, 1916, the plaintiff presented said order to the superintendent of schools of the county of Riverside, who thereupon duly examined and approved the same in writing by indorsing upon said order: 'Examined and approved, numbered as above, June 30, 1916,' and affixed his signature thereto as county superintendent of schools and thereupon drew said requisition on said auditor as such. On the 6th day of September, 1916, the plaintiff presented said requisition to the defendant as auditor of said county at his office; thereupon the defendant refused to allow and indorse the same and refused to draw his warrant in favor of the plaintiff for the amount stated in the order and requisition, although sufficient funds are available therefor."

The court said in that case:

"In such cases, where the official duty involved is discretionary, the burden is upon the petitioner. In the present action, petitioner's complaint does not show what service or other consideration is the foundation of his claim, and does not allege any fact from which an abuse of discretion can be inferred."

It will be observed that there is not a word in the complaint as to the character of the service performed or material furnished, and no allegation that any services were performed or rendered, notwithstanding that section 1700 of the Political Code provides that no warrant must be drawn in favor of any teacher, unless the officer whose duty it is to draw such warrant is satisfied that the teacher has faithfully performed all the duties prescribed in section 1696. In the instant case no such condition exists. The complaint specifically sets forth the services that have been performed by the respondent, as well as do the requisitions drawn by the county school superintendent, which were presented to the auditor and which were and are made a part of the complaint in this action. The allegations of the complaint are certain and specific and set forth all the facts necessary to constitute a complete cause of action, and upon their face show that the petitioner is entitled to the amounts set forth in the requisition. Under these circumstances the case of *Wood v. Strother*, 76 Cal. 545, 18 P. 766, 9 Am. St. Rep. 249, was an action in mandamus arising under the San Francisco charter, wherein it was made the duty of the county auditor to examine the contract, "the steps taken previous thereto, * * * and the record of said assessments," and he "must be satisfied that

the proceedings have been legal and fair." In that case the court said:

"In our opinion the true tests are whether its [referring to the auditor] determination is intended by law to be final, and if not whether there is any other 'plain, speedy and adequate remedy.' If the determination of the tribunal [the auditor] was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way. If it was not intended to be final, but there is another 'plain, speedy and adequate remedy,' the writ cannot issue; for it was not designated to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. * * * In the present case there can be no doubt that the auditor was to examine the proceedings and satisfy himself that they were legal, for the statute expressly says so; and if they were found by the court to be illegal, the writ could not issue. But being perfectly legal, the question is whether the determination of the auditor was intended to be final. And we can see no ground for saying that it was. There is nothing in the language of the act which shows that it was intended to be final. It certainly would not be final in favor of the contractor. In the numerous cases in which street assessments have been before the court, we have never seen it suggested that the signature of the auditor cured previous illegality; and it seems clear that it would not do so. Why, then, should it be final against the contractor, and be conclusive that the proceedings are illegal when it is apparent that they are not so? * * * If the determination of the auditor be not final, then, upon the principles above stated, the writ must issue."

[1, 2] It is significant that the powers and discretion of the auditor under the San Francisco charter are much broader than under the statute. Under the statute he shall sign the warrant in case he allows said demand. Stats. 1905, p. 528. Under the city charter he is burdened with specific responsibilities of investigation which he may not avoid performing. The writ has been repeatedly issued in cases of this character, and where as in the instant case, the irregularities, if existing, do not appear on the face of the complaint, the procedure is undoubtedly warranted and proper. The appellant alleges that the auditor was in a position which enabled him to familiarize himself with the proceedings leading up to the contract executed on the 15th day of June, 1923. This may be true, but, nevertheless, by the demurrer, the facts are admitted as stated in the petition of the respondent and it necessarily devolves upon the court to determine the ultimate fact as to the legality of these proceedings.

[3, 4] Appellant's second contention is that the evidence does not support the finding contained in paragraph 16 of the decision of the court declaring the allegations of paragraph 7 of defendant's second defense to be untrue. The first allegation that the contract of employment of respondent for the sum of \$5,-

600 per annum, commencing July 1st, is wholly void in law and illegal, is a pure conclusion of law, and the second allegation that said contract is void because at the time of its execution respondent was serving as a city superintendent of schools of the city of Santa Barbara under a valid, subsisting, and unrevoked contract, is also a conclusion of law, and the remaining allegation, to wit, that on June 7, 1923, the city superintendent attempted to resign as superintendent of schools and rescind said valid, subsisting, and unrevoked contract, is a mixed allegation of fact and law; and the allegation that petitioner attempted to resign under an express understanding of the board of education that he would be immediately re-employed by said board of education as said city superintendent of schools at an increased salary, and that a new, separate, and distinct contract would be executed by and between said board of education and petitioner, is untrue, is fully supported by the evidence produced at the trial. The remaining allegation in that paragraph, as well as the allegations contained in the third separate defense, consist of a narration of facts concerning the several appointments and resignation and increases of salary of the respondent, the legality of which is the very issue involved in this litigation, and if the conclusion at which we have arrived in this case is correct, and the board of education of the city of Santa Barbara was authorized by law to do the things that they did do, these allegations become immaterial.

[5] The next in order, of the contentions of the appellant, is that the plaintiff is a public officer and that as such his compensation could not be increased after his election or during his term of office, and in this respect, appellant relies upon section 9, art. 11, of the Constitution, which reads as follows:

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."

The question as to whether a city superintendent of schools is a public officer has never been directly determined in this state. It would seem from the wording of section 1793 of the Political Code, on its face, that it was the conclusion and determination of the Legislature that a city superintendent was not a public officer, but simply an employee. Section 2 of that section provides:

"City superintendents of public schools, elected by city boards of education, shall be elected for a term of four years, and said city boards of education shall have full power to fix the salary of all employees." (Italics ours.)

In the case of *San Diego v. Dauer*, 97 Cal. 444, 32 P. 561, it is assumed, and that assumption has never been questioned or con-

tradicted that a city superintendent of schools is an employee and not a public officer. The law as hereinbefore set out with respect to the powers and duties of the boards of education, and contained in sections 1609-1741 of the Political Code, and section 56 of the Santa Barbara charter, is comprehensive and would appear to eliminate the vesting of any statutory or charter powers in the city superintendent. His duties apparently are entirely ministerial and not outlined or enumerated by any law. He is not required to give any bond for the faithful performance of his duties nor take any oath of office. The only provision of the law which is usually incident to a public officer, and which governs in the appointment of a city superintendent, is the section of the Political Code fixing a four-year term of office, which section, however, does not fix any specific time either for the beginning or termination of that term. In the absence of any charter provision or statutory law defining the duties of a city superintendent, it may be fairly deduced that neither the state nor the municipality intended to vest this officer with any of the sovereign powers of the state or municipality, except such as are directed by the employing power which, under the statute and the charter, have complete control and government of the city schools. We have found nothing in the statutes, nor in the municipal charters, nor in the decisions of the higher courts of this state that defines the official status of a city school superintendent. As before indicated, in the case of *San Diego v. Dauer*, supra, the Supreme Court said, "Assuming, therefore, that the superintendent of schools of the city of San Diego is an employee of the board of education of that city," which assumption has been the prevailing opinion with respect to that matter for 34 years and has been and still is being acted upon with the acquiescence of the legislative departments of the state and by everyday practical application in the civil municipalities, it would seem that we have reached a stage in this state with respect to city superintendents of schools where it must be held that the Legislature has conclusively determined in sections 1609 and 1793 of the Political Code that these officers are employees and not public officers; otherwise, the delegation of power by that body to municipalities to fix such salaries is unwarranted and illegal. In *Smith v. Mathews*, 155 Cal. 752, 103 P. 199, the Supreme Court speaking through Mr. Justice Beatty, said:

"When the right to enact a law depends upon the existence of a fact, the passage of the act implies and the conclusive presumption is that the Governor and the Legislature have performed their duty, and ascertained the existence of the fact before enacting or approving the law—a decision which the courts have no right to question or review."

The law in other states with respect to this subject-matter is clearly defined in *Farley v. Board of Education, City of Perry*, 62 Okl. 181, 102 P. 797. The Supreme Court of Oklahoma there said:

"A public officer is one whose duties are fixed by law and who in the discharge of the same knows no guide but established laws. Employment arising out of a contract whereby the person employed acts under the direction or control of others, and which employment depends for its duration and extent upon such a contract, is not an office."

In *Olmstead v. City of New York*, 42 N. Y. Super. Ct. 481, the court says:

"A person 'who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, is not an officer and does not hold an office, * * * although the persons so employing him are public officers, and his employment is in and about a public work or business.'"

In *State v. Spaulding*, 102 Iowa, 639, 72 N. W. 288, the Supreme Court said:

"When such appointment is provided for or required by law, which fixes their powers and duties, and they are required to take an oath and to give bonds, they are usually considered public officers; but where a deputy is appointed, merely at the will and pleasure of his principal, to serve some purpose of the latter, he is not a public officer, but a mere servant or agent. * * * So a 'position the duties of which are undefined, and which can be changed at the will of the superior * * * is not an office, but a mere employment, and the incumbent is not an officer, but a mere employee.'"

An illuminating case covering substantially all the questions involved in this action is found in *Ward v. Board of Education*, 11 O. C. D. 671. It may be stated that the statute law with respect to the matters there involved does not materially differ from our own law. The court says:

"Each board of education shall have the management and control of the public schools of the district with full power to appoint a superintendent and assistant superintendents of the schools," etc. "The General Assembly, in cases not provided for in this Constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished. * * * A majority of the board of education shall constitute a quorum for the transaction of business; upon a motion to adopt a resolution * * * to employ a superintendent, teacher," etc. "Taking the statute and averments together, we believe that Ward as superintendent was not an officer, but was an employee."

[6, 7] Assuming that the foregoing discussion leads to the logical conclusion that the

city superintendent of schools is an employee and not a public officer, we come to the final question as to whether such employee and his employer—the board of education—may within the purview of the law rescind an existing contract by mutual consent? In the case last above cited the Ohio Circuit Court says, speaking of a contract between the board of education and the city superintendent:

"Such contract entered into between the teacher and the board of education is subject to the general rules governing the validity of contracts."

In volume 35 of Cyc., at page 957, we find the following:

"Except in so far as governed by special statutes the making, requisites and validity of contracts by school districts are governed by the rules applicable to contracts generally."

Further, in the same volume, at page 965, the following language is used:

"The modification or rescission of a school district contract must ordinarily be made in the manner in which the execution must have been made."

There are several cases in which the Supreme Court of this state has sanctioned the modification and termination of contracts with boards of education, notably *Harris v. Central High School Dist.*, 45 Cal. App. 669, 188 P. 617; *West v. Pasadena*, 43 Cal. App. 199, 184 P. 877; and *Armstrong v. Vallejo*, 173 Cal. 217, 160 P. 414. Appellant relies upon the case of *California Highway Commission v. Riley*, 192 Cal. 97, 218 P. 579. In that case the real crux of the action centered around the question as to whether the highway commission was authorized by law to breach a contract and make a gift to a contractor as a basis for the extinguishment of an existing and operating contract. The Supreme Court held that, in view of the powers vested in the highway commission by the several legislative acts creating it, it had no such power, the commission, by the terms of the creating acts having been granted specific authority as agent of the state to enter into contracts, but given no corresponding power to breach them, and, as we understand the decision, its application is limited to the conditions and status developed in that particular case, and that it was not its purpose to run counter to the doctrine announced in the long line of cases in this and other jurisdictions which may be said to be crystallized in the language to be found in section 1112 of *Bigelow on Estoppel*, wherein it is said:

"But it is a well-settled principle, applicable alike to states or the United States, that whenever a government descends from the plane of sovereignty and contracts with parties, such government is regarded as a private person itself and is bound accordingly. * * * A state

in its contracts with individuals must be judged and must abide by the same rules which govern similar cases between individuals; and, whenever such a contract comes before the courts, the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons."

Chief Justice Myers, in the Riley Case, states that to warrant the state agent in breaching a contract he must be vested with authority to do so by express grant or clear implication, and he finds neither to exist in the language contained in the acts creating the highway commission. Under the charter of the city of Santa Barbara, approved by the Legislature, the board of education is clothed with the entire control and management of the public schools in the city in accordance with the Constitution and general laws of the state, and "is hereby vested with all the powers and charged with all the duties of such control and management." Certainly under this language there is no limitation and nothing is left to depend upon implication. If the board has full power in the management and control of the school, it must be vested with the power to make contracts and unmake contracts. It is the contention of appellant that to permit the board of education to accept the resignation of a city superintendent of schools during the time for which he was appointed would nullify the effect of section 1793 of the Political Code. Such is not the effect. When in the judgment of the board of education it is for the best interests of the schools under their control and management to accept the resignation of an employee, such termination in nowise disturbs the requirements of that section. It must be remembered that section 1793 provides no specific time for the commencement or ending of the term. Consequently any person elected to succeed a retiring employee will be elected for a full 4-year term.

In the Armstrong Case, *supra*, the Supreme Court has recognized the power of the board of education to employ a city superintendent, notwithstanding the provisions of section 1793 of the Political Code for a temporary term, and this upon a verbal understanding between the employee and the board that such were the terms of his employment. If it is the intention of the legislative power of the state, the county or the city, to deny boards of education the power to do the things that were done in the instant case, it devolves upon that branch of the government to make that purpose clear in the statute law. In this case there is no element of bad faith or ethics involved.

The evidence before the court shows that the respondent had no agreement or understanding with the board of education when

tendering his resignation that he would be appointed to succeed himself. It is disclosed in the record that it had come to the knowledge of the board that the services of the respondent were in demand in another city and at a salary double that paid him in the city of Santa Barbara. Of their own volition and knowledge, and for what the boards considered the best interests of the schools of that city, the resignations and subsequent appointments were brought about.

If we are correct in the foregoing discussion, it becomes unnecessary to consider other points raised by the respondent to the effect that, even if the petitioner is a public officer, he is not a city, town, or municipal officer within the meaning of section 9, art. 11, of the Constitution; nor that the term follows the man and not the office where the commencement and ending of the term are not vested by statute. These are interesting questions, on which we express no opinion, as a discussion of them would unnecessarily greatly enlarge the scope of this opinion.

Judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

84 Cal. App. 201

PEOPLE v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CONTRA COSTA COUNTY et al. (Civ. 5853.)

District Court of Appeal, First District, Division 1, California. June 28, 1927.

1. Criminal law $\S$ 260(12)—Statutes respecting appeals from convictions in superior court apply to justice's court appeals, unless inconsistent, when those expressly applicable to latter control (Pen. Code, $\S$ 1467).

Under Pen. Code, $\S$ 1467, sections in title 9 as to appeals from convictions in superior court must be applied in determination of justice's court appeals, unless inconsistency arises, in which case sections of title 11, expressly made applicable to justice's court appeals, are controlling therein.

2. Criminal law $\S$ 260(12)—On reversal of conviction in justice's court, superior court may decide whether to order new trial (Pen. Code, $\S$ 1262, 1469).

Under Pen. Code, $\S$ 1469, read in connection with section 1262, it is for superior court to decide whether new trial shall be ordered on reversal of judgment of conviction on appeal from justice's court.

3. Criminal law $\S$ 260(12)—Order reversing justice's court conviction of violating self-insurance provision of statute and discharging defendant held within superior court's appellate jurisdiction (Workmen's Compensation, Insurance, and Safety Act 1917, $\S$ 29; Pen. Code, $\S$ 1262, 1469).

Order that justice's court judgment convicting corporation of violating Workmen's Compensation, Insurance, and Safety Act (St. 1917,

p. 857) § 29, relating to self-insurance, be reversed and corporation discharged *held* within superior court's appellate jurisdiction, under Pen. Code, §§ 1262, 1469.

4. Criminal law ⇨ 1134(7)—Superior court's holding that undisputed facts were insufficient to show criminal intent to violate self-insurance provision of statute is not reviewable on certiorari (Pen. Code, § 20; Workmen's Compensation, Insurance, and Safety Act 1917, § 29).

Error in Superior Court's construction of undisputed facts, appearing in statement on appeal from justice's court, as insufficient to establish criminal intent, necessary under Pen. Code, § 20, to convict corporation of violating Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 857), § 29, relating to self-insurance, is not reviewable by Court of Appeal on certiorari.

Application by the People of the State of California for a writ of certiorari to annul an order of the Superior Court of Contra Costa County, H. V. Alvarado, Judge, reversing a judgment of a justice's court, convicting the Cowell Portland Cement Company of violating the self-insurance provision of the Workmen's Compensation, Insurance, and Safety Act, and discharging defendant. Writ denied.

Warren H. Pillsbury and G. C. Faulkner, both of San Francisco, for the People.

A. F. Bray and J. E. Rodgers, both of Martinez, for respondents.

KNIGHT, J. This proceeding in certiorari was commenced in behalf of the people of the state of California for the purpose of having annulled an order made by the respondent superior court in determining the merits of an appeal taken to said court by the respondent corporation Cowell Portland Cement Company, from a judgment of conviction obtained by the people in the justice's court of the first township of Contra Costa county.

There is no controversy as to the facts, and, briefly stated, they are as follows: In January, 1926, the Industrial Accident Commission caused a criminal action to be instituted in said justice's court against the respondent corporation upon a charge of misdemeanor, to wit, violation of section 29 of the Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 857), relating to self-insurance; and thereafter said corporation was tried before a jury upon said charges and convicted. A judgment of fine was imposed; whereupon an appeal was taken to the superior court, which was thereafter heard upon a statement of the case therefore settled by the justice of the peace before whom the action was tried. On November 5, 1926, said superior court rendered a written decision determining said appeal, wherein the sufficiency of the complaint upon

which the conviction was obtained was not questioned, but which held that the evidence set forth in the statement on appeal was legally insufficient to establish the essential fact that the failure of said corporation to comply with the terms of said act was willful and intentional (Pen. Code, § 20); and it was therefore ordered "that the defendant corporation be and it is hereby acquitted of the offense charged in the complaint."

Being dissatisfied with said decision, the people presented a motion to vacate the same upon several grounds, one of them being:

"(4) That said decision was improvidently entered and was a nullity in that the court was without jurisdiction to enter an order of acquittal or to take any other action on appeal than to affirm or to reverse and grant a new trial."

On January 6, 1927, said motion was denied, but in the order denying the same the court directed:

"That the order made in the above-entitled case on the 5th day of November, 1926, be and the same is hereby corrected and made to read as follows: 'The judgment entered in the justice court of the First judicial township of the county of Contra Costa, state of California, in the above-entitled case on July 23, 1926, is reversed. The defendant is ordered discharged and his bond exonerated.'"

Petitioner contends that the jurisdiction of a superior court in the matter of the determination of an appeal from the justice's court in a criminal action is restricted to a dismissal of the appeal, or an affirmance, or a reversal of the judgment of conviction; and that if the judgment be reversed a new trial must be granted as a matter of course, to be held in the superior court; that, therefore, since in the instant proceeding the order of reversal made by the respondent court on January 6, 1927, has the effect of terminating the action without further trial and of discharging the respondent corporation from further prosecution upon said charge, said order is to that extent void and should be annulled.

[1] The Code sections relating to appeals from judgments of conviction rendered in the superior court are set forth in title 9, part 2, of the Penal Code, and the matter of appeals from judgments of conviction in the justice's court is dealt with in title 11, part 2, of said Code; but section 1467, which is made part of the latter title, provides:

"The appeal may be taken, heard, and determined as provided in title 9, part 2 of this Code, * * *

—and consequently the Code sections contained in title 9, relating to appeals from convictions in the Superior Court, relate also to justice's court appeals and must be applied in the determination thereof (*Garrett v. Superior Court* [Cal. App.] 249 P. 871; *Lillywhite v.*

Superior Court [Cal. App.] 251 P. 945; Brown v. Superior Court, 72 Cal. 14, 13 P. 70) unless an inconsistency arises between the Code sections of the two titles, in which event those sections contained in title 11, which are expressly made applicable to justice's court appeals, are controlling therein (People v. Superior Court, 64 Cal. App. 770, 222 P. 864),

[2] Title 11, relating to justice's court appeals, does not specify the forms of judgments which the superior court shall render in the determination thereof, but in title 9 there are two sections which provide as follows:

"The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial." Section 1260, Pen. Code. "If a judgment against the defendant is reversed without ordering a new trial, the appellate court must, if he is in custody, direct him to be discharged therefrom; or if on bail, that his bail be exonerated; or if money was deposited instead of bail, that it be refunded to the defendant." Section 1262, Pen. Code.

The sections just quoted do not in any manner conflict with any of those contained in title 11 relating to justice's court appeals, but, on the contrary, are in entire harmony with section 1469 thereof, which provides:

"Upon an appeal the superior court may review all matters set forth in the statement and affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and attendant upon such judgment, *and may, if necessary or proper, order a new trial. If a new trial be granted it must be in the municipal court, if the appeal be from a judgment of the municipal court, otherwise it must be in the superior court.*" (Italics ours.)

The foregoing section, when read in connection with section 1262 above quoted, makes it clear, we think, that upon a reversal of a judgment of conviction on appeal from the justice's court, it is a matter for the superior court in the exercise of its appellate jurisdiction to decide whether or not a new trial shall be ordered, the language of said section 1469 being that said court "may, if necessary and proper, order a new trial." In *Ex parte Ballard*, 149 Cal. 144, 84 P. 833, it was expressly held that section 1262 of said Code conferred exclusive power upon the court of appellate jurisdiction to order a new trial or to discharge the defendant on reversal of a judgment, the court saying:

"There are cases where there are such inherent defects in the prosecution, and such impossibility of a legal conviction of the defendant, that he ought not to be put upon another trial, and the purpose of section 1262 is to give to the appellate court the power, and impose upon it the duty, of directing discharges in such cases."

And it was furthermore held that when an appeal is taken from the judgment and also from an order denying a motion for a new trial, and the appellate court reverses the judgment without an order directing a new trial and without making any order as to the release of the defendant, "such action is evidently the result of inadvertence and of a temporary forgetfulness of section 1262, * * *" and does not ipso facto entitle the defendant to his release by the trial court, or by any other court into which he may bring the case by habeas corpus or other proceeding; but that the appellate court still has power to, and upon proper application will, either make the order directing the discharge of the appellant or rule upon the order denying the motion for a new trial.

[3] We conclude, therefore, since under section 1469 of said Code the superior court, in the exercise of its appellate jurisdiction over justice's court appeals in criminal actions, may or not order a new trial, upon a reversal of the judgment, and if a new trial be not ordered, must, under section 1262, order the discharge of the defendant and exonerate his bail, that the respondent court, in making the order herein complained of, acted within the lawful exercise of its appellate jurisdiction and that consequently its order is not void.

[4] Petitioner further contends that the legal construction placed upon the undisputed facts appearing in the statement on appeal with reference to the question of criminal intent, upon which the judgment of reversal is based, is erroneous, and that such error is reviewable in the instant proceeding. In ruling upon an analogous situation, the Supreme Court said in *Roberts v. Police Court*, 185 Cal. 65, 195 P. 1053:

"It is thoroughly settled that the judgment of a police or justice's court will not be reviewed on certiorari, after appeal taken therefrom and determination of such appeal in the superior court. * * * It [the superior court] must determine the appeal, reversing or affirming the judgment of the police court as it deems one or the other course proper in view of the matters shown by the statement of the case. Whichever it does it is acting in the exercise of its lawful jurisdiction, and not in excess of such jurisdiction. It has the same power to affirm in any case that it has to reverse, and the mere fact that its conclusion is wrong does not make its action in excess of its jurisdiction. In such case we have simply error in the exercise of jurisdiction. All that petitioner's contention amounts to in this regard is that the superior court should have reversed the judgment of the police court, and that it erred in affirming it. The substantial contention is that the statement of the case showed that the evidence on the trial in the police court was not sufficient to establish the guilt of the petitioner of the offense charged. If that be true, the superior court erred in affirming the judgment, but mere errors in the exercise of jurisdiction are not reviewable on certiorari. It seems superfluous to

(257 P.)

cite authorities in support of these well settled propositions, but if authority be desired, it is to be found in the opinion of this court in the Matter of Hughes, 159 Cal. 360 (113 P. 684)."

In view of the rule above stated, it is certain that even though the legal construction placed by the respondent court upon the evidence relating to the question of criminal intent be erroneous, it is beyond the power of this court to review such error in this proceeding.

The writ is denied.

We concur: TYLER, P. J.; CASHIN, J.

MEMORANDUM DECISIONS

84 Cal App. 25

1

PEOPLE of the State of California, Plaintiff and Respondent, v. William H. SCOTT, Defendant and Appellant. (Cr. 1465.) District Court of Appeal, Second District, Division 2, California. June 16, 1927. Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge. Light & Lane, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

THOMPSON, J. The defendant was charged, by an information filed on August 6, 1926, with the crime of robbery. The first trial of the case, resulting in a conviction, was commenced on the 6th day of October, 1926. On October 21st the court set aside the verdict of guilty and granted a new trial, and reset the case for trial on the 28th day of October, and on that day continued the matter for trial until the 8th day of December, 1926, when the second trial was had. The jury returned a verdict of guilty, and judgment was pronounced thereon, and defendant prosecutes this appeal from that judgment, urging only one point for its reversal, to wit, that defendant was not brought to trial within 60 days from the filing of the information. The point here raised was directly passed upon by us in habeas corpus proceedings involving this defendant. In re Scott, 254 P. 596. That opinion conclusively disposes of this appeal. Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.



